

Summer 2004

# The State of American Federalism, 2003-2004: Polarized Politics and Federalist Principles

Dale Krane

University of Nebraska at Omaha, [dkrane@unomaha.edu](mailto:dkrane@unomaha.edu)

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## Recommended Citation

Krane, Dale, "The State of American Federalism, 2003-2004: Polarized Politics and Federalist Principles" (2004). *Public Administration Faculty Publications*. 57.

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# The State of American Federalism, 2003-2004: Polarized Politics and Federalist Principles

Dale Krane  
*University of Nebraska at Omaha*

*By Bush's third year in office, the nation was embroiled in three wars overseas and a political war at home. The progress made toward a functioning Iraqi government was eclipsed by violent resistance and by administrative scandals. The 9/11 Commission hearings uncovered "missed opportunities" in intelligence and repudiated the two principal reasons for the invasion of Iraq. Slow job growth, rising prices for energy and health care, and fears over outsourcing dragged the president's approval ratings to new lows. Senator John Kerry emerged from a large group of Democrats to become the party's putative nominee, and both he and the president wasted little time in attacking each other. Government revenues continued to be anemic, but there were signs the worst of the state government fiscal crisis had passed. Washington enacted the first-ever prescription-drug benefit for Medicare recipients and continued to ignore the worsening federal debt. State governments produced innovative as well as controversial policies including importation of medicines in defiance of the U.S. Food and Drug Administration and the legalization of same-sex marriages in Massachusetts. California elected a movie star in a gubernatorial recall election. U.S. Supreme Court rulings were less solicitous of state government concerns than in recent years. Intra-party feuding among Republicans who controlled all three branches of the national government led more often to a "divided" government than to a unified majority. With less than six months to the 2004 presidential election, the general public as well as political leaders formed two warring camps, and the principles of federalism were endangered by ideologically driven politics.*

Too often federalism is viewed solely as a constitutional–legal framework of jurisdictions, while its political processes are underappreciated. “The structure of federalism,” Daniel J. Elazar explained, “is meaningful only in polities whose processes of government reflect federal principles.”<sup>1</sup> These federalist principles include relationships of respect among people such that they relate to each other federally; that is, they allow for each other’s integrity “while cooperating for the common good in every aspect of life, not just in the political realm.”<sup>2</sup> The balance between unity and diversity within a federal nation depends fundamentally on how political actors—individuals, groups, and parties—accommodate diversity while pursuing the good of all.<sup>3</sup> In particular, the behavior of political parties affects the stability of federal institutions as well as their capacity to restrain conflict.<sup>4</sup> A key element in James Madison’s case for America’s “extended republic” is that a large country would make it difficult, if nigh impossible, for one faction or political party to gain dominion over the whole country. The danger in

<sup>1</sup>Daniel J. Elazar, *Exploring Federalism* (Tuscaloosa, AL: University of Alabama Press, 1987), p. 21.

<sup>2</sup>*Ibid.*, 70.

<sup>3</sup>Ronald L. Watts, *Comparing Federal Systems*, 2nd ed. (Montreal: McGill-Queen’s University Press, 1999), p. 16.

<sup>4</sup>William H. Riker, *Federalism: Origin, Operation, Significance* (Boston: Little, Brown, 1964).

this design, of course, lies in the converse case. Diverse groups in a large nation might not agree on the common interest, and so any public action is seen as illegitimate.

By President George W. Bush's third year in office, the nation was embroiled in three wars overseas—Afghanistan, Iraq, and the global war against terror—and a full-scale political war at home. The period of national unity forged by the terror attacks on 11 September 2001 lasted only briefly; less than a year later acrimony and divisiveness characterized the political arena. This unfortunate trend did not reverse itself; instead, it worsened through 2003 and into 2004. The situation deteriorated to the point of polarization, and many observers suggested that the nation was once again as divided as it was during the end days of the 2000 presidential election.<sup>5</sup>

Easy to observe causes of this disharmony included the opening rounds of the 2004 presidential campaign, the missteps in the stabilization of Iraq, the acknowledgment of intelligence failures prior to the 9/11 attacks, the inability to find evidence for the president's two principal reasons for invading Iraq, the ever larger national debt, the widespread perception America was losing jobs to other nations, and the discord over same-sex marriage. By August 2003, predictions were common that the presidential election in November 2004 would be "the most polarizing since the Civil War, and it will be the patriots versus the unpatriots."<sup>6</sup>

