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The State of American Federalism, 2004: Is Federalism Still a Core Value?

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Federalism as a political issue was conspicuously absent from the 2004 presidential contest. Unlike many previous campaigns, neither party's candidate made much mention of problems besetting states and localities. The war against global terrorism and the changing situation in Iraq shaped the election. Progress was made on homeland security, but intergovernmental wrangling over federal grants continued unabated. Federal-state feuds were common in several policy areas, including education, environmental protection, and health care. State finances received a revenue boost as economic growth picked up, but rising costs for Medicaid, education, employee pensions, and prisons clouded states' financial forecasts. The U.S. Supreme Court decided several cases with a federalism dimension, and these decisions plus those of the past several years suggest the Court has moved not so much to grant more power to the states but to prune back the power of Congress. Much of what has happened during the first Bush administration must be seen against the larger background of changes in the American political party system. Changes in party organization and policy control, especially during the first Bush administration, reaffirm David Walker's assessment that over the past quarter century American federalism has become more nationalized.

Campaigns for the office of President of the United States begin immediately after a president is elected. The contest becomes a nonstop affair during the final year leading to the election, and 2004 was no different. In many ways the competition between the two candidates played out along familiar lines, albeit more expensively and more acrimoniously than in previous races. The incumbent, George W. Bush, won as most incumbents do, but with the smallest margin of any reelected president in more than a century. Because the nation was at war in Afghanistan and Iraq and also engaged in a global war on terrorism, these conflicts influenced the choice of the Democratic Party's candidate and shaped much of the ensuing debate between the president and his challenger. Domestic issues—the economy, health care, same-sex marriage, taxes—took second place to the question of which candidate could better protect the nation from foreign terrorists.

Unlike recent presidential elections, neither political party devoted any attention to questions of federalism. Whereas in the past the Republican Party platform would include a strong commitment to restrain and reduce federal power over state and local governments, the 2004 platform offered no lengthy brief in defense of states' rights but only made a "tip of the hat"

mention of traditional local control over public education as part of a larger discussion lauding the No Child Left Behind Act. Similarly, where the Democrats in the past spoke of the importance of federal-state cooperation rather than competition, their 2004 platform made only one specific policy recommendation with a federalism dimension: that the decision to ban (or not) same-sex marriage be left to state governments.

After his reelection, President Bush's first two speeches also ignored federalism. His inaugural address set out a sweeping statement about foreign affairs when he declared that "it is the policy of the United States to seek and support the growth of democratic movements and institutions in every nation and culture, with the ultimate goal of ending tyranny in our world."¹ When he touched on domestic matters, Bush reaffirmed the broad conservative theme that reliance on government to solve problems reduces personal freedom and that the way to foster individual responsibility is to create an "ownership society" and make "every citizen an agent of his or her own destiny." Bush emphasized that "self-government relies, in the end, on the governing of the self ... [and the] edifice of character is built in families, supported by communities with standards, and sustained in our national life by the truths of Sinai, the Sermon on the Mount, the words of the Koran and the varied faiths of our people."² Although his State of the Union address devoted much more attention to domestic matters, the problems faced by states and localities were ignored; the only mention of them was in a single sentence expressing gratitude for the work of police, firefighters, and others to make the homeland safer.³

In both speeches Bush evoked presidents who considered the federal character of the United States an important component of its governance. So his apparent indifference to federalism was surprising. This inattention to federal matters is also striking when contrasted to other recent presidents who also were state governors. However, it is important to recall Thomas Anton's observation that "American federalism is a supremely political institution."⁴ It is commonplace in American politics for politicians to seek advantage for themselves and their supporters by adopting different positions about where control of a given policy is best located. President Bush, in successfully pushing the adoption of the No Child Left Behind Act (NCLB) during his first year in office, signaled quite clearly that his administration preferred the locus of decision making to be national and, furthermore, for it to be in the White House.

¹Peter Baker and Michael A. Fletcher, "Bush Pledges to Spread Freedom," *Washington Post* 21 January 2005 (Netscape version).

²Elisabeth Bumiller and Richard W. Stevenson, "Bush, at 2nd Inaugural, Says Spread of Liberty Is the 'Calling of Our Time,'" *The New York Times* 21 January 2005 (Netscape version).

³"President Bush's State of the Union Address," *The New York Times* 3 February 2005 (Netscape version).

⁴Thomas J. Anton, *American Federalism and Public Policy: How the System Works* (New York: Random House, 1989), p. 230.

A PRESIDENTIAL ELECTION IN WARTIME

Since 1900 twelve of seventeen incumbent presidents have been reelected, and few of those contests were as close as the 2004 election. On the day before the election public opinion polls indicated that the two candidates—President Bush and Senator John Kerry (D-MA)—were essentially tied and an indeterminate result, as had happened in 2000, remained a distinct possibility. But this time Bush obtained the popular majority (51.2 percent to 48.7 percent) that eluded him four years earlier and garnered 286 Electoral College votes (out of 538). The Republican Party added to their majorities in the Senate (55 Republican, 44 Democrat, 1 independent) and the House of Representatives (232 Republican, 202 Democrat, 1 independent). Bush's reelection made him the first president since Franklin Roosevelt to be reelected while his party also gained seats in both the House and the Senate. It also made him the first Republican president to win reelection with majorities in the House and Senate since Calvin Coolidge in 1924. ⁵ As a consequence, "Bush holds a level of power not matched perhaps since President Lyndon Johnson in 1964." ⁶

The global effort to defeat the Al-Qaeda terrorists and the U.S. occupation of Iraq served as a background for the election. As a consequence, the changing situation on these two fronts affected the fortunes of both candidates. Reports of progress such as the establishment of an interim Iraqi government or the capture of another terrorist leader boosted the president's popularity, whereas reports of problems such as the Abu Ghraib prisoner abuse scandal and most especially the daily rise in the number of American soldiers killed tended to aid his challenger. The war's general impact on the presidential contest was primarily to reinforce the two camps into which the public had already divided itself as early as June 2004, when opinion polls indicated that only 5 percent of likely voters were undecided. Secondly, the war also diverted voter attention from domestic issues such as employment, job security/outsourcing, and health care.

The monetary costs of the invasion and the support of the provisional coalition climbed to \$130 billion by the start of the 2005 fiscal year and the Government Accountability Office (GAO) warned Congress that the Pentagon would need additional billions to continue operations in Afghanistan and Iraq. ⁷ Economic calculations of the war's cost to the American economy arrived at figures approaching \$150 billion in lost gross domestic product since March 2003, or approximately 1 percentage

⁵Todd S. Purdum, "Electoral Affirmation of Shared Values Provides Bush a Majority," *The New York Times*, 4 November 2004 (Netscape version).

⁶Michael Tackett, "Moral Values' Agenda Proved Edge," *Chicago Tribune*, 4 November 2004 (Netscape version).

⁷Jonathan Wiseman, "War Funds Dwindling, GAO Warns," *Washington Post*, 22 July 2004 (Netscape version).

point of growth.⁸ Questions were raised about the management of the \$18.4 billion congressional appropriation for reconstruction purposes; in particular, analysts in and out of the federal government estimated that “less than half of the aid in the Bush Administration’s reconstruction package for Iraq is being spent to benefit Iraqis.”⁹ Costs for security services, property losses and insurance, contractors’ salaries and profits, overhead, and corruption reduced the impact of the reconstruction funds. Richard Lugar (R-IN), chairman of the Senate Foreign Relations Committee, blamed the slow pace of spending on “the incompetence of the administration.”¹⁰ These rapidly rising expenditures contributed to the national government’s annual deficit and increased pressure to cut federal discretionary spending on domestic programs, in particular programs aiding state and local governments. But neither candidate made much of these costs as an election issue.

The 2004 presidential contest was dead even with three weeks to go and remained so until the very end. Both parties and their allies engaged in what most observers judged to be the most expensive and negative political media war ever conducted. A total of more than \$1 billion (compared with \$100 million in 1996) was spent, and during the last week money was consumed at the rate of \$10 million a day.¹¹ But with both sides engaged in media blitzes, the decisive factor turned out to be old-fashioned “retail” politics of get-out-the-vote activities. The Democrats in 2000 had bested the Republicans in the door-to-door “ground war,” and for four years the Bush campaign team worked incessantly to build up and energize the Republican base vote of evangelical and conservative Christians, small-town and rural voters, pro-gun, anti-gay marriage, culturally conservative people, and the business community, especially small-business owners.¹² Turnout, normally an advantage for Democrats, would be the key to success for the president.¹³

Both parties exceeded their expectations about the number of partisans who voted. More than 125 million Americans, or 64 percent, voted in 2004; this turnout was the highest since 1968, when the Vietnam war was the principal issue.¹⁴ A demographic breakdown of the electoral results shows that Bush outpolled Kerry among voters who were male, white,

⁸Anna Bernasek, “Counting the Hidden Costs of War,” *The New York Times* 24 October 2004 (Netscape version).

⁹The Los Angeles Times “U.S. Reconstruction Money Not Reaching Iraqis,” *Omaha World-Herald* 29 September 2004, p. 11A.

¹⁰*Ibid.*

¹¹Eleanor Clift, Kevin Peraino, Jonathan Darman, Peter Goldman, Holly Bailey, Tamara Lipper, Suzanne Smalley, and Evan Thomas, “How Bush Did It,” *Newsweek* 15 November 2004, p. 123.

¹²*Ibid.*, 56.

¹³Jeff Zeleny, “Broad Turnout Strategy Gave Bush Coveted Edge,” *Chicago Tribune* 7 November 2004 (Netscape version).

¹⁴Brian Falter, “Census Details Voter Turnout for 2004,” *Washington Post* 26 May 2005 (Netscape version).

married, Roman Catholic, evangelical or born again Christians, and over thirty years old.¹⁵ As for the issues that shaped voters' choices, terrorism clearly played a decisive role as three-quarters of the voters, as indicated by postelection surveys, said they feared another terrorist attack yet also believed the country was safer than it was in September 2001. Of those who felt safer (54 percent of voters), four out of five voted for Bush. Seventeen percent more voters stated they trusted Bush more than Kerry to handle terrorism.¹⁶ A huge 88 percent of all voters considered the war in Iraq to be part of the war on terrorism; thus, despite the misgivings about the administration's conduct of the war, voters still leaned toward Bush on this key issue.¹⁷ In Ohio, the pivotal state that determined the Electoral College outcome, only 40 percent of voters trusted Kerry to do a good job handling the war, compared with 58 percent for Bush.¹⁸ Although early exit polls suggested "moral values" were the most important problem facing the nation, more detailed analysis of postelection surveys confirms that terrorism (45.8 percent) was the most important issue, followed by employment and job security (39.8 percent), then abortion (32.4 percent), and gay marriage (26.3 percent).¹⁹

Bush and his campaign managers early on established a simple image of the president as a decisive leader and they never wavered from that message. At the same time, the Bush team was able to define Kerry as indecisive (a "flip-flopper"), and the Kerry organization never managed to create an image of their candidate that appealed to a majority of voters, nor did the Kerry team manage to seriously discredit Bush's image.²⁰ Image problems notwithstanding, it is difficult to defeat an incumbent president, especially in wartime. With advantages in time (four years to organize) and in money (over \$150 million), the Bush organization started from a much stronger position and was able to solidify its support in many states well before the general election. As a consequence, the Republicans could devote resources to states won by Gore in the 2000 election and thus reduce the number of possible Electoral College votes Kerry could win. Though the Republicans squeezed the electoral map on their opponents, fewer than 70 out of the nation's 3,043 counties shifted from Democrat to Republican, but those 70 made the difference. In the end, American presidential contests come down to the Electoral College, a lesson the nation learned in 2000.

¹⁵"Survey of Voters: Who They Were ... " The New York Times 4 November 2004, p. P4.

¹⁶Dana Milbank, "Deeply Divided Country Is United in Anxiety," Washington Post 4 November 2004 (Netscape version).

¹⁷Zeleny, 7 November 2004.

¹⁸Steve Rosenthal, "Okay, We Lost Ohio. The Question Is, Why?" Washington Post 5 December 2004 (Netscape version).

¹⁹D. Sunshine Hillygus and Todd G. Shields, "Moral Issues and Voter Decision Making in the 2004 Presidential Election," PS: Political Science & Politics 38 (April 2005): 203.

²⁰Elisabeth Bumiller, "Turnout Effort and Kerry, Too, Were G.O.P.'s Keys to Victory," The New York Times, 4 November 2004 (Netscape version).

