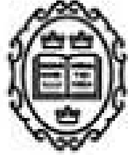

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National-State Relations: Cooperative Federalism in the Twentieth Century

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Daniel J. Elazar's 1959 Ph.D. dissertation demonstrated conclusively the inadequate explanatory value of the theory of dual federalism and the prevalence of cooperative national-state relations in the period ending in 1913. Congressional employment of total and partial preemption and coercive regulatory powers since 1965 raises the question whether the theory of cooperative federalism explains fully the functioning of the federal system at the beginning of the twenty-first century. An examination of national-state relations reveals that each of the two theories retains a degree of explanatory value. There is, however, a need for a more general theory incorporating elements of these theories and coercive use of congressional powers, highlighting the generally cooperative nature of national-state relations, and explaining the continuous readjustment of the respective powers of Congress and states.

The United States Constitution contains the seeds for the development of the theories of dual and cooperative federalism by dividing powers between Congress and the states, and incorporating provisions to promote cooperative national-state relations (e.g., state conduct of elections of federal officers, consideration of constitutional amendments proposed by Congress, and training the militia in accordance with the nationally prescribed discipline).

Daniel J. Elazar's 1959 Ph.D. dissertation at the University of Chicago was a ground-breaking one in terms of federalism theory. The dissertation demonstrated conclusively that relations between the national government and the states had been cooperative from the early decades of the nineteenth century to 1913, thereby revealing the inadequacy of the explanatory value of the theory of dual federalism.[1]

Elazar built upon the works of two scholars in particular. Edward S. Corwin in 1950 wrote an article–"The Passing of Dual Federalism"–and utilized the term cooperative federalism.[2] Elazar also was influenced greatly by his mentor, Morton Grodzins.[3] Elazar's positing in 1959 of an alternative hypothesis–cooperative federalism–stimulated research by many scholars

AUTHOR'S NOTE: I express my appreciation to John Kincaid, Sanford F. Schram, Nelson A. Wikstrom, and Roger W. Tippy for their critical comments on a draft of this article.

[1]The dissertation was published by the University of Chicago Press in 1962 under the title *The American Partnership: Intergovernmental Co-operation in the Nineteenth-Century United States.* Also consult James Bryce, *The American Commonwealth,* 3rd ed. (New York: The Macmillan Company, 1893).

[2]Edward S. Corwin, "The Passing of Dual Federalism," *Virginia Law Review* 36 (February 1950): 1-24.

[3]Morton Grodzins, *The American System: A New View of Government in the United States* (Chicago: Rand McNally & Company, 1966). Grodzins had nearly completed the manuscript for this book at the time of his death. Elazar edited the manuscript for publication.

on the nature of national-state relations, as did his subsequent works on the same subject. My federalism research has focused on cooperation and conflict in national-state, interstate, and state-local relations, and my findings generally reinforce Elazar's cooperative national-state relations findings. In addition, my findings reveal interstate relations, although competitive and conflictive at times, and state-local relations generally are cooperative in nature.[4]

The theory of cooperative federalism is accepted widely today, but a question must be raised whether evidence supporting this theory has negated completely the theory of dual federalism. Furthermore, an additional question must be examined: How adequately does the theory of cooperative federalism explain the use of regulatory powers by Congress to remove totally or partially discretionary authority from states, to impose mandates and restraints on these polities, and to employ crossover and tax sanctions to persuade states to implement national policies?

Congress plays three principal roles–facilitator, inhibitor, and initiator–in terms of national-state relations. As a facilitator, Congress provides direct and indirect financial assistance–exemption of municipal-bond interest from national income taxation, grants-in-aid, insurance, loans and loan guarantees, tax deductions, and tax credits–and technical assistance and training to promote subnational governmental regulation and provision of services in accordance with national standards. As an inhibitor, Congress employs its total preemption powers to nullify state regulatory laws and administrative rules, and to prohibit future enactment of such laws and promulgation of such rules.[5] Partial preemption statutes either remove all state regulatory authority from a segment of a regulatory field or establish minimum national standards.

As an initiator, Congress plays a leadership role by enactment of partial preemption statutes establishing minimum national standards to provide the framework for new regulatory programs involving a partnership between the national and state governments, and also employs conditional grants-in-aid, and crossover and tax sanctions to encourage states to implement national regulatory policies and initiate provision of services conforming to national standards.

The degree to which Congress emphasizes one of these roles over the other two affects the reliance we can place on the theory of cooperative federalism as an explanation of how the federal system functions.