### *Iraq War*

The swift victory over the Iraqi armed forces achieved in March and April 2003 was replaced by a chaotic, costly, and dangerous situation that emerged soon after Bush declared "Mission Accomplished" on 1 May 2003. Instead of being welcomed as "liberators," as promised by Vice-President Dick Cheney, U.S. led coalition forces found themselves battling gangs of looters, armed religious militia, recalcitrant Baathists, and Islamic jihadists. Whereas the fatalities suffered by U.S. forces during the invasion totaled 138, by mid-May 2004 the death toll reached 773 and the number of wounded exceeded 4,700.<sup>7</sup> Initially budgeted at \$87 billion, of which \$65.6 billion was for military costs, the funds appropriated for Iraq by mid-May 2004 passed \$112 billion, and with requested funds, the costs of the war totaled at least \$152 billion.<sup>8</sup>

While controversy swirled around the rationale for regime change in Iraq, the rapidly inflating price tag of the war meant that pressing domestic problems—for example, homeland security and medical care—could not be addressed without adding to the national government's burgeoning debt.

<sup>5</sup>David S. Broder and Dan Balz, "Nation Again Split on Bush: As 2004 Nears, President's Policies on Iraq, Economy Divide Voters," *Washington Post*, 2 November 2003 (Netscape version).

<sup>6</sup>Eleanor Clift, "Using Catholicism," *MSNBC News*, 11 August 2003 (Netscape version).

<sup>7</sup>Susan Page, "Convergence of factors raises costs of Iraq war," *USA Today*, 13 May 2004 (Netscape version).

<sup>8</sup>Ron Nordland and Michael Hirsh, "The \$87 Billion Money Pit," *Newsweek*, 31 October 2003 (Netscape version).

Abuses and mismanagement by contractors not only added unnecessary costs, but also posed questions about the merits of “privatizing” public activity, especially military service. Revelations that Bush relied on faulty or “cooked” intelligence data fed opposition to the war at home and abroad.<sup>9</sup> Bush’s popularity declined as military and civilian deaths rose and as Iraq began to look as if it could become another Vietnam quagmire.<sup>10</sup> The president retreated to the rationales that the world was safer with the disappearance of Saddam Hussein and that the war on terrorism could only be won by changing the world because “freedom is the Almighty’s gift to every man and woman in this world. And as the greatest power on the face of the Earth, we have an obligation to help the spread of freedom.”<sup>11</sup> This single-minded viewpoint served to justify any cost, and as a consequence, became one of the key issues in the presidential contest.

#### *Politics in 2003-2004*

Partisan squabbling for positional advantage in the 2004 presidential election dominated politics in Washington, D.C. Democrats who had supported Bush strongly after 9/11 felt betrayed by his unexpected attacks on Democratic congressional candidates in 2002.<sup>12</sup> Senate Republicans complained loudly about Democratic efforts to block the president’s judicial nominees. Democrats in turn attacked the president for squandering international goodwill, mismanaging the war on terrorism, misleading the nation about the threat posed by Iraq (compared to other members of the “axis of evil”), pursuing more tax cuts while the deficit worsened, and failing to create more jobs. Republicans, especially the House leadership, retaliated by marginalizing Democrats in mark-up sessions as well as by excluding them from conference committees.<sup>13</sup>

Beginning in spring 2003 and continuing until summer 2004, public and private hearings held by the National Commission on Terrorist Attacks Upon the United States (“The 9/11 Commission”) produced disturbing information that dismayed the general public and unsettled Washington officialdom. The commission was a product of grass-roots action first by a small band of women widowed by the 9/11 attacks (“the Jersey girls”) and second by the much larger Families of September 11 organization. Fearful that the congressional committee investigations of the attacks would be a whitewash, these groups pushed for an independent commission of the type that investigated the Kennedy assassination. Bush opposed the creation of an independent commission, but once the Senate passed legislation by a

<sup>9</sup>John Barry and Mark Hosenball, “What Went Wrong?” *Newsweek*, 8 February 2004, pp. 24-31.

<sup>10</sup>Evan Thomas, “The Vietnam Question,” *Newsweek*, 19 April 2004, pp. 28-35.

<sup>11</sup>David E. Sanger, “Making a Case for a Mission,” *New York Times*, 14 April 2004 (Netscape version).