HOMELAND SECURITY

Three years after the 11 September 2001 terrorist attacks on the United States, significant progress toward protection of the homeland can be seen, but so can shortcomings. The principal challenges to further progress continue to be those identified in the National Strategy for Homeland Security issued in July 2002 by the Office of Homeland Security.²¹ The formation and institutionalization of the U.S. Department of Homeland Security (DHS) out of twenty-two separate federal agencies moved forward, but the old adage "Rome wasn't built in a day" applies. Congress has enacted thirty grant programs to assist states and localities with antiterrorism and emergency response activities,²² but the usual political "games" associated with grant programs continue unabated. Polls showed that voters in the presidential election cared deeply about the issue of terrorism, yet citizens and public officials in many jurisdictions did not see themselves as likely targets.²³

During 2004 the DHS made impressive progress toward homeland preparedness.

- The Customs and Border Patrol made the Integrated Automated Fingerprint System operational three months ahead of schedule and expanded the Container Security Initiative to thirty-three ports in twenty-one nations.
- Immigration and Customs Enforcement federal protective officers responded to 438 bomb threats and 887 calls about suspicious packages at federal facilities.
- The Transportation Security Administration, a much-maligned unit in the DHS, made over 3,000 arrests at security checkpoints and stopped over 6.5 million prohibited items, including 693,548 incendiary devices and 598 firearms, from going on board aircraft.
- The U.S. Citizenship and Immigration Services conducted 35 million background checks on persons petitioning for immigration benefits.
- The U.S. Secret Service's Operation Firewall prevented an estimated \$1 billion in fraud by arresting people active in global cybercrime, and the Secret Service also arrested 1,957 people for counterfeit money activities and closed 499 counterfeit production plants.²⁴

²¹The White House, National Strategy for Homeland Security, July 2002; www.whitehouse.gov.

²²Alice Lipowicz, "Finding the Money: A Guide to Where the Grants Are," *Securing The Homeland: Federal, State & Local Approaches*, Special Report by Governing and Congressional Quarterly (October 2004), pp. 37-44.

²³Donald F. Kettl, "Dashed Expectations," *Securing The Homeland*, p. 8.

²⁴U.S. Department of Homeland Security, Fact Sheet: U.S. Department of Homeland Security 2004 Year End Review 30 December 2004; www.dhs.gov.

Of special note is the rapid progress on the implementation of the Smart Border Action Plan by Canada and the United States, which includes the establishment of integrated border enforcement teams—multiagency law enforcement groups designed to interdict cross-border criminal and terrorist activity.²⁵

The FY 2005 Homeland Security Appropriations Act signed by President Bush on 18 October 2004 increased the DHS budget by \$1.8 billion, a 6.6 percent increase over FY 2004. New monies were included for national projects such as radiation detection monitors to screen passengers and cargo entering the country (\$80 million), the U.S. Visitor and Immigrant Status Indicator Technology program (\$340 million), Immigration Enforcement (\$56 million), the National Incident Management System (\$15 million), and the Emergency Preparedness and Response Directorate (\$3.1 billion). The FY 2005 budget also allocates \$4 billion to state and local governments, of which \$1.66 billion goes to state-based formula grants, \$885 million to the Urban Area Security Initiative (UASI) grants, and \$715 million for firefighter assistance.²⁶

On the other side of the implementation ledger, a number of reports and studies indicate that unresolved issues and problems constrain progress toward homeland security. The Council of State Governments published a report highlighting several features of rural areas that pose challenges to antiterrorism programs.²⁷ The report noted that public health services are “often fragmented at the state and local levels, contributing to the disparities among rural and urban hospitals” and that “the lack of communications interoperability among public safety and health officials continues to hinder preparedness, especially in rural areas.” The report complains that “the current system of federal funding promotes insular planning for the various homeland security disciplines ... and these programs are creating ‘stovepipe’ environments in the states that promote less integration of resources and efforts.”²⁸ The challenge of appropriate assignment of roles and responsibilities among the fragmented and multiple jurisdictions typical of state and local government is no doubt great, but Kiki Caruson, Susan MacManus, Matthew Kohen, and Thomas Watson in their article in this issue review factors that contribute to improved levels of regional cooperation and homeland security preparedness in Florida.

²⁵U.S. Department of Homeland Security, “Secretary Tom Ridge and Deputy Prime Minister Anne McLellan Highlight Progress on the Smart Border Action Plan,” press release, 14 October 2004; www.dhs.gov.

²⁶U.S. Department of Homeland Security, Fact Sheet: Department of Homeland Security Appropriations Act of 2005 18 October 2004; www.dhs.gov.

²⁷Council of State Governments, Protecting Rural America: State Challenges and Solutions, Homeland Security Brief, October 2004 (Lexington, KY: Council of State Governments).

²⁸Ibid.

Two other reports merit attention. First, the Federal Aviation Administration's Airport Rescue and Firefighting Requirements Working Group determined that "federal standards for airport fire departments are inadequate."²⁹ The working group pointed to an insufficient number of firefighters and fire trucks at airports and recommended the adoption of more stringent international standards for the minimum number of fire trucks and the amount of foam carried on the trucks. The Trust for America's Health, a nonprofit organization headed by former U.S. Senator Lowell P. Weicker Jr., conducted a study of bioterrorism readiness that "found only six states are adequately prepared to distribute vaccines and antidotes in an emergency."³⁰ States were evaluated on ten criteria such as the amount of state expenditures and federal aid devoted to public health, the number of scientists and laboratories available to test for anthrax or plague, local concurrence with the state's bioterror preparedness plan, a disease tracking system in daily operational use via the Internet, legal authority to quarantine, an increase in flu vaccination rates for senior citizens between 2002 and 2003, and a pandemic flu plan.³¹ Only Florida and North Carolina met nine of the ten assessment criteria; most states met five or six, and Alaska and Massachusetts met only three criteria. The report observed that the decrease in FY 2004 federal bioterrorism aid to state governments creates unacceptable problems. The ongoing state fiscal crisis in 2004 also contributed to a drop in state dollars for public health in about one-third of the states.

The politics of federal funding continues to provoke considerable conflict and tension between the national and state governments as well as among states and localities. Many state and local officials agree with Representative Christopher Cox (R-CA), cochair of the House Select Committee on Homeland Security, who issued a review of the intergovernmental flow of federal funds and found "half of the money set aside for state and local governments is stuck in the funding pipeline, caught up in state and federal bureaucracies."³² The problems of moving money from Washington, DC, to state and local governments were addressed in a June 2004 DHS report from a task force on state and local homeland security funding established by Secretary Tom Ridge. The task force identified nine major problems and made eleven recommendations.³³ A number of changes in federal and state financial management based on

²⁹Alan Levin, "FAA panel: Airport Fire Units Lacking," *USATODAY*, 6 October 2004 (Netscape version).

³⁰Associated Press, "Report: States Slow to Prepare for Bioterror," *CNN.com*, 15 December 2004 (Netscape version).

³¹Trust for America's Health, "Ready or Not? Protecting the Public's Health in the Age of Bioterrorism" December 2004; www.healthyamericans.org.

³²As quoted in Christopher Logan, "Politics and Promises: Rhetoric Meets the Reality of a Slowdown in Homeland Security Funding," *Securing the Homeland* 14.

³³See Dale Krane, "The State of American Federalism, 2003-2004: Polarized Politics and Federalist Principles," *Publius: The Journal of Federalism* 34 (Summer 2004): 105.

the task force's recommendations have been implemented, and according to William O. Jenkins, director of homeland security and justice issues at the GAO, "the process is becoming more efficient and all levels of government are discovering and institutionalizing ways to streamline the grant system."³⁴

A more difficult problem is deciding how best to allocate homeland security funds. A provision in the 2001 USA Patriot Act guaranteed each state at least 0.75 percent of the total appropriations for terrorism preparedness grants. This provision distributes 40 percent of the appropriations and the other 60 percent is distributed according to the proportion of a state's population to the national population. Because of this allocation policy, states with the least population receive the most federal money on a per capita basis. The state with the highest per capita homeland security funding is Alaska, which receives \$92 per resident, compared with New York (\$32), California (\$22), Florida (\$21), and Texas (\$21). The result of this imbalance in funding is that high-threat targets in populous areas are not fully protected, whereas less populous areas are awash with funds. Juneau, Alaska, a city of 31,000, received nearly \$1 million dollars of homeland security funding in 2004, yet the chief of police there said, "I don't need more stuff anymore; I need more people."³⁵

The per capita imbalance in the distribution of homeland security funds is a contemporary example of the big state versus small state battle during the constitutional convention. Congress has acted to address this fiscal disparity by supplementing the \$1.66 billion in the State Homeland Security Grant program with an additional \$855 million for the UASI program, which "provides additional resources to those areas with greater security needs."³⁶ Unlike the State Homeland Security Grant program, UASI funds must be applied for by a state's designated homeland security agency on behalf of high-threat, high-density urban areas designated by the DHS secretary, and the award offunds is based on a formula that takes into account estimates of the current threat, number of critical assets in an urban area, population density, and total area population. Although the UASI targets preparedness funds to urban areas, many of the other thirty homeland security grants do not; they award funds to states. The overall result has been to allocate homeland security funds not on the basis of the threat of terrorism but on the traditional basis of states' interests. Homeland security funding has become, in the opinion of Richard Ben-Veniste, a member of the 9/11 Commission, "a general revenue sharing program."³⁷

³⁴Logan, "Politics and Promises," p. 15.

³⁵Dean E. Murphy, "Security Grants Still Streaming to Rural States," The New York Times 12 October 2004 (Netscape version).

³⁶U.S. Department of Homeland Security, "Department of Homeland Security Announces Over \$2.5 Billion in Grants Nationwide," press release, 3 December 2004; www.dhs.gov.

³⁷Murphy, "Security Grants to Rural States."

THE INTERGOVERNMENTAL POLICY MIX

Since 1993, when it ended four decades of Democratic control of the U.S. House of Representatives, the Republican Party has changed numerous practices and rules to strengthen its ability to enact legislation consonant with its policy preferences. Congressional rules are not immutable, and it is to be expected that when the majority composition of a chamber changes, some new rules will be created. For example, House Republicans moved to alter an ethics rule that required party leaders to step down from their position if they came under not just federal indictment but also state government indictment. The rule, originally enacted in 1993 to publicize Democrat malfeasance, targeted Dan Rostenkowski, then chairman of the Ways and Means Committee, who eventually pled guilty to mail fraud. But in late 2004, the rule was revised to protect Majority Leader Tom DeLay (TX), three of whose aides were indicted by a Texas grand jury on charges of illegal fundraising from corporations and illegal laundering of the funds back to state legislative candidates. The charges allege that one of DeLay's political action committees sought donations from at least eight corporations and transferred the monies to the Republican National Committee, which in turn sent the funds to seven candidates for the Texas House of Representatives. Whether the rule stands or is so politically damaging that it has to be withdrawn remains to be seen. The allegations by themselves reveal the elaborate, labyrinthine machinations that are increasingly part of the intergovernmental flow of campaign funds. The scheme was part of a successful effort to capture control of both chambers in the Texas legislature as a prelude to redistricting U.S. House seats in Texas, the ultimate goal of which was to better insulate the Republican majority in the U.S. House from capture by the Democrats.³⁸

As the Republican majority has consolidated its control over Congress, it has ended several bipartisan practices. For example, it had been common in the past (when the Democrats were the majority party) for conference committees to be composed of members of both parties from each chamber. Similarly, it was common for members of both parties to participate in drafting or "marking up" legislation.³⁹ However, both of these practices are no longer followed in all instances—for example, in the drafting of the 2003 Medicare Act and the 2004 reforms of the intelligence community. In the postelection congressional session in November, Speaker of the House J. Dennis Hastert (IL) announced a new policy that

³⁸R. Jeffrey Smith, "DeLay's Corporate Fundraising Investigated," Washington Post 12 July 2004 (Netscape version); Glen Justice and Sheryl Gay Stolberg, "3 DeLay Aides Facing Charges in Fund-Raising," The New York Times 22 September 2004 (Netscape version); Charles Babington, "GOP Pushes Rule Change to Protect DeLay's Post," Washington Post 17 November 2004 (Netscape version).

³⁹James MacGregor Burns, J.W. Peltason, Thomas E. Cronin, David B. Magleby, David M. O'Brien, and Paul C. Light, *Government by the People: National, State, and Local Versions*, 2nd ed. (Upper Saddle River, NJ: Pearson Prentice-Hall, 2004), pp. 295–298.

he would schedule a bill for a final “floor” vote (i.e., a vote of the whole House of Representatives) only if a majority of the majority Republican party favored the legislation.⁴⁰ One immediate consequence of this “majority of the majority” rule is to prevent a faction of the Republican party from joining with the minority Democrats to form a voting majority that enacts legislation opposed by a majority of the House Republicans. Furthermore, this new practice complicates interchamber relationships, as exemplified in the long negotiations over the bill to reform the intelligence community.⁴¹

This strategy to eliminate bipartisanship, if followed much further, could produce Madison’s worst fear—tyranny of the majority. Two critical restraints on preventing strong-willed majorities from oppressing individuals and minorities, according to The Federalist no. 51, are a bicameral legislature and a federal republic.⁴² But rule changes designed to emasculate the minority party, coupled with contemporary campaign fundraising practices, make it possible for a majority to use its power intergovernmentally to ensure its ability to act without restraint by the minority.