[4]Joseph F. Zimmerman, *Contemporary American Federalism: The Growth of National Power* (Leicester: Leicester University Press, 1992); Joseph F. Zimmerman, *State-Local Relations: A Partnership Approach*, 2d ed. (Westport, CT: Praeger Publishers, 1995); and Joseph F. Zimmerman, *Interstate Relations: The Neglected Dimension of Federalism* (Westport, CT: Praeger Publishers, 1996).

[5]Joseph F. Zimmerman, *Federal Preemption: The Silent Revolution* (Ames: Iowa State University Press, 1991).

THE THEORY OF DUAL FEDERALISM

Alexander Hamilton in *Federalist 32* outlined key elements of the theory of dual federalism, explicitly declaring:

> But as the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, exclusively delegated to the United States. This exclusive delegation, or rather this alienation, of State sovereignty would only exist in three cases: where the Constitution in express terms granted in one instance an exclusive authority to the Union, and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union to which a similar authority in the States would be absolutely and totally contradictory and repugnant.[6]

The Tenth Amendment to the United States Constitution was proposed by Congress and ratified by states (1791) to clarify that Congress is a government of delegated powers only and that all other powers, unless prohibited, are reserved to the states or to the people. The Fourteenth Amendment (1868) also recognizes dual sovereignty by declaring that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

The first references to dual federalism or dual sovereignty in the literature reflected a legalistic approach to the governance system, in contrast to a political approach, and suggested a genuine independence model, with Congress and the states each possessing independent powers. A number of United States Supreme Court decisions support the concept of dual federalism.

A 1793 decision–*Chisholm v. Georgia*–suggested the existence of a dual federal system: The "United States are sovereign as to all the powers of government actually surrendered: each State in the Union is sovereign, as to all the powers reserved."[7] In 1819, Chief Justice John Marshall opined that Congress "is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends . . . found it necessary to urge."[8] Chief Justice Roger B. Taney, in *Abelman v. Booth* in 1859, declared "the powers of the general government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties acting separately and independently of each other, within their respective spheres."[9] In 1991, Justice Sandra Day O'Connor explained: "As every school

[6] *The Federalist Papers* (New York: New American Library, 1961), p.198.
[7] *Chisholm v. Georgia*, 2 Dallas 219 (1793), 435.
[8] *McCullogh v. Maryland*, 4 Wheaton 316 (1819), 405.
[9] *Abelman v. Booth*, 21 Howard 506 (1859), 516.

child learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government."[10] Chief Justice William H. Rehnquist in 2000 opined: "The Constitution requires a distinction between what is truly national and what is truly local . . . The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States."[11]

The term "dual federalism" generally had been employed loosely to describe national-state relations until 1950 when Corwin published his article on the theory of dual federalism containing four postulates.[12] Building on his work, the following postulates explain the nature of a genuine dual federal system:

1. Congress possesses only enumerated powers and may employ them to promote only a few purposes.
2. Within their respective spheres, Congress and states are "sovereign" and "equal."
3. Neither Congress nor a state legislature may nullify an act of the other or employ coercive powers against the other plane.[13]
4. Changes in the power distribution between the two planes of government can be accomplished only by constitutional amendments.
5. Inter-plane relations are minimal as each Congress and each state legislature operates autonomously by employing its respective enumerated or reserved powers.
6. Congress and a state legislature each possesses the power to tax and borrow funds.

THE THEORY OF COOPERATIVE FEDERALISM

Elazar in 1962 conceived cooperative federalism "to be the opposite of dual federalism which implies a division of functions between governments as well as a division of governmental structures. Although the theory of cooperative federalism assumes a division of structures, it accepts a system of sharing that ranges from formal federal-state agreements covering specific programs to informal contacts on a regular basis for the sharing of information and experience."[14] More recently, Elazar wrote that "central

[10] *Gregory v. Ashcroft*, 501 U.S. 452 (1991), 456.

[11] *United States v. Morrison*, 120 S.Ct. 1740 (2000), 1754.

[12] Corwin, "The Passing of Dual Federalism," 1-24.

[13] Alexander Hamilton wrote, "there is no power on either side to annul the acts of the other." See *The Federalist Papers*, p. 206. Also consult Arthur N. Holcombe, "The Coercion of States in a Federal System," *Federalism: Mature and Emergent*, ed. Arthur W. MacMahon (New York: Doubleday & Company, 1955), p. 137.