<sup>12</sup>E.J. Dionne, Jr., “Republicans are wrong in saying the Democrats took a hard left,” *Omaha World-Herald* 25 September 2003 (Netscape version).

<sup>13</sup>Helen Dewar, “Democrats Forced to Work on Margins,” *Washington Post*, 22 December 2003 (Netscape version).

90-8 vote in 2002, the White House agreed to negotiate the commission's scope and budget.<sup>14</sup> The commission's public hearings reached a climactic moment on 24 March 2004 when Richard Clarke, former counterterrorism chief for the Bush White House, apologized to the families and to the nation with his opening remarks: "Those entrusted with protecting you failed you."<sup>15</sup> Clarke's testimony was followed soon by that of Condoleezza Rice, the National Security Advisor, who reminded the nation, "The terrorists were at war with us, but we were not yet at war with them."<sup>16</sup> Commissioners' questions of Rice focused on the Presidential Daily Briefing (P.D.B.) of 6 August 2001, a pivotal document the White House had refused to release, but finally did so after Rice's testimony to demonstrate the validity of her argument that the administration never had "any actionable intelligence" on which to act prior to the 9/11 attacks.<sup>17</sup> President Bush and Vice-President Cheney agreed to answer questions, but not under oath, and their interview with the commission produced "no surprises."<sup>18</sup>

The commission's 400-page report made it clear that "the 9/11 attacks were a shock, but they should not have come as a surprise." After documenting operational errors made during the period 1998 to 2001, the commission proposed a three-part strategy to prevent future attacks and recommended several changes in the organization of intelligence agencies and their oversight by the president and by Congress.<sup>19</sup> Because the crucial public hearings occurred during the presidential primary season, it was only natural that some of the commission's findings would become elements in the election. In particular, the commission's announcement that there is "no credible evidence" that the government of Saddam Hussein collaborated with Al Qaeda in its attack on the United States contradicted statements by Bush and Cheney.<sup>20</sup> The declaration was part of a much larger indictment of "missed opportunities" by the Clinton as well as Bush administrations, but whether the commission's findings would hurt Bush's re-election was unknown.

As is typical to the political party not holding the White House, several Democrats entered the primary contests, but surprisingly the field was reduced in short order and the party had its presumptive candidate long before the convention to ratify the choice. Howard Dean, former governor

<sup>14</sup>Pat Wingert, "Bonds of Steel," *Newsweek*, 5 April 2004, pg. 31; Sheryl Gay Stolberg, "9/11 Widows Skillfully Applied the Power of a Question: Why?" *New York Times*, 1 April 2004 (Netscape version).

<sup>15</sup>Evan Thomas, Michael Isikoff, and Tamara Lipper, "The Insider," *Newsweek*, 5 April 2004, p. 22-29.

<sup>16</sup>National Commission on Terrorist Attacks Upon the United States, *Statement of Dr. Condoleezza Rice*, 8 April 2004, p. 2.

<sup>17</sup>Douglas Jehl and David E. Sanger, "Pre-9/11 Secret Briefing Said That Al Qaeda Was Active in U.S.," *New York Times*, 11 April 2004 (Netscape version); The White House, "Bin Laden Determined to Strike in U.S.," *Presidential Daily Briefing* (6 August 2001).

<sup>18</sup>Philip Shenon and David E. Sanger, "Bush and Cheney Tell 9/11 Panel of 2001 Warnings," *New York Times*, 30 April 2004 (Netscape version).

<sup>19</sup>National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report: Executive Summary* (Washington, DC: 22 July 2004).

<sup>20</sup>Dan Eggen, "9/11 Panel Finds No Collaboration Between Iraq, Al Qaeda: Findings Contradict Comments by Cheney, Bush," *Washington Post* 16 June 2004 (Netscape version).

of Vermont, attracted considerable support from those opposed to the Iraq war. However, Dean's acerbic style and his vulnerability on national security issues resulted in his withdrawal from the race as Senators John Kerry (MA) and John Edwards (NC) emerged from the Iowa caucuses as frontrunners. Kerry, a decorated Vietnam War veteran, argued his wartime experiences gave him the credentials to command the war on terrorism, more so than any other Democratic candidate. By "Super Tuesday" Kerry led Edwards in most state polls and garnered the necessary number of convention delegates to ensure his nomination.<sup>21</sup>