Education

Few pieces of federal legislation have gone so quickly from a heralded national triumph to an unwelcome intrusion into state and local affairs as has the NCLB.⁴³ Passed in 2001, the act, which reauthorized the 1965 Elementary and Secondary Education Act (ESEA),

reflected an unprecedented, bipartisan commitment to ensuring that all students, regardless of their background, receive a quality education. To reach this goal, NCLB refocused federal education programs on the principles of stronger accountability for results, more choices for parents and students, greater flexibility for states and school districts, and the use of research-based instructional methods.⁴⁴

Yet, just three years later, legislation protesting the act’s many provisions or demanding Congress significantly alter or even repeal it had been introduced in more than half of the states.⁴⁵ The objections of state and local education officials are numerous and range from the national performance goals and standardized testing to the numerous subgroups based on race, income, and English proficiency for which results must be

⁴⁰Charles Babington, “Hastert Launches a Partisan Policy,” Washington Post 27 November 2004 (Netscape version).

⁴¹Charles Babington and Walter Pincus, “House Leaders Expect Passage of Intel Bill,” Washington Post 7 December 2004 (Netscape version); John Diamond, “Senate Passes Bill to Overhaul Intelligence,” USATODAY, 9 December 2004 (Netscape version).

⁴²Burns et al., *Government by the People* 275; Jacob E. Cooke, ed. *The Federalist* (Cleveland, OH: Meridian Books, 1961), pp. 347–353.

⁴³For a review of the act, see Dale Krane, “The State of American Federalism, 2001–2002: Resilience in Response to Crisis,” *Publius: The Journal of Federalism* 82 (Fall 2002): 10–12.

⁴⁴U.S. Department of Education, “NCLB: An Overview, 17 May 2005; www.ed.gov.

⁴⁵Alan Greenblatt, “The Left Behind Syndrome,” *Governing* 17 (September 2004): 40.

achieved, from the cost of compliance and insufficient federal funding to the time line within which success must be reached, from the lack of consistent federal actions to the fears that many local schools will be deemed as "failing."⁴⁶

Secretary of Education Rod Paige acknowledged the negative reactions to the NCLB but discounted them by saying "much of the opposition is due to a misunderstanding of the law, although there is some opposition fueled by guardians of the status quo who simply don't want to change."⁴⁷ But is the revolt against the NCLB the usual, to-be-expected resistance that change efforts typically provoke? The secretary and many others inside and outside the U.S. Department of Education recall that the minimum competency movement of the 1970s engendered many of the same complaints now being leveled against the NCLB; yet between 1973 and 1979 thirty-six states put in place minimum competency testing.⁴⁸ So why the widespread and virulent state and local resistance when prominent members of both parties in Congress continue to praise the NCLB's goals?

Some point to missteps in the act's initial implementation such as the requirement for the use of the same tests with all students, even though some in a school speak little English or are special education students with learning disabilities.⁴⁹ Some school officials have expressed exasperation and frustration with the requirements that test results must be reported for as many as three dozen targeted subgroups reflecting income, English proficiency, and race. For example, "a special education student who is a Latino from a low-income home is counted in 10 different subgroups across the NCLB grid,"⁵⁰ and unacceptable test results by any one subgroup can doom an entire school to "failure."

As with almost every federal initiative, state-federal wrestling over the amount offunds made available by Washington is a regular part of intergovernmental relations, and it is no different with the NCLB. The administration has supported modest funding, but the \$10.72 billion increase in Department of Education appropriations over the last three years is due to congressional action. The White House insists extra spending required to comply with the NCLB is the responsibility of state

⁴⁶Center on Education Policy, "No Child Left Behind Gains Some Traction, but Progress May Soon Stall in States, Warns First Comprehensive Study of Law's Implementation," press release, 3 January 2003; Center on Education Policy, "New Report on No Child Left Behind Offers First-Ever Analysis of Implementation Efforts at Federal, State & Local Levels," press release, 26 January 2004; www.cep-dc.org.

⁴⁷Rod Paige, remarks delivered at No Child Left Behind? The Politics and Practice of Accountability a conference sponsored by the Brookings Institution, Washington, DC, 11 December 2003.

⁴⁸Rick Hess, remarks delivered at No Child Left Behind? The Politics and Practice of Accountability a conference sponsored by the Brookings Institution, Washington, DC, 11 December 2003.

⁴⁹Jack Jennings and Nancy Kober, "Talk Tough, But ... : Put the Money Where Your Mouth Is," Washington Post 3 October 2004 (Netscape version).

⁵⁰Greenblatt, "The Left Behind Syndrome," 40.

and local governments but ignores the fact that the NCLB's requirements were imposed during the worst fiscal crisis faced by state governments since the Great Depression.⁵¹ Paul Peterson downplays the NCLB's fiscal price by noting the annual average per pupil cost of testing is about \$15, compared with the average per pupil cost of education of around \$8,000.⁵² Testing, however, is only one cost item, and the interventions necessary to uplift youngsters and schools also have to be included in the act's total price. Several states have conducted studies of the full cost of implementation—Ohio estimates its extra costs to be \$1.5 billion annually and Hawaii estimated the added annual costs at \$30 million. Jack Jennings, director of the Center on Education Policy, and Nancy Kober, a consultant to the center, distill the debate over federal dollars by pointing out, "The federal government is demanding 100 percent accountability in elementary and secondary education, while paying just 10 percent of the bill."⁵³ Little wonder James Dillard II (R-Fairfax), chairman of the Education Committee, Virginia House of Delegates, proclaimed, "This is a punitive act that uses coercion. . . . It's costing us additional money and all kinds of pain and suffering."⁵⁴

Others indict the leadership in the U.S. Department of Education for taking an insensitive stance toward state and local officials. In particular, Undersecretary Eugene Hickok has been a political lightning rod because he has "dismissed the complaints of state legislatures against the law as 'dinner conversation,' [and] charges that critics 'would like to revisit the statute to gut it.'"⁵⁵ It is important to note that some of the most virulent opposition to the NCLB comes from the reddest of Republican states—Utah, Nebraska, Oklahoma, Virginia—where state and local officials have a long history of resistance to federal mandates. Doug Christensen, Nebraska commissioner of education, who has been successful in wresting concessions from the U.S. Department of Education, expressed the ire of his state and local colleagues in saying that "the entire conversation about this has gone from an education conversation to a political conversation. . . . Every state legislator, whether they like it or not, ought to be angry that the evolution of No Child Left Behind absolutely excluded them."⁵⁶ A long-standing principle of intergovernmental implementation of federal programs is that success hinges on adequate and

⁵¹Jennings and Kober, "Talk Tough"; Greenblatt, "The Left Behind Syndrome"; Dale Krane, "The State of American Federalism, 2002–2003: Division Replaces Unity," *Publius: The Journal of Federalism* 33 (Summer 2003): 1–44.

⁵²Paul Peterson, remarks delivered at "No Child Left Behind? The Politics and Practice of Accountability" a conference sponsored by the Brookings Institution, Washington, DC, 11 December 2003.

⁵³Jennings and Kober, "Talk Tough."

⁵⁴Chris L. Jenkins, "Bill Imperils U.S. School Aid Killed by Va. Panel," *Washington Post* 11 November 2004 (Netscape version).

⁵⁵Greenblatt, "The Left Behind Syndrome," 42.

⁵⁶*Ibid.*, 40.

significant involvement of state and local officials in the decisions by the lead federal agency.⁵⁷

These implementation ills notwithstanding, progress can be seen in many school districts. Schools in need of improvement are being identified, and many of these schools are receiving special attention from state and local authorities. The Center on Education Policy's study of NCLB implementation found that

more than half of the districts with schools identified for improvement implemented a new research-based curriculum or instruction program, and more than one-third extended the school day or the school year. To help identified schools, a majority of school districts reported that they allocated resources to such strategies as increasing the use of achievement data to inform instruction, matching curriculum with standards and tests, and using research to inform decisions about improvement strategies.⁵⁸

Other actions taken by school districts include the development of supplemental educational services, especially tutoring services, as a way to retain parental support and to reduce the number of transfers among schools.⁵⁹ Peterson and West predict that accountability systems "soften" over time, but "even soft accountability systems work."⁶⁰ "The political future of NCLB and the new, more assertive federal role in education will likely be determined," according to Patrick McGuinn in his article in this issue on the transformation of federal education policy, "by the extent and pace of school improvement, whether the public continues to support federal activism in schools, and the degree to which the bipartisan consensus behind the law can continue to be sustained."

The feud over the NCLB did not completely eclipse other important federal actions related to education. In late November 2004 Congress made several changes to special education policy. State and local officials gained more discretion over special education, and parents had their access to lawsuits over services provided to disabled children reduced. Previously, school officials had the burden of demonstrating that student behavioral problems were unrelated to the student's medical condition and that they had attempted to do everything possible to assist the child. The new legislation requires parents "to spell out their criticisms precisely before

⁵⁷Edward T. Jennings Jr., Dale Krane, Alex N. Pattakos, and B.J. Reed, "Assessing the State Small Cities CDBG Experience," From Nation to States: The Small Cities Community Development Block Grant Program, eds. Edward T. Jennings Jr., Dale Krane, Alex N. Pattakos, and B.J. Reed. (Albany: State University of New York Press, 1986), pp. 221-251; Walter Williams, The Implementation Perspective: A Guide for Managing Social Service Delivery Programs (Berkeley, CA: University of California Press, 1980).

⁵⁸Center on Education Policy, "New Report on No Child Left Behind Offers First-Ever Analysis of Implementation Efforts at Federal, State & Local Levels," press release, 26 January 2004; www.cep-dc.org.

⁵⁹Nancy Trejos, "Schools Vying For Share of Tutoring Funds: New Programs Compete With Private Offerings," Washington Post 21 September 2004 (Netscape version).

⁶⁰Paul Peterson and Martin R. West, remarks delivered at No Child Left Behind? The Politics and Practice of Accountability a conference sponsored by the Brookings Institution, Washington, DC, 11 December 2003.

they can sue and stick to their original charges in seeking redress, making it easier for school systems to anticipate and contain legal challenges.”⁶¹ The effect of these changes will make “it more difficult for parents to protect the rights of their children,” argued Calvin Luker, founder of Our Children Left Behind, an advocacy group for special education.⁶² But from the perspective of school officials, it will be easier for them to remove disruptive students and avoid costly lawsuits. Bruce Hunter, representing the American Association of School Administrators, pointed out the new requirements will bring parents and school officials together in a “last ditch effort” to forge an agreement before going to court. This requirement alone will solve problems and save school districts considerable money.⁶³

Congress also changed the formula for college aid so that students whose parents earn between \$35,000 and \$40,000 per year would lose their Pell grants. The change would save the federal government approximately \$270 million but would reduce the number of students eligible for Pell grants by about 84,000.⁶⁴

Energy and the environment

Controversy continued to characterize Bush administration environmental policies. Immediately after the 2004 presidential election, Senator John McCain (R-AZ) publicly labeled Bush’s position on greenhouse gases and climate change as “terribly disappointing.”⁶⁵ McCain’s statement was merely the most recent complaint in a litany of criticism that has done little to deter Bush from changing the direction of federal environmental policy. For Bush, the development of additional energy resources and the protection of the environment are not mutually exclusive options, as he stated in the introduction to his National Energy Policy: “America must have an energy policy that plans for the future, but meets the needs of today. I believe we can develop our natural resources and protect our environment.”⁶⁶ Michael Leavitt, director of the Environmental Protection Agency (EPA) in 2004, elaborated on the administration’s view on energy and environment by observing, “There is no environmental progress without economic prosperity. Once our competitiveness erodes, our capacity to make environmental gains is gone. There is nothing that promotes pollution like poverty.”⁶⁷

⁶¹Diana Jean Schemo, “Parts of Special-Ed Bill Would Shift More Power to States and School Districts,” *The New York Times* 22 November 2004 (Netscape version).

⁶²Ibid.

⁶³Ibid.

⁶⁴Greg Winter and Diana Jean Schemo, “Bill Clears Way for Government to Cut Back College Loans,” *The New York Times* 21 November 2004 (Netscape version).

⁶⁵Andrew C. Revkin, “Election Over, McCain Criticizes Bush on Climate Change,” *The New York Times* 16 November 2004 (Netscape version).

⁶⁶U.S. Department of Energy, *National Energy Policy: Report of the National Energy Policy Development Group*, May 2001.

⁶⁷As quoted in Felecity Barringer, “New Priorities in Environment,” *The New York Times* 14 September 2004 (Netscape version).