[14] Elazar, *The American Partnership*, p. 305.

to the idea of cooperative federalism is the notion that cooperation is negotiated."[15]

A reading of the United States Constitution reveals that the framers recognized the importance of cooperative national-state relations by including provisions that (1) each state legislature would appoint two United States senators, (2) the method of appointment of presidential and vice presidential electors in each state would be determined by the state legislature, (3) members of the United States House of Representatives are to be chosen by "electors in each State [who] shall have the qualifications requisite for electors of the most numerous branch of the State Legislature," (4) state legislatures or conventions consider amendments to the Constitution proposed by Congress, (5) each state trains the militia [National Guard] in accordance with the nationally prescribed discipline, and (6) specifically forbid states to take only a few actions and permit initiation of a few other specified actions with the consent of Congress.[16] James Madison was convinced in 1799 that the national government "can not be maintained without the co-operation of the States, . . .," thereby suggesting that the framers of the constitution did not intend to establish a system comporting with all tenets of the theory of dual federalism.[17]

Examining the state of federalism theory in terms of national-state relations, S. Rufus Davis in 1978 announced that scholars were in agreement on two points:

> [F]irst in pronouncing the demise of "dual federalism". . .that tidy ornament of jurisprudential fiction which envisaged a dual world of sovereign, coordinate, coequal, independent, autonomous, demarcated, compartmentalized, segregated, and distinct constitutional personae, the federal and the state governments; and second, in affirming in its place the idea of something like a vast cooperative of all governments of all levels, together with all group and individual interests of society, in a complex pluralistic relationship of sharing, reciprocity, mutuality, and coordination, as the true face of American federalism.[18]

As noted, the United States Constitution contains provisions for state cooperation with the national government. A review of pertinent United States Supreme Court decisions and of relevant literature reveals the following postulates explaining the nature of cooperative national-state relations:

[15]Daniel J. Elazar, "Cooperative Federalism," *Competition among States and Local Governments: Efficiency and Equity in American Federalism*, eds. Daphne A. Kenyon and John Kincaid (Washington, DC: The Urban Institute Press, 1992), p. 73.

[16]It should be noted that the Seventeenth Amendment provides for the direct election of senators. States have also been deprived of part of their discretionary authority by greater integration of the National Guard into the total national military structure and by the Voting Rights Act of 1965, 79 Stat. 437, 42 U.S.C. § 801.

[17]Gaillard Hunt, ed., *The Writings of James Madison* (New York: G.P. Putnam's Sons, 1906), pp. 332-333.

[18]S. Rufus Davis, *The Federal Principle: A Journey Through Time in Quest of Meaning* (Berkeley, CA: University of California Press, 1978), pp. 182-183.

1. Each plane of government possesses certain autonomous powers that may be exercised cooperatively, with such cooperation initiated by either plane.
2. One plane of government does not coerce the other plane of government.
3. The roles of Congress in terms of national-state relations are facilitating and leadership ones.
4. Congress uses its power to regulate interstate commerce to assist states by prohibiting use of such commerce in violation of state laws.
5. Cooperation is negotiated.

Cooperative federalism would be an empty term without possession of autonomous powers by both the national and state planes of government. What is distinctive about the post-1913 nature of cooperative federalism is the influence over the services provided by states and local governments gained by Congress through the conditions attached to grants-in-aid. Corwin in 1950 maintained that cooperative federalism based upon such grants results in an increase in the power of the national government because "when two cooperate, it is the stronger member of the combination who calls the tune."[19]

CONGRESSIONAL REGULATORY POWERS

The validity of the dual and cooperative federalism postulates can be assessed by reviewing the powers Congress employs to regulate the activities of subnational governments. This review also assists in identifying coercive postulates that should be included in a more general theory of federalism in the United States.

Elazar wrote in 1984 that "the real problem confronting the states is the new intrusiveness of the federal government, usually in response to local interests that pursue short-term benefits without considering long-range consequences."[20] The example he cited, "expansion of the National Park Service in the country's metropolitan areas," is a minor one compared to the employment of preemption and other coercion powers by Congress that raises the question of whether the current federal system may be described accurately as either dual or cooperative federalism or a combination of the two? To answer the question, one must review the employment of regulatory control powers by Congress since 1965.

The drafters of the Constitution, recognizing that they were launching an experimental governing system and that the nation would undergo a

[19]Corwin, "The Passing of Dual Federalism," 21.