Although the Democrats' nomination contest ended quickly, the charges leveled against Bush by the several candidates gained traction with the public and contributed to a decline in Bush's approval ratings. Through the last months of 2003 and the early part of 2004, the worsening situation in Iraq, the revelations about prisoner abuse at Abu Ghraib, and the continued bad news about job growth pushed the president's approval ratings to their lowest levels (43 percent) since 9/11. Although Bush's popularity plummeted and only 40 percent approved of his post-invasion management of Iraq, 57 percent supported his decision to use military force to remove Saddam Hussein.<sup>22</sup> Kerry contrasted his record of service in Vietnam to allegations that Bush did not fulfill his obligations while in the National Guard. Immediately after Super Tuesday, the Bush campaign initiated a national advertising campaign claiming Kerry had "been in Washington long enough to take both sides on just about every issue."<sup>23</sup> This charge that Kerry "flip-flopped" on issues became a constant theme of Bush's campaign.

By June 2004, the two sides discovered most voters had already made up their minds as opinion polls found only 5 percent of the public undecided. The country's division into two polarized camps over Iraq hardened even more as gay rights and same-sex marriage became a cultural "wedge" issue. The Massachusetts Supreme Judicial Court in November 2003 declared the state's ban on same-sex marriage unconstitutional.<sup>24</sup> In a follow-up decision in February 2004, the Massachusetts court ruled that civil unions are not a sufficient substitute for a full-fledged marriage.<sup>25</sup> At the same time, the mayor of San Francisco ordered city officials to permit same-sex marriages, and by May 2004 gay couples obtained marriage licenses in Massachusetts.<sup>26</sup>

<sup>21</sup>Howard Fineman and Tamara Lipper, "Smile To Go," *Newsweek* 1 March 2004, pp. 24-29; Howard Fineman, "Back to The Front," *Newsweek*, 2 February 2004, pp. 20-25.

<sup>22</sup>Pew Research Center, as quoted in "Bush job ratings in poll drops to a new low," *Omaha World-Herald*, 7 April 2004 (Netscape version).

<sup>23</sup>Elisabeth Bumiller, "Bush Glad to Be in the Campaign Fray and Not Above It," *New York Times*, 18 March 2004 (Netscape version).

<sup>24</sup>The Associated Press, "Massachusetts Court: State Wrong to Ban Gay Marriage," *Washington Post*, 18 November 2003 (Netscape version).

<sup>25</sup>Pam Belluck, "Massachusetts Gives New Push to Gay Marriage in Strong Ruling," *New York Times* 5 February 2004 (Netscape version).

<sup>26</sup>Dean E. Murphy, "San Francisco Mayor Exults in Move on Gay Marriage," *New York Times*, 19 February 2004 (Netscape version); Pam Belluck, "Town Set to Defy Governor on Same-Sex Marriage Issue," *New York Times*, 11 May 2004 (Netscape version).

Bush endorsed a constitutional amendment to ban same-sex marriages, but while Senator Kerry opposed an amendment, he supported leaving the question to each state to decide. Both parties eagerly grasped this “values” issue as way to whip up their core supporters. As a consequence, the nation became more polarized.

#### *Economics in 2003–2004*

Depending on one’s vantage point, the economy looked good or bad. Reports from the White House and other federal agencies documented the end of the recession and demonstrated brisk economic growth. Third-quarter 2004 growth figures for Gross Domestic Product compared to the third quarter of 2003 were up 4.7 percent, national income was up 5.3 percent, and corporate profits for domestic industries were up 7.7 percent.<sup>27</sup> The 7.2 percent growth rate for the third quarter of 2004 was the highest quarterly rate in 21 years.<sup>28</sup> From a peak of 6.3 percent in June 2003, unemployment fell to 5.4 percent in August 2004 with nearly 1.7 million jobs added since August 2003. The national homeownership rate in the second quarter of 2004 hit an all-time high of 69.2 percent, and minority homeownership reached its highest point ever at 51 percent.<sup>29</sup> All of this good news supported Bush’s contention that his economic policies of a heavy reliance on tax cuts, low interest rates, and a weakening dollar were producing results.