Also important to Bush's policy is the administration's use of various administrative tools, or what Denise Scheberle in an article in this issue labels as the "stealth dimension" of the federal matrix, to implement its policy objectives. For example, instead of relying primarily on legislative initiatives, where Bush has not always been successful, the president via executive orders has accelerated the approval process for permits to drill on federal lands. The number of approved permits grew from 900 in 2000 to 1,600 in 2004. The action to approve drilling permits more quickly resulted in a large number of resignations by U.S. Department of the Interior personnel.⁶⁸

To oversee the new policy course, Bush appointed to positions in the Department of the Interior several people with direct connections to the energy industry, such as Deputy Secretary J. Steven Griles and Assistant Secretary Rebecca Watson. Interior officials have responsibility to manage federal lands to foster "multiple use" among competing interests such as environmental protection, energy development, outdoor recreation and tourism, ranching, and the protection of endangered species. The Bureau of Land Management (BLM), U.S. Department of the Interior, oversees the development of land-use plans, and it is these plans that have become the administration's policy tool of choice. It should be noted that the land-use plans are not subject to congressional oversight. Typically, BLM civil servants develop the plans, but the administration, as part of its effort to push energy development, farmed out the revision to "corporations, including several large multinational consulting firms with extensive government contracts."⁶⁹ Revised plans opened federal lands in Colorado, Montana, New Mexico, Utah, and Wyoming to drilling for gas and oil. Local opposition by ranchers, outdoors men, and the recreation industry did not deter the BLM from expediting energy projects. Federal workers have even been ordered to stop surveys designed to identify areas of federal land that might merit designation as a federal preserve prohibiting any type of development.⁷⁰

But the Department of the Interior is not the only administrative agency within which the new policy direction prevails. The EPA's revision of the New Source Review rule, which applies to stationary sources of air pollution, altered the requirements so that existing power plants would have a 20 percent annual margin when making repairs before the federal pollution control limit is violated. Just as the new policy actions caused a split among BLM civil servants, the New Source Review revision has created division between the politically appointed EPA officials and the agency's legal staff responsible for enforcement. Although the final rule has not yet

⁶⁸As quoted in Joby Warrick and Juliet Eilperin, "Oil and Gas Hold the Reins in the Wild West," *Washington Post* 25 September 2004 (Netscape version).

⁶⁹*Ibid.*

⁷⁰*Ibid.*

been implemented because of legal challenges to it, the EPA's own inspector general Nikki L. Tinsley (appointed by President Clinton) issued a report stating the revised rule "seriously hampers" the EPA's ability to rely on lawsuits to enforce air quality.⁷¹ Senator James M. Jeffords (Ind.-VT), commenting on the inspector general's report, stated, "This report is further evidence that the Bush Administration has been trying to gut the enforcement of the Clean Air Act since coming into office."⁷²

Bush's preference for executive orders and other top-down administrative controls undercuts the ten years of progress achieved under the National Environmental Performance Partnership System described by Scheberle in this issue. Likewise, John Hoornbeek demonstrates in his analysis of state water pollution policies in this issue that the administration's reliance on a command-and-control regulatory approach is counterproductive as federal policy because it ignores other "federal policy options available which can foster more active programs at the state level without specifying particular solutions for variable problems."

Health care

The cost and quality of medical care continued to be a serious concern for American families, and they were issues in the 2004 elections. The claim that the best ways to reduce long-term health care costs were to foster competition among all health providers (public and private) and to entice more private health providers into the health-care market was an important rationale for the Medicare Prescription Drug, Improvement and Modernization Act of 2003 (MMA).⁷³ But the unrelenting rise in the costs of private health plans prompted members of Congress to question the wisdom of moving seniors out of traditional Medicare and into private health programs. A report issued by the federal Medicare Payment Advisory Commission stated that Medicare paid private providers an average of 107 percent of the average cost for patients under the traditional public fee-for-service program, and in rural counties the payments approached 123 percent of the average for traditional Medicare. These large overpayments constituted a subsidy for private providers, and as noted by former Senator Dave Durenberger (D-MN), "there appears to be no good reason why private plans should be given more money per capita than is given through the traditional fee-for-service system." The problem is a growing one, with 11.5 percent of Medicare's 41 million beneficiaries already in private plans and the MMA's incentives for competition just beginning to take effect. Private providers argued they deserve additional monies to create health networks in rural areas as well as to pay for services

⁷¹Michael Janofsky, "Inspector General Says E.P.A. Rule Aids Polluters," *The New York Times* 1 October 2004 (Netscape version).

⁷²Ibid.

⁷³Krane, "The State of American Federalism, 2003-2004," 113-115.

beyond those offered by traditional Medicare.⁷⁴ But the GAO reported that “the Bush Administration had improperly allowed some private health plans to limit Medicare patients’ choice of health providers, including doctors, nursing homes and home care agencies.” Furthermore, the GAO said private plans overall “had increased out-of-pocket costs for the elderly and had not saved money for the government, contrary to predictions by Medicare officials.”⁷⁵

The U.S. Department of Health and Human Services (DHHS) continued to encounter complaints and obstacles as it implemented the MMA. Secretary Tommy Thompson announced a new feature on the Medicare Web site (www.medicare.gov) that made possible price comparison among similar brand-name pharmaceuticals. The purpose of the new feature, according to the secretary, was to offer doctors and patients information they could use “to choose less expensive drugs providing benefits similar or identical to those of high-cost medications.” Presumably, the availability of these data would boost competition among drug manufacturers. However, drug companies objected to the new feature and emphasized that similar medicines can have different effects in different patients. Secretary Thompson pointed out that the Web site information was part of the DHHS’s work to implement the MMA’s requirement that it perform research on the “comparative clinical effectiveness” of drugs.⁷⁶ At the same time, the DHHS and the drug manufacturers also argued over the scope of the federal formulary—the list of drugs approved for reimbursement by Medicare. Manufacturers want the list to be large so that most if not all of their medications qualify, but insurers and drug benefit managers prefer a list limited in number and type of drug. How expansive or how restrictive the formulary will be will have an important effect on future Medicare costs.⁷⁷

The initial confusion surrounding the MMA’s temporary discount drug benefit led to a slow sign-up of Medicare beneficiaries, and this forced the DHHS to send discount cards to eligible low-income individuals who had not yet applied by the end of Summer 2004. Part of the DHHS’s concern was that seniors who did not sign up by 31 December 2004 would lose half of the \$1,200 pharmaceutical drug credit in 2005.⁷⁸ The Bush administration received some good news as a study by the Kaiser Family Foundation estimated that 29 million of the 41 million Medicare beneficiaries would

⁷⁴Robert Pear, “Private Plans Costing More for Medicare,” *The New York Times* 19 September 2004 (Netscape version).

⁷⁵Robert Pear, “Inquiry on Medicare Finds Improper Limits on Choices,” *The New York Times* 28 September 2004 (Netscape version).

⁷⁶Robert Pear, “Price Comparison for Drugs Is Put on Federal Web Site,” *The New York Times* 16 September 2004 (Netscape version).

⁷⁷Ibid.

⁷⁸Robert Pear, “Low-Income Nonapplicants to Get Medicare Drug Cards,” *The New York Times* 23 September 2004 (Netscape version).

sign up for the MMA's drug benefit when it became fully available in 2006. Furthermore, the study also predicted that 65 percent of those who sign up would spend less on prescription drugs, 25 percent would spend more, and 10 percent would spend about the same.⁷⁹

In a related matter, the National Association of Insurance Commissioners (NAIC), which represents state government insurance regulators, objected to a proposed federal rule that would require health insurers "to tell policyholders that the Medicare drug benefit provided 'greater value' than did the drug coverage available to people with private Medigap insurance." This statement was posted on the DHHS's Web site. The NAIC opposed the rule's language because (1) the claim was not necessarily true, (2) it "sounds a little too much like advertising," and (3) the federal government had not consulted with the NAIC, as required by law.⁸⁰

Perhaps the biggest disappointment to date with new initiatives contained in the MMA is the widespread reluctance of employers and individuals to use the provision for health-care savings accounts. The savings accounts offer lower-cost but high-deductible insurance to cover medical care, and the logic behind them is that allowing health consumers to save money tax free would reduce unnecessary and wasteful health expenses. Insurance companies report that only small numbers of employers and employees are switching to plans built with health savings accounts. Analysts suggest that the plans are untested and too new to attract many employers and may not be affordable for average workers because of high deductibles. Equally problematic is that the health accounts offer no savings for chronically ill people.⁸¹

The federal-state feud over the importation of prescription drugs raged on as states became more assertive and creative in their efforts to find alternative and lower-priced sources of pharmaceutical drugs. For example, Maine governor John Baldacci (D) gave the Penobscot Indian Nation \$400,000 to build a warehouse and establish a program to distribute imported drugs; in effect, the Penobscots would become the state's designated wholesaler of medicines.⁸² Governors Rod Blagojevich (D-IL) and Jim Doyle (D-WI) held a news conference in October 2004 to announce the "I-Save Rx" program, which would use a Canadian company to buy and distribute medicines purchased from forty-five wholesalers and retailers in Canada, Ireland, and the United Kingdom. Blagojevich claimed the initiative would lower drug costs for Illinois and Wisconsin

⁷⁹Robert Pear, "Study Finds Savings in Medicare Drug Benefit," The New York Times 23 November 2004 (Netscape version).

⁸⁰Robert Pear, "State Officials Criticize Medicare Benefit Wording," The New York Times 7 November 2004 (Netscape version).

⁸¹Milt Freudenheim, "Bush Health Savings Accounts Slow to Gain Acceptance," The New York Times 13 October 2004 (Netscape version).

⁸²Pam Belluck, "Maine and One of Its Tribes Look to Buy Canadian Drugs," The New York Times 1 October 2004 (Netscape version).

residents by 25–50 percent. The governor justified the new program as a response to the U.S. Food and Drug Administration's (FDA) denial of his petition for the state to launch a pilot program to buy drugs from Canada.⁸³ Missouri and Kansas joined I-Save Rx by the end of 2004, and in early 2005 the Vermont legislature voted to join the program.⁸⁴ Numerous states and cities put up Web sites linking their states with pharmacies in Canada so their residents could buy drugs at lower costs and with assurance about their quality.⁸⁵ It should be noted that Governor Arnold Schwarzenegger (R-CA) vetoed several bills permitting California to become active in drug importation.⁸⁶

The FDA reaffirmed its opposition to state government importation of prescription drugs and charged that I-Save Rx, as well as Maine's use of an Indian tribe, was illegal and unsafe. Despite its strong words, the FDA did not stop states from maintaining Web sites linked to Canadian pharmacies.⁸⁷ The duration and intensity of the federal-state feud over imported medicines as well as other aspects of the nation's health-care arrangements, according to William Weissert and Edward Miller's review of state pharmacy assistance programs in this issue, has the potential to stymie future innovation and risk taking by state governments.

The FDA also found itself increasingly embroiled in allegations that it had become too closely aligned with drug manufacturers and had approved some medications without sufficient testing to detect serious side effects such as heart attacks, strokes, and birth defects.⁸⁸ The FDA suffered further embarrassment when it was informed by Chiron, a British firm, that bacteria had been found in its influenza vaccine and that the British government had pulled the company's license. The effect of the action by the British authorities was to cut in half the anticipated vaccine supply for the 2004–2005 flu season in the United States.⁸⁹ The FDA was forced to ration the vaccine, and this provoked fears that not all high-risk persons would receive flu shots. Several governors went shopping for vaccine overseas and were able to purchase some additional doses.⁹⁰

On another health front, the White House drug czar John Walters initiated a national campaign against substance abuse, targeting the rapidly

⁸³Courtney Flynn, "State Starts Drug Import Plan," *Chicago Tribune* 5 October 2004 (Netscape version).

⁸⁴"States Look to Europe for Prescription Drugs: Canadian Government Considers Shutting Down Flow to U.S." *CNN.com*, 17 January 2005 (Netscape version).

⁸⁵Belluck, "Maine and One of Its Tribes."

⁸⁶John M. Broder, "Schwarzenegger Vetoes Bills Seeking Drugs from Canada," *The New York Times* 1 October 2004 (Netscape version).

⁸⁷Flynn, "State Starts Drug Import Plan."

⁸⁸Gardiner Harris, "F.D.A. Failing in Drug Safety, Official Asserts," *The New York Times* 19 November 2004 (Netscape version); Gardiner Harris, "Regulation Redefined: AT F.D.A. Strong Drug Ties and Less Monitoring," *The New York Times* 6 December 2004 (Netscape version).

⁸⁹Anita Manning, "FDA Red-Flagged Flu Vaccine Factory," *USATODAY*, 11 October 2004 (Netscape version).