[20]Daniel J. Elazar, *American Federalism: A View from the States*, 3rd ed. (New York: Harper & Row, 1984), p. 238.

continuous metamorphosis, included provisions for the flexible employment of delegated powers by Congress, which would be the architect responsible for redesigning aspects of the federal system on a continuing basis. National powers initially were, to a great extent, latent ones capable of being exercised as a consensus to do so developed in Congress.

Arguing it was improbable that Congress would usurp the reserved powers of the states, Hamilton contended in 1787, "it will always be far more easy for the state governments to encroach upon the national authorities than for the national authorities to encroach upon the state authorities."[21] Nevertheless, a constitution containing grants of powers in general terms to a national legislature, in combination with a necessary and proper clause and a supremacy of the laws clause, possesses the potential for facilitating fundamental changes in a federal system over time through total and/or partial nullification of the states' concurrent and non-concurrent reserved powers.

Preemption

State and local government officers often decry congressional preemption of their regulatory authority. On occasion, a prediction is made by a state or local government officer that continued preemption will result in the conversion of the federal system into a unitary system, echoing a fear expressed by Brutus in letters to the editor of the *New York Journal* in the period October 1787 to April 1788.[22]

The Anti-Federalists were convinced that Congress in time would use its delegated powers to preempt the powers of the states. Their fear is understandable, particularly in light of the fact that the United States Constitution delegates broad undefined powers to Congress, includes the supremacy of the laws clause, and assigns the supreme judicial power to a national court.

The regulatory powers of Congress have been enlarged since 1789 by constitutional amendments (particularly the Fourteenth, Fifteenth, and Sixteenth), generally broad judicial interpretations of the scope of delegated powers, and innovative statutory elaboration of expressed powers. Commencing early in the nineteenth century, the United States Supreme Court tended to interpret the national government's powers in an expansive manner, as illustrated by the development and employment of the doctrine of implied powers in *McCullogh v. Maryland* and the doctrine of the continuous journey in *Gibbons v. Ogden.*[23] Judicial interpretation of the interstate commerce clause and the Fourteenth Amendment has restricted severely the states' police power. The Tenth Amendment notwithstanding,

[21] *The Federalist Papers*, p. 119.

[22] Ralph Ketcham, ed., *The Anti-Federalist Papers and the Constitutional Convention Debates* (New York: New American Library, 1986), pp. 272, 279.

[23] *McCulloch v. Maryland*, 4 Wheaton 316 (1819) and *Gibbons v. Ogden*, 9 Wheaton 1 (1824).

Congress until recently appeared to have been licensed by the Supreme Court to restructure national-state relations with few restrictions. In divining the extent of the reach of delegated powers since 1937, the Court generally sanctioned their broadest possible employment until the 1990s.

Congress in 1790 enacted two total preemption statutes-the Copyright Act and the Patent Act-without protests from the states. Twenty-seven additional preemption acts were enacted prior to 1900. Several were temporary in nature, others were total and partial preemption acts, and a few or sections of a few were declared unconstitutional, as illustrated by the electoral sections of the Civil Rights Act of 1870 and Civil Rights Act Amendments of 1871 based upon the Fifteenth Amendment (1870).[24]

The pace of enactment of preemption statutes increased after 1900, but most such statutes had relatively little impact on subnational governments until the mid-1960s when Congress recognized the inadequacies of conditional grants-in-aid and other conditional federal assistance in persuading all states to implement certain congressional policies. A consensus developed among a majority of the members of Congress that stronger national action was essential to solve several serious national problems.

The year 1965 was a turning point in the nature of the federal system. In that year, Congress decided that water quality throughout the United States must meet minimum national standards. Subsequently, Congress came to rely heavily on its preemption powers–total and partial–to foster implementation of national policies, and it enacted more than 250 preemption statutes.[25] Preemption bills have faced a generally hostile environment in Congress since 1995. Two such bills, however, were enacted in 1996. The Telecommunications Act of 1996 removed all state and local government legal barriers to firms providing any interstate or intrastate telecommunications service.[26] Furthermore, local governments cannot require or prohibit the provision of telecommunication services by a cable operator.[27] The Health Insurance Portability and Accountability Act of 1996 also reduced the discretionary authority of states to regulate private health insurance by establishing minimum national standards.[28]

Congress also employs its powers to regulate interstate commerce to impose mandates and restraints on subnational governments, and its tax and spending powers to persuade these governments to implement congressional policies.