However, to many Americans, the economy did not appear so rosy. Life at the bottom of the economy continued to worsen as the nation experienced its ninth consecutive year of increase in the number of working poor who fell below the federal poverty line.<sup>30</sup> A quarter of the workforce, or about 28 million persons between ages 18 and 64, earned less than \$9.04 per hour, or \$18,800 per year—the federal poverty line for a family of four. Sixty percent were white, one-fifth were foreign-born, and a majority had completed high school.<sup>31</sup> The middle class, those families earning between \$25,000 and \$99,999, were not much better off as personal bankruptcies set a new one-year record, with job loss, divorce, or medical problems being the main causes. Although food and clothing consumed less of a family’s income, housing and energy costs continued to rise, and employee benefits declined as employers raised employee contributions to health insurance by 13 percent from 2002 to 2003.<sup>32</sup>

Factors contributing to the mixed economic picture included a rapid run-up in oil prices to all-time highs, thus pushing up the price of gasoline

<sup>27</sup>U.S. Department of Commerce, Bureau of Economic Accounts, Table 1.15 Gross Domestic Product; Table 1.12 National Income by Type of Income; Table 1.16D Corporate Profits by Industry.

<sup>28</sup>The White House, *Ask the White House*, 31 October 2004 ([www.whitehouse.gov/ask](http://www.whitehouse.gov/ask)).

<sup>29</sup>The White House, *Economy Shows 12 Straight Months of Job Gains*, 3 September 2004 ([www.whitehouse.gov/news/releases](http://www.whitehouse.gov/news/releases)).

<sup>30</sup>Tim Jones, “The Working Poor,” *Chicago Tribune*, 25 April 2004 (Netscape version).

<sup>31</sup>Business Week Online, “Working... And Poor,” 21 May 2004 ([www.businessweek.com](http://www.businessweek.com)).

<sup>32</sup>*Ibid.*

and other forms of energy. Job creation lagged far behind the growth in corporate income. Although the Iraq War accounted for 16 percent of the past year's economic growth, including a significant portion of the new employment,<sup>33</sup> total employment at the beginning of 2004 was approximately 3 million below that at the beginning of 2001.<sup>34</sup> The overseas migration of white-collar work increased and broadened its reach beyond call-center operators and back-office clerks to higher skilled occupations, ranging from accountants, chip designers, and computer programmers to architecture, geographic analysis, and radiological diagnosis.<sup>35</sup> Worker anxiety prompted Indiana to cancel a state contract with a consulting firm in India, and the likelihood of other state governments following suit grew as outsourcing became hotly contested.<sup>36</sup> Labor productivity and the rising cost of health insurance were less widely publicized factors slowing job growth. Because companies could produce more goods with fewer workers, they had less incentive to hire, especially if workers' compensation continues to rise rapidly due to health care costs.<sup>37</sup>

Outsourcing and slow job creation also restrained any upward movement in wages; instead, many of the new jobs paid less on average than lost jobs. One of the most important downward pressures on wages is the "Wal-Martization" of the economy. The country's largest retail employer pays its hourly workers an average of \$9.64, or about one-third the pay at supermarkets with unionized workers. Wal-Mart's health plan also covers only 47 percent of its employees. As the company has expanded nationally, its significant advantage in wage costs (and lower prices) has driven many of its competitors out of business or forced them to lower wages and/or terminate workers.<sup>38</sup> The lags in employment growth and wages cast doubt on the credibility of Bush's claim that his policies were effective, and created an opening for his political rivals as the quality of jobs became one of the key issues in the election-year debates.

## HOMELAND SECURITY

The U.S. Department of Homeland Security's (DHS) mission statement—"to lead the unified national effort to secure America," to "prevent and deter terrorist attacks and protect against and respond to threats and hazards to the nation," to "ensure safe and secure borders, welcome lawful immigrants and visitors, and promote the free-flow of commerce"—describes

<sup>33</sup>Jonathan Weisman, "Across America, War Means Jobs: Defense Spending Pumps New Life Into Small or Dying Towns," *Washington Post*, 11 May 2004 (Netscape version).

<sup>34</sup>Bureau of Labor Studies, *Economic Reports to the President, 2002, 2003, and 2004*, as depicted in Paul Krugman, "Promises, Promises," *New York Times*, 9 March 2004 (Netscape version).

<sup>35</sup>Dan Roberst and Edward Luce, "As Service Industries Go Global More White Collar Jobs Follow," *FT.com*, 19 August 2003 (Netscape version).