⁹⁰Gardiner Harris, "Complaints Build across the Nation on Flu Vaccine Supplies," *The New York Times* 19 October 2004 (Netscape version); Monica Davey, "Illinois Governor Seeks Vaccine Abroad," *The New York Times* 25 October 2004 (Netscape version).

increasing use of methamphetamine, painkillers such as OxyContin, and stimulants, particularly Ecstasy. Walters urged (1) stronger state control of ingredients to make meth, especially pseudoephedrine, which is a major component of over-the-counter decongestant medicine; (2) state establishment of programs to monitor sales of prescription drugs such as OxyContin; and (3) more vigorous local law enforcement efforts to control promoters of “raves” (underground electronic music parties) because Ecstasy is often part of the rave scene.

Less Taxing, More Spending, and Deeper in Debt

President Bush signed the American Jobs Creation Act of 2004 (P.L. 108-357) on 22 October 2004, making him a perfect “four-for-four” on tax cut proposals enacted into law during his first term—a record of success achieved by few of his predecessors. But the passage of this most recent tax cut engendered more conflict and opposition than the previous three. The White House had to overcome opposition by moderate Senate Republicans and Democrats over the act’s permanent extension of the 2001 and 2003 tax cuts. Senators concerned about the burgeoning deficit had insisted through the summer on the adoption of a “pay-as-you-go” (or “pay-go”) approach that would require any extension of existing but temporary tax cuts or the enactment of new tax cuts to be offset by spending decreases or increases in other taxes.⁹¹ Other senators, including Charles Grassley (R-IA), opposed a change in the 2001 child-care tax credit that would have reduced or eliminated the credit for 4 million of the estimated 11 million low-income families who qualified for this benefit.⁹² Last-minute opposition came from Senator Mary Landrieu (D-LA) because the bill did not include a proposal to grant \$2 billion in tax credits to companies that had continued to pay their employees on active military duty.⁹³

One might have expected campaign politics to fuel opposition to \$136 billion in corporate tax breaks, but not only did the Democrats not have the votes to stop the tax bill, but they and their presidential candidate also could not vigorously oppose several key provisions, including a five-year extension of the \$1,000 child-care credit, a four-year reduction of the “marriage penalty” on two-income families, a six-year extension of the lowest 10 percent tax rate, and a one-year hold on growth of the alternative minimum tax.⁹⁴ At best, the Democrats could try to make the case that the new tax reductions would make the deficit worse, but that argument

⁹¹See Krane, “The State of American Federalism, 2003–2004,” 111–112.

⁹²Jonathan Weisman, “Bid to Save Tax Refunds for the Poor Is Blocked,” Washington Post 23 September 2004 (Netscape version).

⁹³Edmund L. Andrews, “A Senator’s Outrage Delays Passage of Corporate Tax Bill,” The New York Times 11 October 2004 (Netscape version).

⁹⁴Edmund L. Andrews, “Deal in Congress to Keep Tax Cuts, Widening Deficit,” The New York Times 23 September 2004 (Netscape version); Jonathan Weisman, “Congress Votes to Extend Tax Cuts,” Washington Post 24 September 2004 (Netscape version).

carried little weight with most voters. Nor were many voters concerned that corporate taxes had fallen to their lowest level since 1988.⁹⁵

Ultimately, passage of the 2004 act rested on a “feeding frenzy” by interest groups that would benefit from the \$76.5 billion in new tax relief for U.S. manufacturers. In fact, “House and Senate leaders openly invited lawmakers and industry groups to draw up their own wish list for special tax provisions.”⁹⁶ Key features of the act include a broader definition of manufacturing so that it covers oil and gas producers, architectural and engineering firms, and music companies. Other benefits go to NASCAR racetrack owners, native Alaskan whalers, corn farmers, and shipbuilders. Also included are a \$10.1 billion dollar buyout for tobacco farmers and a new deduction for state and local sales taxes paid by residents who live in states without a state income tax (Alaska, Florida, Nevada, South Dakota, Texas, Washington, and Wyoming).⁹⁷ The American Jobs Creation Act, according to Keith Ashdown, vice president of the nonpartisan group Taxpayers for Common Sense, “was a perfect storm for pork, in that they added all of these provisions that were really important to lawmakers in an election year.”⁹⁸

Whatever one’s assessment of the 2004 act, the simple fact is that Bush’s four proposals to cut taxes succeeded more than the administration imagined and amount to almost \$1.9 trillion in tax reductions over a ten-year period.⁹⁹ The recipe for this success is obvious: wrap a wide array of cuts for targeted interests in a thin blanket of highly popular and difficult-to-oppose tax cuts for low- and middle-income families. Although this policy design may be excellent electoral strategy, Robert Bixby, executive director of the Concord Coalition, points out that in the long term it merely “postpones all the hard choices on the deficit.”¹⁰⁰

Although Congress enacted tax cuts before the election, the Consolidated Appropriations Act of 2005 became law three weeks after the election by votes of 344 to 51 in the House and 65 to 30 in the Senate. Two issues delayed its passage. First, House conferees’ support for a ban on abortion services or referrals prompted a fight with Senate conferees. The House proposal affected approximately half of the states that use state dollars to offer abortion services to Medicaid recipients.¹⁰¹ A second obstacle to final approval of the appropriations bill emerged suddenly when it was

⁹⁵Lynnley Browning, “Study Finds Accelerating Decline in Corporate Taxes,” The New York Times 23 September 2004 (Netscape version).

⁹⁶Edmund L. Andrews, “How Tax Bill Gave Business More and More,” The New York Times 13 October 2004 (Netscape version).

⁹⁷Ibid.; Associated Press, “Senate Passes \$136B Corporate Tax Bill,” USATODAY, 11 October 2004 (Netscape version).

⁹⁸Andrews, “Tax Bill Gave More and More.”

⁹⁹Weisman, “Congress Votes to Extend Tax Cuts.”

¹⁰⁰Ibid.

¹⁰¹Dan Morgan and Helen Dewar, “Congress Agrees on Tight Budget for the U.S.,” Washington Post 21 November 2004 (Netscape version).

discovered at the last minute that the bill contained a provision allowing the chairman of the House or Senate appropriations committees to designate agents who would have the authority to examine a person's tax returns. When this unprecedented provision became widely known, it was quickly denounced as "a Saturday night massacre on Americans' privacy" by House minority leader Nancy Pelosi (D-CA), and embarrassed Republicans rushed to remove the provision.¹⁰²

Although House Republicans labeled the \$388 billion budget bill as "a lean and clean package,"¹⁰³ it was, in the words of Senator John McCain (R-AZ), "one big fat turkey ... but this bird is not loaded with the traditional stuffing, it is packed with pork."¹⁰⁴ Congressional leaders managed to adhere to the administration's demand to hold expenditure growth to 1 percent, while at the same time filling the budget bill with a wide spectrum of perks and pork. Taxpayers for Common Sense counted 11,772 earmarked special projects totaling \$15.78 billion, or about 4 percent of the FY 2005 budget bill.¹⁰⁵

Most agencies suffered an across-the-board expenditure cut of 0.8 percent, which along with the 3.5 percent raise in civil service pay effectively reduced agency spending by more than 4 percent, especially that of agencies with larger workforces. However, some programs did see increases such as the Women's, Infants', and Children's (WIC) nutrition program (13 percent), the Section 8 housing program (5 percent), the Low Income Housing Energy Assistance program (15 percent), and Head Start (1 percent).¹⁰⁶

Members of both parties expressed dismay over the budget process itself. For three years in a row, the budget was passed at the last minute in the form of an omnibus bill rather than in the traditional form of thirteen separate and specific appropriations bills. Even worse, this last-minute procedure meant that most members of Congress had not read the 3,300-page bill. This new procedure creates opportunities for what Robert Reischauer, former Congressional Budget Office director, sees as "legislative mischief." Senator McCain states, "We've reached the bizarre point where we approve hundreds of billions of dollars of bills without anyone seeing them. And then we're shocked—shocked!—that a provision [the tax privacy issue] could sneak in that is onerous."¹⁰⁷

¹⁰²Sheryl Gay Stolberg, "In Congress, Growing Doubts on Spending Process," The New York Times 24 November 2004 (Netscape version).

¹⁰³Morgan and Dewar, "Congress Agrees on Tight Budget."

¹⁰⁴David E. Rosenbaum, "Call it Pork or Necessity, but Alaska Comes Out Far Above the Rest in Spending," The New York Times 21 November 2004 (Netscape version).

¹⁰⁵Ibid.; Sharon Theimer, "Deficit Hasn't Tamed Appetite for Pork," Associated Press 24 November 2004 (Netscape version); Katherine Q. Seelye and David E. Rosenbaum, "Big Spending Bill Makes a Winner of Mars Program but Many Losers Elsewhere," The New York Times 23 November 2004 (Netscape version).

¹⁰⁶Seelye and Rosenbaum, "Big Spending Bill."

¹⁰⁷As quoted in Stolberg, "Growing Doubts on Spending Process."

Worries over earmarks and the budget process are important, but more worrisome is the failure by Congress and the president to address the cost of entitlement programs. After all, domestic discretionary spending, of which earmarks are a relatively modest portion, constitutes only one-seventh of the \$2.3 trillion federal budget. The consequences of unrestrained growth in federal expenditures coupled with multiple rounds of tax cuts are a federal debt in excess of \$4 trillion. If one adds the national government's liabilities for Medicare and Social Security, this figure increases by tenfold. Total federal, state, and local government debts and liabilities equal \$53 trillion, or \$473,456 per household, which is 5.6 times what each household owes in personal debt (\$84,454). Medicare and Social Security spending in FY 2004 increased by \$45 billion, compared with the FY 2004 budget of \$28 billion for the DHS. The Congressional Budget Office and the GAO have reported these figures and have recommended various combinations of benefit cuts, expenditure reductions, and tax increases to pay for federal government obligations.¹⁰⁸ Leaders of both political parties are well aware of this fiscal situation; unfortunately, as C. Eugene Steuerle, a widely respected economist at the Urban Institute, complains, "It's a game of chicken, and nobody's moving even though we have a crash coming."¹⁰⁹

THE STATES

The 2004 election results at the state level ran somewhat against the national results. Of the eleven states holding gubernatorial elections, six produced Democratic winners. As for state legislatures, Democrats took power in seven, Republicans gained control in four, and a split occurred in one state. After the elections, Republicans held twenty-eight governorships and 3,658 state legislative seats, compared with twenty-two governorships and 3,656 state legislators for the Democrats. It should be noted that the Democrats acquired sixty more legislative seats, an important increase from the 2002 elections. Republicans control both legislative chambers in twenty-one states and Democrats do so in seventeen states; eleven states have divided legislatures, and one is officially nonpartisan, although a majority of its members are Republican. If one includes the governorship in the equation, Republicans control the executive and legislative branches in twelve states, the Democrats exercise power in seven states, and twenty-nine states exhibit divided government.¹¹⁰

¹⁰⁸Dennis Cauchon and John Waggoner, "The Looming National Benefit Crisis," USATODAY, 13 October 2004 (Netscape version).

¹⁰⁹Dennis Cauchon and John Waggoner, "Solutions for Debt Crisis Go Far Beyond Tinkering," USATODAY, 5 October 2004 (Netscape version).

¹¹⁰National Governors Association, "NGA Welcomes New Governors," 1 January 2005; www.nga.org/common/issueBrief; National Conference of State Legislatures, "Partisan Composition of State Legislatures," 6 April 2005; www.ncsl.org/ncsl/db/elect98.

What is somewhat surprising about these state-level results is that in several states where the Republican national ticket did well, Republicans did not do as well at the state level. For example, citizens in the red states of Colorado and Montana voted for President Bush but gave both chambers in Colorado and the Senate in Montana to the Democrats (the Montana House is split 50–50). In North Carolina, another red state, Democrats returned to power in the state lower chamber and increased their margin in the upper chamber. That citizens vote differently for different offices is a long-standing feature of elections in the American federal system. In many cases issues motivating voter choices at the state level are different from those impelling their choice at the national level (e.g., North Carolina). In other situations the state party engages in destructive actions, whereas the national candidate remains attractive (Colorado). In other cases the national candidate is personally popular but the policies pursued by the national candidate upset some voters who then take their dislike out on state-level candidates (Montana).¹¹¹

Citizens in 34 states also voted on 163 ballot propositions. Constitutional amendments to ban same-sex marriage passed by margins of three-to-one in ten states (AR, GA, KY, MI, MS, MO, ND, OK, OH, and UT) and by 56 percent in Oregon. Earlier in the year voters in Louisiana and Missouri supported constitutional bans on same-sex marriages. These state-level results contrast with the failure in Congress to pass the presidentially supported constitutional amendment to define marriage as being only between a man and a woman, thus also prohibiting civil unions for gay people.¹¹²

In contrast to the controversy engendered by proposals to ban same-sex marriage, measures to reduce traffic congestion met little opposition. Twenty-three of thirty-one proposals in support of new or expanded bus and rail lines in eleven states were approved, as were nineteen of twenty-four propositions to raise taxes or issue bonds to pay for roads and bridges. “Public transportation won almost everywhere. ... It was astonishing how much was passed,” enthused Stephanie Vance, a program manager at the Center for Transportation Excellence, a nonprofit research organization.¹¹³ Voters in California and Missouri approved measures stopping the diversion of highway funds to other types of activities. Matt Jeanneret, a transportation lobbyist, claimed the support for transportation “speaks volumes to what voters see as a very important problem. ... People are clamoring for relief from traffic congestion. ... The voters are way ahead of the politicians on this.”¹¹⁴

¹¹¹Dennis Cauchon, “Dems Gain in ‘Hidden Election,’” *USATODAY*, 15 December 2004 (Netscape version).