[24]For a listing of such statutes, consult, United States Advisory Commission on Intergovernmental Relations, *Federal Statutory Preemption of State and Local Authority: History, Inventory, and Issues* (Washington, DC: ACIR, 1992). Most of the provisions of the two Civil Rights acts were invalidated by the U.S. Supreme Court in *State v. Reese*, 91 U.S. 214 (1875).

[25]Zimmerman, *Federal Preemption*, pp. 63-74 and 91-100; U.S. ACIR, *Federal Statutory Preemption of State and Local Authority*.

[26]*Telecommunications Act of 1996*, 110 Stat. 70, 47 U.S.C. § 253(a).

[27]*Ibid.*, 110 Stat. 124, 47 U.S.C. § 541(b)(3)(A).

[28]*Health Insurance Portability and Accountability Act of 1996*, 110 Stat. 1946, 29 U.S.C. § 1184.

Very limited available evidence reveals that numerous subnational governments often do not comply or do not comply fully in a timely manner with national government requirements.[29] Elazar's three political cultures–individualistic, moralistic, and traditionalistic–and his classification of individual states by political culture are helpful in explaining state cooperation or resistance to congressional mandates and restraints.[30]

Most interestingly, congressional deregulation of the banking, communications, and transportation industries since 1978 occurred simultaneously with increasing congressional regulation of the states and their political subdivisions as polities and decreasing federal financial assistance to these governments

Total Preemption

Congressional total preemption statutes can be grouped into 14 categories, ranging from ones classified as restraints, removing all regulatory powers from the states, to ones authorizing state cooperation in enforcing a statute.[31] States have been stripped of their powers to engage in economic regulation of airlines, bus, and trucking companies, to establish a compulsory retirement age for their employees other than specified state policymakers and judges, or to regulate bankruptcies with the exception of the establishment of a homestead exemption.

Four total preemption statutes have a cooperative component in the form of a limited regulatory "turn back" by authorizing states to perform inspections in accordance with national standards applicable to grain quality and weighing, hazardous and solid-waste materials, railroad safety, and specified types of ionizing radiation.

Two preemption statutes are contingent ones. If two specified conditions exist, for example, a state or a local government is subject to the Voting Rights Act of 1965 as amended and may make no change in its electoral system without the approval of the United States attorney general or a declaratory judgment, issued by the United States District Court for the District of Columbia, that a proposed electoral change would not affect adversely a protected group–blacks or a specified language "minority."[32]

Several total preemption statutes have become, in effect, partial preemption ones. As noted, these statutes authorize specified federal administrators to "turn back" limited authority to states capable of regulating in accordance with national standards. In addition, a few total preemption statutes, such as the Age Discrimination in Employment Amendments of 1986, allow federal administrators to enter into cooperative enforcement

[29]"Waterway Cleanup Efforts Criticized," *Times Union* (Albany, N.Y.), 6 April 2000, p. A8.
[30]Elazar, *American Federalism*, pp. 109-149.
[31]Zimmerman, *Federal Preemption*, pp. 63-64.
[32]*Federal Voting Rights Act of 1965*, 79 Stat. 437, 42 U.S.C. § 1973.

agreements with their state counterpart agencies, but do not "turn back" regulatory authority to states.[33]

It is important to note that a preemption statute may be enacted by Congress at the request of states that have been unable to solve a major problem by means of interstate cooperation. This point is illustrated by the Commercial Motor Vehicle Safety Act of 1986 enacted by Congress at the request of governors because of the inability of the states to cope with the problem of commercial vehicles drivers who held operator licenses issued by several states and would continue to drive after revocation or suspension of a license by a state department of motor vehicles for violations of state law or rules and regulations.[34] The act totally preempted state commercial driver licenses and replaced them with a single national one.

A second example of a cooperative total preemption act is the Abandoned Shipwreck Act of 1987.[35] Technological developments have facilitated the location of abandoned shipwrecks but raised the question of the ownership of such wrecks. The 1987 act, a total preemption act, asserts a national government title to each abandoned historic shipwreck. The cooperative nature of the act is revealed by the provision that the federal title is transferred to the state in whose waters the shipwreck is located.

It is important to recognize that the successful implementation of a total preemption statute may be dependent upon the cooperation of subnational governments, as illustrated by total federal supersession of state regulation of nuclear electric-power generating plants. The national government does not possess the necessary equipment and personnel to ensure the safety of the residents in the general vicinity of such plants and relies on the cooperation of state and local government emergency-response services in the event of an incident involving the release of radioactive materials into the atmosphere.