<sup>36</sup>Associated Press, "Job losses push states to considering outsourcing bans," *Chicago Tribune*, 20 January 2004 (Netscape version).

<sup>37</sup>Dan McGinn, "Help Not Wanted," *Newsweek*, 1 March 2004, pp. 31-33.

<sup>38</sup>Business Week Online, 21 May 2004.



in brief the department's enormous set of tasks and also hints at the obstacles to accomplishing those tasks. In particular, protecting the country from terrorism required the design and implementation of a nationwide strategy that functions effectively despite the high degree of governmental fragmentation that characterizes the American federal union. While trying to lead the national effort, DHS also faced more than the normal problems associated with the establishment of a new public agency. DHS, as the product of the largest reorganization within the federal government in the last half century, brought together approximately 180,000 employees from 22 existing agencies. Unifying these disparate entities into an effective force posed a huge challenge. The immediacy of threats made rapid progress essential, but the realities of government and politics could not be avoided. By the end of its first year, DHS leaders could point to several important accomplishments while critics could point to several crucial shortcomings.

Secretary Tom Ridge, speaking to the National Association of Counties on DHS' first anniversary, highlighted activities he claimed made America "more secure and better prepared . . . than we were a year ago." Ridge enumerated several successes, including significant advances in air travel security, new layers of custom and border protection, overseas inspection of U.S.-bound cargo, stockpiles of antibiotics and vaccines, and new standards for first-responder personal protective equipment. He also announced the inauguration of the National Incident Management System (NIMS), "the nation's first-ever standardized management system, a framework to create a unified command system for federal, state and local governments and the response community."<sup>39</sup> NIMS establishes "a single, unified standard that could be applied to any crisis, no matter how large or how localized" creating a "common set of terminologies, protocols and processes to ensure a seamless, coordinated response" to terrorist incidents.<sup>40</sup> Ridge asserted that NIMS and other new activities and tools such as the planned Homeland Security Information Network and the National Infrastructure Coordination Center, and Unified National Database of Critical Infrastructure "required a whole new philosophy of how we secure the country, a philosophy of shared responsibility, shared accountability and shared leadership—in short, a renewed commitment to federalism."<sup>41</sup> To be sure, the shock of 9/11 prompted all governments to increase their degree of interaction, but "a philosophy of shared responsibility" is hardly a new notion in emergency response and disaster management nor is it a new philosophy in the implementation of many domestic policies.<sup>42</sup>

<sup>39</sup>U.S. Department of Homeland Security, *Remarks by Secretary of Homeland Security Tom Ridge at the National Association of Counties Annual Legislative Conference*, Washington, DC: 1 March 2004.

<sup>40</sup>*Ibid.*

<sup>41</sup>*Ibid.*

<sup>42</sup>Dale Krane, "The State of Federalism, 2001-2002: Resilience in Response to Crisis," *Publius: The Journal of Federalism*, 32 (Fall 2002): 1-28; Dale Krane and Deil S. Wright, "Intergovernmental Relations," *Defining Public Administration*, ed. Jay M. Shafritz (Boulder, CO: Westview Press, 2000), pp. 83-101.

These impressive accomplishments notwithstanding, the institutionalization of new homeland security initiatives encountered several implementation obstacles. In the department's first six months, two of Secretary Ridge's principal assistants resigned following criticism from the White House, and many federal employees who were scheduled to be transferred to the new department decided not to accept transfer. What appeared initially to be a generous budget quickly disappeared as the cost of overtime for airport screeners depleted appropriated funds. Ridge offended officials in the Secret Service (now transferred to DHS) by an agreement to permit the Department of Justice (DOJ) to become the lead agency for investigations of terrorism financing, thus forcing the Secret Service to halt hundreds of its own ongoing cases and end its traditional responsibility in this area. Furthermore, DHS found itself in competition with Department of Defense (DOD), Department of Health and Human Services (DHHS), and even the White House's Homeland Security Council.<sup>43</sup>