¹¹²Kavan Peterson, “Voters Decide Policy Issues,” *Stateline.org* 3 November 2004.

¹¹³As quoted in Haya El Nasser, “Red State or Blue, Americans Sick of Gridlock,” *USATODAY*, 5 November 2004 (Netscape version).

¹¹⁴*ibid.*

Other state ballots contained a diverse range of local hot-button issues: ¹¹⁵

- Alaskans rejected a measure to decriminalize marijuana, but Montana voters legalized cannabis for medical purposes—becoming the tenth state to do so.
- California, Nebraska, and Washington voters rejected various gambling proposals; however, Oklahomans approved a state lottery, the installation of slot machines at horse tracks, and an expansion of tribal gambling activities.
- Arizonans approved a measure to require proof of citizenship to register to vote and proof of immigration status to receive certain social services. The measure also requires state employees to report to federal authorities any person who applies for public benefits but does not have the proper immigration status.
- Californians defeated a proposal to ease the state’s “three strikes and you’re out” rule.
- Florida and Nevada voters approved raising the state minimum wage to \$6.15.
- Alabama voters failed to approve a constitutional amendment that would have erased segregation-era language in the state’s constitution that requires separate schools for “white and colored children.” The failed amendment would have also eliminated language related to poll taxes, a practice now illegal, but once used to prevent blacks from voting.
- Arkansas, Nevada, and Washington voters defeated ballot measures to increase education funding.
- Floridians and Nevadans approved proposals to limit medical malpractice awards, but Oregon and Wyoming voters chose not to.
- Maine voters defeated a proposal to cap property taxes at 1 percent of assessed value.
- Indiana voters approved a constitutional change that will permit state legislators to rewrite property tax laws.
- South Dakota voters refused to exempt groceries from state and city sales tax.
- Colorado, Montana, and Oklahoma voters raised taxes on cigarettes.

¹¹⁵Charisse Jones, “Issues: 11 States Nix Gay Marriage; Calif. Oks Stem-Cell Work,” USATODAY, 3 November 2004 (Netscape version); Manuel Roig-Franzia, “Alabama Vote Opens Old Racial Wounds,” Washington Post 28 November 2004 (Netscape version); Peterson, “Voters Decide Policy Issues”; National Governors Association, “Election 2004: Referendum Recap,” Issues Brief 4 November 2004; www.nga.org.

Californians' habit of adopting policies at odds with Washington, DC, continued when the state's voters approved Proposition 71 to spend \$3 billion during the next decade for research on human embryonic stem cells.¹¹⁶ The measure also establishes the California Institute of Regenerative Medicine to oversee the annual award of approximately \$300 million in grants and loans to public and private research organizations. The institute and the grants will be paid for by \$3 billion in state general obligation bonds estimated to cost \$6 billion over thirty years. California voters took their cues from Governor Schwarzenegger, who organized a coalition of business entrepreneurs, scientists, Hollywood glitterati, and former first lady Nancy Reagan. After Proposition 71 was approved, Daniel Perry, president of the National Coalition for the Advancement of Medical Research, proclaimed, "Californians have sent a strong signal to Capitol Hill—Don't delay research, don't delay cures, and don't delay hope." Opponents lamented their loss by emphasizing not only the moral dimension of the measure but also its financial implications. Judie Brown, president of the American Life League, issued a written statement saying, "The moral bankruptcy exhibited by those who voted for this measure, which endorses the destruction of innocent human beings, could be followed by a matching fiscal bankruptcy."¹¹⁷ That Californians, whose state still had a huge budget shortfall, would make a huge \$3 billion dollar bet on a specific industry was explained simply by Lt. Governor Cruz Bustamante, who stated, "It's this century's gold rush." Wayne C. Johnson, a leading opponent of Proposition 71, agreed with Bustamante's observation by noting, "There's a lot more truth there than he intended. Three billion dollars is a lot of money, and there's a potential for a lot of people to get very, very wealthy without accomplishing any public good."¹¹⁸ Certainly, the approval of Proposition 71 creates one of the most expensive and politically controversial policy experiments ever conducted by one of America's "laboratories of democracy." Its success or failure will have enormous repercussions for public support not just of medical research but also for other emerging technologies, and it definitely will shape the course of the moral debate over the use of human embryos.

The electoral victories by conservative religious advocates of same-sex marriage bans will give additional impetus to other parts of the Christian political agenda such as abortion and evolution. More and more of this activity will be aimed at state legislators and state judges because state governments exercise "police powers" to protect the health, safety, and welfare of citizens and this authority has long been held to encompass

¹¹⁶See Krane, "The State of American Federalism, 2001–2002," 25; Krane, "The State of American Federalism, 2002–2003," 38–39.

¹¹⁷As quoted in Peterson, "Voters Decide Policy Issues."

¹¹⁸As quoted in John M. Broder, "California's New Stem-Cell Initiative Is Already Raising Concerns," *The New York Times*, 27 November 2004 (Netscape version).

moral issues. Michael Bowman, director of state legislative relations for Concerned Women for America, a conservative Christian advocacy group, explained it is on the state level “where most family issues are decided.”¹¹⁹ No doubt in those states where Republicans have gained control of both legislative chambers and the governorship (e.g., Georgia, Texas) one can expect the introduction of legislation to limit or ban abortion, prevent human cloning, and alter school curricula to incorporate “intelligent design” as an alternative view about the creation of the universe and the origins of life.

However, the success of Proposition 71 in California and the continued legalization of gambling and medical marijuana suggest that in a number of states proponents of conservative moral policies will encounter stiff opposition. Furthermore, legislators usually are reluctant to move quickly to adopt policies radically different from those already in the state code. For example, bills prefiled in Missouri to stop schools from teaching about contraception and to teach only abstinence will likely see opposition not only from public health advocates but also from manufacturers of contraceptive devices and drugs. Nevertheless, the growing political clout of Christian religious groups, as indicated by the number of elected officials who publicly espouse the causes advocated by Christian groups, will create an additional axis of issue conflict and will result in the further polarization of state policymaking.

State Finances—Possibly a Respite, but Fiscal Pressures Not Likely to Disappear

Signs of a respite, if not a recovery, finally appeared in the fourth year of the state government fiscal crisis that began in 2001. That only fifteen states in FY 2004 had to cut their already enacted budgets by about \$2.2 billion, compared with FY 2003, when 40 states had to cut their enacted budgets by \$11.8 billion, was seen as a positive sign. Other FY 2004 fiscal actions (or nonactions) taken as positive signs included that (1) only eight states raised taxes, (2) two states cut taxes, (3) thirty-five states had revenues that exceeded projected amounts, (4) general fund spending increased by 3 percent over the previous year, and (5) only one state decreased cash benefit levels for Temporary Assistance for Needy Families recipients.¹²⁰ Scott D. Pattison, executive director of the National Association of State Budget Officers, summed up the past budget year by emphasizing the “relative improvement from the fiscal malaise of the past few years,” but he also pointed to dangers still lurking for state purses by noting that

¹¹⁹Neela Banerjee, “Christian Conservatives Turn to Statehouses,” *The New York Times* 13 December 2004 (Netscape version).

¹²⁰National Governors Association and National Association of State Budget Officers, *The Fiscal Survey of States* (Washington, DC: National Governors Association and National Association of State Budget Officers, December 2004), p. ix.

“the states’ fiscal situation will remain difficult for the foreseeable future.”¹²¹

The improvements in state revenues were viewed cautiously, more as a temporary reprieve than as an indicator of recovery, because other elements of state budgets raised red flags. The aggregate state budget gap in 2004 (i.e., the gap between projected revenues and projected expenditures) was \$36.3 billion, and two-thirds of the states exhibited a budget gap. California, in particular, experienced a 2004 gap of \$30 billion. To close these budget shortfalls most states had, once again, to restrain spending, use reserve and other funds, reduce or freeze the state workforce, and raise fees and other nontax revenues.¹²² The budget gap resisted closure because tax revenues, although trending upward, have only returned to 1998 levels.¹²³ Perhaps the most important indicator of state financial ability to respond to future situations is a state’s total balance, which is composed of a state’s year-end balance and the amounts in the state’s stabilization funds. The National Association of State Budget Officers reports, “total balances now are stable, but at levels lower than those generally considered to provide an adequate fiscal cushion.”¹²⁴ Expressed more simply, state financial conditions have stopped deteriorating but have not rebounded sufficiently to weather the next storm.

Other negative signs in the states’ fiscal picture suggest that the next storm is rapidly approaching. The relentless rise in Medicaid costs since the late 1990s has displaced K-12 education as the single largest expenditure category for state governments. In FY 2003 public education accounted for 21.7 percent of state expenditures and Medicaid 21.4 percent, but these positions reversed in FY 2004 as Medicaid consumed 21.9 percent and K-12 education constituted 21.5 percent.¹²⁵ The percentage change from the previous fiscal year in all state funds for Medicaid and for elementary and secondary education between 2002 and 2003 was 6.6 and 3.2 percent, respectively, and between 2003 and 2004 the percentage changes were 8.0 and 6.4. State monies devoted to Medicaid are expected to grow nonstop as prices rise for prescription drugs and for evolving medical technologies. Medicaid expenditures are also pushed higher by federal and state actions that expand the program’s coverage to include more low-income children and their parents, while at the same time the number of

¹²¹As quoted in Robert Pear, “States’ Pocketbooks Are Fuller, but Health Costs Stall Recovery,” *The New York Times* 17 December 2004 (Netscape version).

¹²²Nicholas W. Jenny, “2004 Tax and Budget Review,” State Fiscal Brief No. 71 (New York: The Nelson A. Rockefeller Institute of Government, November 2004).

¹²³Donald J. Boyd, “State Finances: Not Out of the Woods Yet,” a presentation to the Federation of Tax Administrators, Burlington, VT, 20 September 2004.

¹²⁴National Governors Association and National Association of State Budget Officers, *Fiscal Survey of States* p. 12.

¹²⁵National Governors Association and National Association of State Budget Officers, “Medicaid Squeezes State Budgets,” press release, 12 October 2004; www.nga.org; National Governors Association and National Association of State Budget Officers, *Fiscal Survey of States* p. 1.

disabled and “dual eligible” populations (those eligible for Medicare and Medicaid) increases. The nation’s over-65 population will increase by 26 percent between 2005 and 2015, and even if medical care costs stay stable state governments will see Medicaid spending rise faster than the economy grows.¹²⁶ It is no surprise, then, that all fifty states took actions in 2004 to contain Medicaid costs. But these efforts to contain Medicaid costs encountered strong resistance from advocacy groups.

As Medicaid consumes more and more of state fiscal resources, monies for other programs become harder to obtain; yet the demand in these other areas also grows. Higher-education spending has been reduced, some would say ravaged, by 7.8 percent between FY 2002 and FY 2004. Enrollments are on the rise, but recent double-digit increases in tuition have raised student costs dramatically. Although violent crime has declined by over 30 percent since 1990, incarcerations are up by over 50 percent owing primarily to drug-related arrests. The rising number of arrests has forced widespread construction of new prisons in most states, but even the adoption of alternative sentencing procedures in many states has not halted the growth in prison operating costs. Pensions for state and local government employees require more state contributions because investment returns have weakened since the dot.com bubble burst.¹²⁷ Per pupil spending for K-12 education is not likely to decline even though enrollment growth is slowing. The added costs required to educate socially disadvantaged students, students with various learning disabilities, and newly arriving immigrant children are often not included in typical state aid to education formulas. This absence not only strains local school district revenues (principally property taxes), but also has resulted in two dozen “adequacy” lawsuits in which the plaintiffs (often certain school districts) maintain that state public education spending is insufficient.¹²⁸ Further pressure for additional elementary and secondary funds arises from the accountability movement, in particular the federal 2001 NCLB. Federal FY 2004 appropriations for elementary and secondary education were nearly \$37 billion, but this amount constitutes only 10.6 percent of state spending for public education.¹²⁹ The vigorous resistance to the NCLB by many state education officials rests on the costs of accountability mandates contained in the federal act. As long as the amount of money appropriated for the NCLB is “not even in the ballpark” of what’s needed for true school reform programs and accountability” states will be faced with the politically painful choice of refusing to abide by federal requirements, and thus forgoing

¹²⁶Donald Boyd, “State and Local Government Face Continued Fiscal Pressure,” *New Year’s Report 2005* (New York: The Nelson A. Rockefeller Institute of Government, January 2005), pp. 2–3.