Partial Preemption

Although total preemption statutes have produced important changes in the governance system, partial preemption statutes have had more important consequences for the system in terms of increasing its complexity and raising accountability issues. Congressional statutes partially assuming regulatory responsibility can be grouped into eight categories.[36]

The type of partial preemption that has had the most major impact is minimum standards preemption. This type originated in the Water Quality Act of 1965, which authorized the Secretary of the Interior [now Environmental Protection Agency administrator] to establish minimum national water quality standards and to delegate regulatory primacy to any

[33] *Age Discrimination in Employment Amendments of 1986*, 100 Stat. 3342, 29 U.S.C. § 623.
[34] *Commercial Motor Vehicle Safety Act of 1986*, 100 Stat. 3207, 49 U.S.C. § 2701.
[35] *Abandoned Shipwreck Act of 1987*, 102 Stat. 432, 42 U.S.C. § 2101.
[36] Zimmerman, *Federal Preemption*, pp. 91-106.

state submitting a plan with standards meeting or exceeding the national ones and effective mechanisms for enforcement of the state standards.[37] This preemption type is designed to foster formation of a national-state partnership, with states assuming regulatory primacy delegated by a federal department or agency. Only if a state fails to apply for and accept regulatory primary or returns it will the concerned federal department or agency assume complete responsibility for the function within the state.

Minimum-standards preemption statutes encourage states to become responsible in large measure for implementing congressional policies and comport with Elazar's theory of cooperative federalism as does the system of preemption relief. If states are unable to prevent enactment of intrusive preemption laws, states pressure Congress to repeal or amend the laws.[38] This system of preemption relief comports with Herbert Wechsler's political safeguards of federalism thesis and is essentially a leadership-feedback model, with Congress leading the policymaking process by enacting preemption statutes and amending some on the basis of adverse feedback from states and/or local governments.[39]

Mandates and Restraints

Congress has utilized its power to regulate interstate commerce to impose mandates and restraints on state and local governments. The former requires subnational governments to undertake a specified activity, enact a statute, or provide a service in conformance with minimum national standards. The Equal Employment Opportunity Act of 1972, Fair Labor Standards Act Amendments of 1974 as amended, Safe Drinking Water Act of 1974, and Federal Mine Safety and Health Act of 1977 are examples of statutes directing state legislatures to enact compliance laws under the threat of civil or criminal penalties.[40] A mandate may impose significant costs on subnational governments. The Asbestos Hazard Emergency Response Act of 1986 requires the removal of asbestos from all public buildings. This act was a particularly expensive mandate for school districts.[41] Congress since 1995 has been hostile to mandate bills, but did include a provision in the Telecommunications Act of 1996 assigning arbitration responsibilities to states relative to disagreements between a local government and a cable television operator.[42]

The political safeguards of federalism thesis also is illustrated by mandate relief acts. The Safe Drinking Water Act amendments of 1986, for example,

[37] *Water Quality Act of 1965*, 79 Stat. 903, 33 U.S.C. § 1151.

[38] Zimmerman, *Federal Preemption*, pp. 141-145.

[39] Herbert Wechsler, "The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government," *Federalism: Mature and Emergent*, ed. MacMahon, pp. 97-136.

[40] *Equal Employment Opportunity Act of 1972*, 86 Stat. 103, 42 U.S.C. § 2000(e)(5); *Fair Labor Standards Act Amendments of 1974*, 88 Stat. 55, 29 U.S.C. § 203(d); *Safe Drinking Water Act of 1974*, 88 Stat. 1676, 42 U.S.C. § 300; and *Federal Mine Safety and Health Act of 1977*, 91 Stat. 1290, 30 U.S.C. § 801.

[41] *Asbestos Hazard Emergency Response Act of 1986*, 100 Stat. 2970, 15 U.S.C. § 2641.