¹²⁷*Ibid.*, p. 5.

¹²⁸Dennis Farney, “Insufficient Funds,” *Governing* 18 (December 2004): 26–29.

¹²⁹National Association of State Budget Officers, *2003 State Expenditure Report* (Washington, DC: National Association of State Budget Officers, 2004), p. 5.

federal aid, or raising additional state and local revenues in the face of continuing opposition to higher taxes.¹³⁰

The combined challenges of Medicaid, K-12 education, and pensions coupled with the labor market pull for higher education and the rising tide of drug abuse create huge pressures on state officials to find sufficient revenues. If the nation's economy grows and consumer spending proceeds at a robust pace, then states and localities may well see a significant rise in revenues from sales and income taxes. However, the pressure to return public services to their precrisis levels will collide with the relentless demands to lower taxes made by antigovernment groups such as the Club for Growth and Americans for Tax Reform. No wonder National Conference of State Legislatures executive director Bill Pound said, "The 2005 sessions will pose challenges for legislators across America. With the federal government reducing payments for its share of Medicaid, and the continued fiscal strain of No Child Left Behind, there aren't many dollars left unspoken for in states."¹³¹

On a positive note, it appears that states and local governments are rebounding in terms of public opinion concerning their "value." John Kincaid and Richard Cole in an article in this issue report the results of a 2005 poll asking respondents from which level of government they get the most for their money. States and local governments are the preferred choice for most respondents—turning around results following the 11 September terrorist attacks, when the federal government outpolled the other governments.

Election Administration

The administration of elections in the United States is a responsibility of state governments, and decisions by state officials, as the nation discovered in 2000, have the potential to shape the national outcome. Election officials perform many tasks; for example, they oversee new voter registration, decide where to locate polling places, select voting equipment, make available absentee ballots, determine voter eligibility, and count the votes. The secretaries of state who are the chief administrators of elections are not neutral civil servants; instead they are political party members. Because they may be active in their party's campaigns, their decisions are sometimes seen as biased by the other party, and it is not unusual for some of their decisions to be challenged in court.

The chaotic climax of the 2000 presidential election and the U.S. Supreme Court's decision in *Bush v. Gore* transformed election law so that, according to Loyola University law professor Richard L. Hansen,

¹³⁰Louise Hoffman Broach, "No Matter How You Slice It," *Maxwell Perspective* 15 (Fall 2004): pp. 11–12.

¹³¹National Conference of State Legislatures, "State Revenue Pressures Ease, but Expenditure Concerns Remain," press release, 9 December 2004; www.ncsl.org/programs/fiscal.

it “has become just another part of the political strategy of the parties.”¹³² Because of the importance of state administration of elections to the presidential election outcome, both parties dispatched thousands of attorneys to battleground states (those where neither presidential candidate had an insurmountable lead) to observe and identify election problems, and if necessary file lawsuits. For example, the Democrats positioned about 2,000 lawyers in Florida, while the Republicans organized an army of attorneys stationed in 30,000 precincts around the country.¹³³

Each side shared concerns about the new digital recording electronic voting machines (DREs) that were used by about one-third (150 million) of all voters. Numerous problems with these machines were encountered as they were installed during the last four years in states such as California and Ohio. Questions about the absence of a paper record, about privacy and security, about the training of poll workers, and other matters were raised about the DREs.¹³⁴ Both parties also had concerns about the “provisional ballot” created by the 2002 Help America Vote Act, which requires state election officials to allow voters who arrive at polling places but do not find their names on the voter rolls to cast a “provisional ballot” that would be verified and, if valid, added to the election totals. Both parties also worried about the abuses possible because of the rapidly growing use of absentee ballots. More than half of the states now grant absentee ballots without the requirement that a voter offer one of the traditional excuses of being out of town on election day or unable to travel to the assigned polling place. States have made absentee ballots easier to obtain as part of their effort to ease crowding at the polls and to lower costs. A key decision is how far ahead of the election absentee ballots will be made available to voters. In 2004 North Carolina began to distribute them in mid-September, nearly two months ahead of election day. One obvious problem with such a long lead time is simply that early voters will not have access to events and new information that occur during the remaining weeks of the campaign. Absentee ballots also open the door for possible abuse because they bypass some of the antifraud measures that surround polling booths such as verifying signatures or requiring proof of identity.¹³⁵

It was anticipated that Florida—the state of “hanging chads” and the “butterfly ballot”—would again be the focal point of legal battles over the 2004 election results. After the 2000 embarrassment, Florida election officials engaged in extensive changes in the state’s election procedures and decertified the notorious punch-card machines, replacing them with

¹³²As quoted in Jo Becker, “Legal Battle for Presidency Underway,” Washington Post 20 October 2004 (Netscape version).

¹³³Ibid.

¹³⁴See Krane, “The State of American Federalism, 2003–2004,” 95–147.

¹³⁵Michael Moss, “Absentee Votes Worry Officials as Nov. 2 Nears,” The New York Times 13 September 2004 (Netscape version).

DREs or optical scanners. However, Florida officials also took actions that led to lawsuits, including challenges over voter registration forms, the acceptance of provisional ballots for voters displaced by the hurricanes that ravaged the state, and racial bias in the purge of voter rolls.¹³⁶ These problems led former president Jimmy Carter to claim, "Florida voting officials have proved to be highly partisan, brazenly violating a basic need for an unbiased and universally trusted authority to manage all elements of the electoral process."¹³⁷ Florida was not the only state where lawsuits were filed before the election; for example, two weeks before election day the use of DREs was challenged in New Jersey, and lawsuits over treatment of Hispanic voters were filed in New Mexico.¹³⁸

But in the final tally, Florida was not "ground zero" of the 2004 election. Bush carried the state with about 377,000 more votes than Kerry. Instead, Ohio for a brief moment was poised to be the legal battleground. With turnout exceptionally high, vote counts ran slow and it was not until early morning the next day that the television networks declared Bush had carried Ohio. But there was one nagging problem: the totals did not add up correctly because of "provisional ballots." The Kerry team debated the merits of a court fight, but Senator Kerry decided to forgo any challenge and he conceded. The day after the election former U.S. Senator Bob Kerrey (D-NE) called for the federal government to establish national standards for election administration by the states: "Right now, these elections are left up to the individual secretaries of state and laws set by the legislatures in the states. . . . This is too important to be left up to different standards in different states. We're talking about the presidency for gosh sake!"¹³⁹

FEDERALISM IN COURT

The Supreme Court's decisions in the October 2004 term spanned almost every type of federalism relationship possible in the United States: federal-state, federal-local, state-state, Indian-state, and Indian-federal. The questions ranged from requests for equitable relief to interpretation of federal statutory requirements to statements of the rights of convicted individuals and the states responsible for the laws under which they have been convicted.

¹³⁶Terry M. Neal, "Florida under the Magnifying Glass," *Washington Post* 20 October 2004 (Netscape version); Abby Goodnough, "In '04 Florida, Lawsuits Begin Before Election," *The New York Times* 14 October 2004 (Netscape version).

¹³⁷As quoted in Greg Botelho, "Could Election Lightning Strike Twice in Florida?" *CNN.com*, 5 October 2004 (Netscape version).

¹³⁸Tom Zeller Jr., "New Jersey Challenges Electronic Voting" *The New York Times* 19 October 2004 (Netscape version); T. R. Reid, "In N.M., Spotlight Is on Voting Rights," *Washington Post* 25 October 2004 (Netscape version).

¹³⁹As quoted in Ed Howard, "Bob Kerrey: Feds Should Give States National Standards for Presidential Elections," *NebraskaStatePaper.com* 4 November 2004 (Netscape version).

Discussions of the early decisions of the Rehnquist court pointed to the movement of the Court to allow greater discretion to the states and to minimize the role of the federal bureaucracy in regulating behavior, particularly when the state is used as a conduit for that regulation. Recent analyses by several authors have suggested that the Court is finding it difficult to maintain the “federalism revival” that was begun in the 1990s.¹⁴⁰ This second pattern is stunningly present in the October 2004 decisions. Of the eight decisions discussed here, the state level prevailed on two—one a search-and-seizure case and the other remanding a decision to the state court after excising elements of the federal mandatory sentencing guidelines. Local governments fared better. Local government power prevailed in both zoning cases brought before the Court.

The case that had the most direct impact on the legislative powers of another government in the United States is *Roper v. Simmons*, 125 S.Ct. 1183 (2005). In *Roper*, the Court was asked to consider again the imposition of the death penalty in cases where a minor committed the crime. Simmons was 17 years old when he committed the premeditated murder of an elderly woman. The Missouri jury returned a verdict of capital murder nine months after the crime was committed and shortly after Simmons turned 18. Simmons appealed to the Missouri Supreme Court for postconviction relief based on the logic of the U.S. Supreme Court decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), which held that the Eighth and Fourteenth amendments prohibit the execution of mentally ill individuals. The Missouri Supreme Court ruled in favor of Simmons. The U.S. Supreme Court granted certiorari to review the question of whether the Eighth and Fourteenth amendments prohibit the execution of minors.

The U.S. Supreme Court spoke on precisely the same issue in *Stanford v. Kentucky*, 492 U.S. 361 (1989). In *Roper*, the Court voted five to four to overturn *Stanford*'s ruling that the Eighth and Fourteenth amendments do prohibit the execution of minors. As it had in *Stanford*, it drew on contemporary standards of decency and Supreme Court practice in making its decision. The Court found that both of these had changed significantly since *Stanford* and that neither supported the continued imposition of the death penalty if the person was younger than 18 when the capital crime was committed. Justices O'Connor, Scalia, Thomas, and Rehnquist dissented from the judgment.

The ruling has obvious federalism impacts, as the federal Constitution is being used to supersede states' constitutions on an historically state-determined issue. The decision reveals the ongoing tension within the Court on federalism issues. The “type of decision” element to the Court's ruling indicates that a majority of the Court sees greater involvement in

¹⁴⁰Timothy Conlan and Farnosi Verguilolle deChantal, “The Rehnquist Court and Contemporary American Federalism,” *Political Science Quarterly* 16 (2001): 253–275.

federalist matters as being appropriate. Allowing states to retain power is still a question for this Court.

The Court issued two other decisions that dealt with the administration of state criminal law, both changing administrative procedure. The first of these, *Johnson v. California*, 125 S.Ct. 1141 (2005), reviewed the California Department of Corrections unwritten policy of segregating prisoners based on race into two-man cells upon entry or transfer from another facility. After the initial segregation, which was used to assess the likelihood of violent behavior, inmates were able to select their own cell mates. Johnson argued that this constituted an impermissible use of race by the state and violated his right to equal protection. The District Court granted summary judgment to California after discovery, “on the grounds that [the administrators] were entitled to qualified immunity because their conduct was not clearly unconstitutional.” The District Court cited *Turner*,¹⁴¹ which allows for deference to the state when assessing challenges to the management of prisons. The Ninth Circuit Court of Appeals affirmed. The U.S. Supreme Court reversed the lower courts’ decisions, noting that where classifications based on race are questioned, a court must use the strict scrutiny standard of review. That level of review—the most rigorous in civil cases—requires that the state show that it is using the most narrowly tailored alternative to accomplish a legitimate government function. Control of a prison is clearly a legitimate government function. The Supreme Court drew on the experiences of the other states and the federal government to demonstrate that the segregation of prisoners is not a narrowly tailored alternative. The qualified immunity of the administrators was left intact; the use of race as a criterion for decision making was changed. The dissents, one written by Justice Stevens and the other written by Justice Thomas and joined by Justice Scalia, stressed the state’s purported need for control. Justice Stevens dissented from the majority’s failure to address the actual question—whether the action of the state rose to the level of a violation of equal protection. Justice Stevens opined that those actions did. Justices Thomas and Scalia dissented to the requirement of using the most narrowly tailored alternative, as the prison environment creates special pressures that the state must be allowed to address in the most effective manner. This was the argument supported by a majority of the Court in *Turner*.

In the second case involving the management of prisoners, the Court ruled in *Wilkinson v. Dotson*, 125 S.Ct. 1242 (2005), that prisoners can challenge the constitutionality of state parole proceedings using 42 U.S.C. §1983 rather than relying solely on habeas corpus actions. The State of

¹⁴¹In *Turner v. Safley*, 482 U.S. 78 (1987), the Court held the proper balancing test when assessing restrictions on the exercise of freedoms by prisoners “reasonably related” to “legitimate penological interests” (p. 89). The Court in *Johnson v. California* ruled that because the state could avoid using race—a suspect classification—in making its determinations, the *Turner* test should not be used.