[42] *Telecommunications Act of 1996*, 110 Stat. 66, 47 U.S.C. § 252(b).

imposed costly mandates on a progressive basis on public suppliers of drinking water, and numerous small local governments were faced with the choice of either abandonment of their drinking water supply systems or bankruptcy brought on by the costs of complying with directives.[43] Congress responded to the complaints of subnational governments by enacting the Safe Drinking Water Act Amendments of 1996 providing relief from numerous expensive mandates.[44]

A restraint, in common with a mandate, is imposed by a congressional statute forbidding a state or local government to initiate a specific action. Transportation preemption statutes have removed authority from subnational governments to engage in the economic regulation of airlines, businesses, and motor-carrier firms. In 1988, Congress enacted the Ocean Dumping Ban Act prohibiting the dumping of sewage sludge in oceans.[45] This act has had major cost implications for coastal cities and has resulted in fines being levied on violating municipalities.

Crossover and Tax Sanctions

These sanctions are coercive and designed to persuade states to adopt national policies in areas where Congress lacks preemption powers. Crossover sanctions date to the Hatch Act of 1939 that requires states accepting federal grants-in-aid to employ the merit principle in selecting and promoting state personnel financed in full or in part with federal funds.[46] A controversial 1984 crossover sanction statute threatened to deprive states of part of their federal highway grants-in-aid unless they raised the minimum alcoholic beverage purchase age to 21 in order to reduce highway fatalities and injuries.[47]

To date, Congress has enacted two tax sanction statutes designed to increase the revenue of the federal government. The Tax Equity and Fiscal Responsibility Act of 1982 stipulates that interest on only registered bonds issued by states and their subdivisions will be exempt from the federal income tax.[48] Continuation of issuance of bearer municipal bonds subjects the interest received by bondholders to the federal income tax and would result in potential bond purchasers either demanding a higher rate of bond interest or purchasing municipal bonds at a discount to offset the income tax they would have to pay. A somewhat similar tax sanction is contained in the Tax Reform Act of 1986.[49]

[43]*Safe Drinking Water Act Amendments of 1986*, 100 Stat. 651, 42 U.S.C. § 300.
[44]*Safe Drinking Water Act Amendments of 1996*, 110 Stat. 1613, 42 U.S.C. § 201 note.
[45]*Ocean Dumping Ban Act of 1988*, 102 Stat. 4139, 33 U.S.C. § 1401A.
[46]*Hatch Act of 1939*, 53 Stat. 1147, 5 U.S.C. § 118i.
[47]*National Drinking Age Amendment*, 98 Stat. 437, 23 U.S.C., § 158.
[48]*Tax Equity and Fiscal Responsibility Act of 1982*, 96 Stat. 324, 26 U.S.C. § 1.
[49]*Tax Reform Act of 1986*, 100 Stat. 2085, 26 U.S.C. § 1.

THE THEORY OF COERCIVE FEDERALISM

Our review of congressional use of total and partial preemption powers, crossover sanctions, and tax sanctions reveals the following postulates of a theory of coercive federalism.[50]

1. Congress removes certain regulatory powers from states and also coerces them to implement national policies.
2. Subnational governments employ the political process in efforts to defeat preemption bills, except ones requested, or to obtain relief from preemption laws and preemption rulings of United States courts.
3. Extensive use of preemption powers by Congress produces national-state and federal interagency coordination problems.
4. The intertwining of the two planes of government in implementing policies in specific functional areas creates accountability and responsibility problems.
5. Minimum standards preemption statutes generally have engendered expanded use of reserved powers by States.

A MORE GENERAL FEDERALISM THEORY

Dual federalism is valid in postulating that Congress possesses a number of autonomous powers, but is inaccurate in suggesting that states possess many important powers free of potential formal or informal congressional encroachment. Although the Twenty-First Amendment to the United States Constitution grants states complete authority for temperance-promoting purposes over the importation, sale, and consumption of alcoholic beverages within their respective boundaries, Congress can control the importation of such beverages into the United States, regulate interstate beverage shipments, and tax such beverages. As noted, Congress employed a crossover sanction in 1984 to intrude into an area of state responsibility–the minimum alcoholic beverage purchase age.

Nevertheless, dual federalism retains a degree of explanatory value because Congress does not possess delegated powers to provide most governmental services and often must rely on financial inducements to convince states to adopt and implement national policies. Furthermore, states have nearly complete control over the structure and powers of their political subdivisions, subject to provisions of their respective state constitution and to federal grant conditions, mandates, and restraints.

The theory of cooperative federalism retains greater explanatory value as many national-state relations, including ones structured by preemption

[50]For an overview of the transition in the nature of the federal system, consult John Kincaid, "From Cooperative to Coercive Federalism," *The Annals of the American Academy of Political and Social Science* 509 (May 1990): 139-152.

statutes, are cooperative in nature. Minimum standards partial preemption is premised on active state cooperation. Lacking adequate staff and other resources, the national government would be unable to implement its standards in the absence of state cooperation. Total preemption statutes with provision for a limited turn back of regulatory authority or state enforcement of national standards are inherently cooperative.

While retaining a degree of explanatory value, the theory of cooperative federalism fails to explain the structuring of national-state relations by the coercive use of formal federal preemption, mandates, restraints, crossover sanctions, and tax sanctions. A more general theory of federalism should explain that the governmental system is a continuum in terms of national-state relations, ranging from nil to cooperative to coercive with the precise location of a given relationship on the continuum determined by the function or component of a function concerned.

A more general theory of federalism would start with the recognition that the United States Constitution includes elements of both dual and cooperative federalism. The more general theory is a non-equilibrium one as fluid economic and societal changes generate pressures of varying intensities for readjustment of the respective competencies of the three planes of government. As a result, the political system since 1965 has become more metamorphic as many inter-plane relationships change continually with (1) congressional enactment of conditional grants-in-aid, crossover sanctions, tax sanctions, and preemption statutes; (2) promulgation of new federal implementing rules and regulations; (3) states' refusal, or acceptance, or return of regulatory primacy under minimum standards statutes; (4) judicial decisions holding state and/or local government regulatory actions partially or totally preempted by congressional statutes or the United States Constitution; (5) judicial remedial orders, such as ones mandating housing and school integration, overriding state constitutional tax limitations, and establishing federal receivership of state institutions and public school systems; and (6) congressional responses to subnational governmental pressure for relief from preemption statutes, judicial preemption decisions, mandates, and restraints. These developments ensure the federal system is in a perpetual state of locomotion that is kaleidoscopic rather than linear in nature.

CONCLUSION

Many scholars concluded that the period of the dominance of the loosely defined theory of dual federalism ended in 1937 when the United States Supreme Court commenced to uphold the constitutionality of New Deal statutes by a five-to-four vote. The dominant role of the Congress in the period 1935-1970 was a facilitating one, commencing with the Social Security

Act of 1935 that encouraged states by means of tax credits to establish unemployment compensation systems. The period 1970-1982 was a transitional one during which the facilitating role declined in importance as the initiating, inhibiting, and mandating roles assumed center stage. The latter roles dominated the period subsequent to 1982 until 1995.

The federal system has evolved from one exhibiting chiefly dual federalism features when contacts between the national government and states were minimal and generally symbiotic in nature to a system exhibiting a number of characteristics of a unitary system. Congress today may act as a central government exercising nearly plenary powers in several traditional areas of state government regulatory responsibility. Interestingly, the great increase in the number of preemption statutes since 1965 has not produced a corresponding increase in national administration of regulatory and service-provision programs, and the federal government directly administers few programs that it did not administer prior to 1935.

There is still reason to accept the idea that cooperative federalism was read into the Constitution since its effective date. Yet cooperative federalism appears to have been a transitional phase between an essentially dual federalism phase and the current more coercive phase that retains cooperative features. The facilitating role of Congress comports with Elazar's theory of cooperative federalism as do minimum standards preemption statutes and a few total preemption statutes noted above. Coercive use of congressional regulatory powers, including unfunded mandates and restraints, is at odds with the theory of cooperative federalism. Elazar wrote to the author in 1992 that "[y]our addition of federal mandates and preemption to the older theories of dual and cooperative federalism is quite helpful."[51]

The more general theory of federalism emphasizes the continuous readjustment of the respective competences of Congress and the states, and explains that relations between the national government and a state and its political subdivisions are not uniform in each state and are affected by a variety of factors, including the amount of nationally owned land, presence of Indian reservations and large national government facilities, wealth of the state, political influence of a state's congressional delegation, discretionary authority of regional offices of national regulatory departments and administrations, and other factors.

In summary, the postulates of a more general federalism theory of national-state relations include dual, cooperative, and coercive elements, and emphasize the importance of the national political process to states and their political subdivisions in preventing enactment of or obtaining

[51]Letter to author from Director Daniel J. Elazar of Temple University's Center for the Study of Federalism, 7 December 1992.

relief from preemption statutes, their implementing rules and regulations, and mandates and restraints, protection against the exercise of coercive powers by Congress, and enactment of statutes desired by states. A still broader federalism theory would include competitive, cooperative, and conflictive postulates relating to interstate relations.