Ohio argued that allowing the use of section 1983 to challenge any element of the parole process will result in a violation of federalist principles. The majority dismissed this concern, noting that

earlier cases, however, have placed the States' important comity considerations in the balance, weighed them against the competing need to vindicate federal rights without exhaustion, and concluded that prisoners may bring their claims without fully exhausting state-court remedies so long as their suits, if established, would not necessarily invalidate state-imposed confinement. . . . Thus, we see no reason for moving the line these cases draw—particularly since Congress has already strengthened the requirement that prisoners exhaust state administrative remedies as a precondition to any §1983 action.

The implications of *Johnson* and *Dotson* run to administrative elements of federalism. Of course, in *Johnson* the Court made more difficult the processes by which states can regulate prisons. More important is the fact that this decision has the potential to expand to all other state-run institutions where the individuals are subject to state control. The standard could be used by anyone in a protected class to argue for the same "narrowly tailored alternative" response to state needs. The Court has raised the bar for the states in accomplishing legitimate state responsibilities. Similarly, *Dotson* provided a second course by which prisoners can challenge their confinement. The Court did not reinstate the broad view of habeas corpus proceedings removed by Congress, but it did carve out an avenue of review not recognized before Congress's actions in limiting judicial review of continued incarceration.¹⁴²

The Court decided two cases to which local governments were a party. Both of these opinions report a victory for local zoning powers. In *City of Sherrill v. Oneida Indian Nation of N.Y.*, 125 S.Ct. 1478 (2005), the Court addressed the question of whether the nation's purchase of land that was once part of the tribe's original territory allowed the Oneida Indian Nation the right to refuse to pay state and local taxes on that land. The Court ruled that fundamental considerations of equity required that the City of Sherrill be permitted to continue collecting taxes on the property. The claim of ownership by the tribal government was asserted too late, as over 200 years had passed with the city providing infrastructure services without complaint by the Oneida Indian Nation.

The Court affirmed the right of local governments to continue to control the zoning of their community, even in the face of national legislation that has the capacity to supersede local control. In *Rancho Palos Verdes v. Abrams*, 125 S.Ct. 1453 (2005), the Court was asked to affirm the use of 42 U.S.C. §1983 to enforce the right to site a wireless communication antenna under the Telecommunications Act of 1996. The primary

¹⁴²See 28 U.S.C. §2254.

legislative purpose of the act is to provide for national uniformity of wireless services. This goal is forwarded by the requirement that local governments have legitimate bases for denying special use permits and that those bases be fully documented through the public record. Abrams, after a continuing battle to build and use antennae for commercial purposes, was denied the special exemption necessary to use of the antenna on his property. He did not appeal the denial within the thirty-day period required by the statute. Having missed the statutorily created statute of limitation, Abrams sought relief using 42 U.S.C. §1983, which prohibits the state from taking action that abridges the rights of individuals. Section 1983 actions can only arise from rights guaranteed by the U.S. Constitution and federal statutes.¹⁴³ The Court ruled that the Telecommunications Act does not support the use of section 1983 to obtain injunctive relief from local governments who legitimately deny relevant zoning requests.

Two cases raised issues posed by a constitutionally created government. In *Cherokee Nation of Okla. v. Leavitt*, 125 S.Ct. 1172 (2005), the Court was asked to decide whether the U.S. government had to pay the Indian tribes under contracts through which the tribes administered services that the U.S. government would otherwise have administered. Two cases were consolidated under this opinion. The case of most interest involves the Shoshone-Paiute and Cherokee Nation of Oklahoma contracts. The U.S. government contracted with these tribes for the tribes to provide health-care services to their members. When each tribe sought reimbursement from the government under the relevant contract, the Department of the Interior refused to pay, claiming that Congress had not appropriated enough money to allow payment and therefore the government had no responsibility to pay. The government attempted to show that these contractual relationships were special and distinct from normal procurement contracts between the government and other parties. The government also argued that various elements of the statute allowed the government to consider the contracts with the tribes nonbinding. The Court found none of these arguments persuasive and ruled unanimously that the U.S. government had to pay the Indian tribes.

In its October 2004 term the Court revisited the questions posed by the ongoing conflict between Kansas and Colorado over the use of water from the Arkansas River in *Kansas v. Colorado*, 125 S.Ct. 944 (2005). The case began in 1985, when Kansas alleged that Colorado had been in violation of the Arkansas River Compact for almost two decades. After years of litigation and arbitration, the two states finally reached the point at which final determinations on damages and future compensation to Kansas by

¹⁴³See http://www.constitution.org/brief/forsythe_42-1983.htm (accessed 27 May 2005), fn. 33, citing *Chapman v. Houston Welfare Rights Org*, 441 U.S. 600, 617 (1979); *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979).

Colorado were assessed by a special master. Kansas disagreed with several specific recommendations by the special master to the Supreme Court and appealed to the Court for additional relief, including continuing oversight by a special master. The Court denied all of Kansas's requests for relief. Of particular importance to federalism concerns is the refusal of Kansas's request for a special master to monitor the enforcement of the Court's final decree. The Court noted that the enforcement of the decree would likely involve making choices grounded in the public policy of each state and that those decisions would affect the legal rights of each state. Given the nature of the decisions, the appointment of a special master was rejected. The decision to refuse to appoint another special master removed the Court from this phase of the management of the compact between Kansas and Colorado, resulting in a return to state control of the water. In this case, the Court affirmed the power of the states to direct their own policy agenda and to work through the problems of state to state relations.

The role of federal mandatory sentencing guidelines has already received attention in *Publius*, where the Court's *Blakely* decision resulted in the invalidation of a Washington state court's sentence.¹⁴⁴ The Court revisited the federal mandatory sentencing guidelines in *United States v. Booker*.¹⁴⁵ In *Booker* the Court was asked to overturn a sentence that exceeded the relevant mandatory sentencing guideline. Instead of directly granting or denying that request, the Court excised elements of the guidelines and then ordered that the District and Appellate courts apply the guidelines as altered by the decision. The section of the opinion that ordered this extraordinary step was written by Justice Breyer, who was an author of the guidelines and had dissented from the *Blakely* opinion. The *Booker* opinion most likely saved the rest of the federal sentencing guidelines, but that question still remains, leaving for another day the decision on the issue of whether the guidelines can override a state court's sentencing procedure.

Booker and the other opinions issued following the October 2004 term have changed portions of the federalism landscape. More suits are allowed, legislation has been radically altered, and minors can no longer be executed. The most important insight from the review of these cases is the nature of how the Court is changing federalism. Pickerell asserts that the Court is not making the states more powerful but instead is attempting to

¹⁴⁴Krane, "The State of American Federalism, 2003–2004," 143–144.

¹⁴⁵The decision in *Booker* was the best example of a plurality decision in recent Court history. The decision, as reported in the syllabus of the case, is described as follows: "Stevens, J., delivered the opinion of the Court in part, in which Scalia, Souter, Thomas, and Ginsburg, JJ., joined. Breyer, J., delivered the opinion of the Court in part, in which Rehnquist, C.J., and O'Connor, Kennedy and Ginsburg, JJ., joined. Stevens, J., filed an opinion dissenting in part, in which Souter, J., joined, and in which Scalia, J., joined except for Part III and footnote 17. Scalia, J., and Thomas, J., filed opinions dissenting in part. Breyer, J., filed an opinion dissenting in part, in which Rehnquist, C.J., and O'Connor and Kennedy, JJ., joined." Syllabus, *United States v. Booker* 25 S.Ct. 738 (2005).

limit the power of Congress.¹⁴⁶ Other authors agree with this interpretation of the trend in the Court's rulings.¹⁴⁷ Taken in this light, with the exception of *Roper*, all of the cases discussed here are a rational outcome of a consistent judicial logic. This foundation for the analyses of these cases is less than satisfactory for students of federalism as the foundation posits that separation of powers and limitations on branches are the motivating forces behind what was supposed to be a federalism revolution. Pickerell finds some hope for advances in federalism:

... The Court is neither the end-all-be-all denier of national democratic preferences as political safeguards advocates worry nor the savior of states as judicial safeguards proponents claim. While the boundaries of federalism will be debated, established, and re-established in the political process, the Court and states should both be important actors in that process. The Court is not at the center of the federalism universe and scholars should not treat it as such. The Court's federalism jurisprudence will not be self-executing; it does, however, provide new context and leverage for state and local interests in the national policymaking process if they choose to utilize and to not squander the opportunity.¹⁴⁸

CONCLUSION

The absence of federalism as an issue in the 2004 presidential contest was not a matter of "forgetfulness"¹⁴⁹ nor solely a matter of the centralization that often accompanies the response to a national crisis or threat.¹⁵⁰ Instead, the disappearance of federalism as an important political issue is more a product of political changes that have been occurring over the past decade but accelerated during the first four years of Bush's tenure. From 1968 to 2000, American national government was "divided government"—no political party controlled the White House and both chambers of Congress—but for the first time in over three decades one party holds the reins of government. Furthermore, the power of the Republican Party is enhanced by its dominance of a majority of state governments, as evidenced by the number of governors and state legislators who are members of the party. A key to the Republican Party's success has been its ability to build a centralized, integrated political organization that guides party strategy not just at the national level but also at the state and local levels. This intergovernmental political network is composed not just of

¹⁴⁶Michael Pickerell, "Leveraging Federalism: The Real Meaning of the Rehnquist Court's Federalism Jurisprudence for States," *Albany Law Review* 66 (Spring 2003): 825–834.

¹⁴⁷David G. Savage, "Finite Federalism," *ABA Journal* 90 (1 July 2004): 20.

¹⁴⁸Pickerell, "Leveraging Federalism," 832.

¹⁴⁹Christopher Hamilton and Donald T. Wells, *Federalism, Power, and Political Economy: A New Theory of Federalism's Impact on American Life* (Englewood Cliffs, NJ: Prentice-Hall, 1990), p. 1.

¹⁵⁰G. Ross Stephens and Nelson Wikstrom, "A Century of Evolving Intergovernmental Relations: A Longitudinal Analysis of the Roles of Federal, State, and Local Governments" (paper presented at the 1999 annual meeting of the American Political Science Association, 2 September, Atlanta, GA).

party officials and members; it also includes a wide array of interest groups, nonprofit organizations (e.g., churches, “527” organizations), and media personalities.

William Riker explained that the structure of political parties was a key intervening variable between the background social conditions of a nation and the nature of the nation’s federal bargain.¹⁵¹ Elazar pointed out that “recent studies have shown that the existence of a noncentralized party system is perhaps the most important single element in the maintenance of federal noncentralization.” In the United States this “noncentralization” derived from long-standing practices whereby “party financing and decision-making are dispersed either among the state organizations or among widely divergent factions operating nationwide.”¹⁵² But more recently David Walker disagreed with Elazar’s perception by noting that “parties, politics, and pressure groups have become nationalized over the past quarter century.”¹⁵³ Because of these trends toward a more centralized party and policy system, Walker asked, “Is Federalism still a core value?”¹⁵⁴ His answer was that the “noncentralizing features of contemporary American federalism—although significant—still leave the constituent governments and their localities partially at the mercy both of unilateral interventionist actions of national government officials and of hostile pressure tactics of interest groups in Washington that do not defer to the federalist principle.”¹⁵⁵

American politics and government in 2004 offered ample evidence that Walker’s judgment is sound. With little countervailing force from the Democrats, the Republican Party may be near the point where its intergovernmental network can override the Madisonian institutional protections against a strong majority (the horizontal and vertical division of power) contained in the U.S. Constitution (see *The Federalist* no. 51). If, as Elazar has argued, “noncentralized parties are necessary for the proper functioning of federal government,”¹⁵⁶ then the changes occurring in the American party system, as manifested in the elections of 2004, may well signal an important shift in American federal relationships. Could it be that President Bush’s inattention to federalism is an indication that it does not matter because his party’s policy preferences can be achieved using the party’s centralized organization to overcome the dispersed and fragmented authority characteristic of American federalism?

¹⁵¹William H. Riker, *Federalism: Origin, Operation, Significance* (Boston: Little, Brown), p. 136.

¹⁵²Daniel J. Elazar, *Exploring Federalism* (Tuscaloosa: The University of Alabama Press, 1987), pp. 178–179.

¹⁵³David B. Walker, *The Rebirth of Federalism* 2nd ed. (New York: Chatham House Publishers, 2000), p. 316.

¹⁵⁴*Ibid.*, 340.

¹⁵⁵*Ibid.*, 342.

¹⁵⁶Elazar, *Exploring Federalism* p. 221.