Serious criticism continued through DHS' first year. Many of the actions taken by the Transportation Security Agency (TSA)—for example, air marshals and lists of items prohibited on board airplanes—were labeled as “cosmetic” because TSA used outmoded 1970s screening equipment, luggage and air cargo were not screened, and aircraft remained vulnerable to shoulder-fired surface-to-air missiles. Wags went so far as refer to TSA as “thousands standing around.”<sup>44</sup> The Government Accountability Office (GAO) reported that information on the state of the nation's public safety wireless communication network was unavailable, and thus efforts to improve interoperability were impeded.<sup>45</sup> The GAO also criticized DHS for “continuing confusion” among federal, state and local officials caused by its color-coded threat alert system. A GAO survey of 84 agencies and jurisdictions found the vagueness of the system's warnings had “hindered their (the respondents') ability to determine whether they were at risk” and “what protective measures to take in response.”<sup>46</sup> Members of both parties in Congress worried that “the public was at risk for ‘threat fatigue’,” and that “the public's going to lose trust and confidence in the system and won't pay any attention to it anymore.”<sup>47</sup>

Despite Ridge's declarations of “shared responsibility” for homeland security, serious problems plagued intergovernmental implementation. An August 2003 survey of cities conducted by the U.S. Conference of Mayors (USCM) showed that 90 percent of the responding cities had not received

<sup>43</sup>John Mintz, “Government's Hobbled Giant: Homeland Security Is Struggling,” *Washington Post*, 7 September 2003 (Netscape version).

<sup>44</sup>“Security State at the Border,” *Business Week Online*, 25 May 2004.

<sup>45</sup>U.S. General Accountability Office, *Federal Leadership and Intergovernmental Cooperation Required to Achieve First Responder Interoperable Communications* (Washington, DC: GAO-04-740, July 2004).

<sup>46</sup>Eric Lichtblau, “Report Questions the Value of Color-Coded Warnings,” *New York Times*, 13 July 2004 (Netscape version).

<sup>47</sup>*Ibid.*

any money from the \$1.5 billion federal funds to prepare local responders for terrorist incidents. James A. Garner, the Republican mayor of Hempstead, New York, and president of the USCM, stated: "Nine-one-one does not ring at the statehouse; it rings in city hall. Cities are the first to respond in a crisis, but the last in line for funds. We need direct funds."<sup>48</sup> The targets of the mayors' complaints were state governments as much as the federal government. Tom Cochran, executive director of the USCM, expressed the view that the mayors believed "state decision makers tend to view counties, rather than cities, as the focal points of emergency and disaster response." Christine M. LaPaille, a spokesperson for the National Governors' Association (NGA), rejected the mayors' criticisms of state government by noting: "States are the only players sitting at the homeland security table that are in a position to take the lead in formulating regional strategic plans that protect our communities."<sup>49</sup> This state, county, municipal bickering is reminiscent of the 1960s and 1970s when county sheriffs and city police feuded over law-enforcement assistance grants. At stake in this intergovernmental fight is the disposition of monies from programs such as the State Homeland Security Grant Program (SHSGP) and the Emergency Management Performance Grant (EMPG).

The intrastate squabbles have been paralleled by interstate arguments over the geographic distribution of federal aid. For example, the EMPG formula awards 0.75 percent of the \$2 billion appropriation to each state regardless of the state's population; the rest is then distributed on a per capita basis. Because factors such as population density, potential targets, and threat levels are not part of the aid formula, Wyoming (the least populous state) in 2003 received \$35.31 per person, while California received \$4.68 and New York \$5.05 per person.<sup>50</sup> New York City Mayor Bloomberg called this distribution "pork barrel politics at its worst," but Larry Majerus, deputy director of the Wyoming Office of Homeland Security, pointedly observed that: "If we understand anything about the psychology of terrorism, it is that attacks in the future are likely to be multiple and designed to get the biggest psychological effect they can possibly get. One way to do that is to attack in areas where there is the least capacity to respond."<sup>51</sup> To be sure, there are other less well funded grants targeted to large cities, for example, \$65 million for transit security, \$800 million for 30 cities judged to be high threat locations, and \$245 million for port security, but these funds do not begin to provide the dollars necessary to fully protect the nation's metropolitan areas.<sup>52</sup> The emergence of these intergovernmental

<sup>48</sup>Philip Shenon, "Counterterror Aid Is Tied Up by the States, Mayors Assert," *New York Times*, 18 September 2003 (Netscape version).

<sup>49</sup>Ibid.

<sup>50</sup>Mimi Hall, "Homeland security money doesn't match terror threat," *USA Today*, 30 October 2003 (Netscape version).

<sup>51</sup>Edward Wyatt, "As New York Fumes, Wyoming Says It, Too, Needs Antiterror Funds," *New York Times*, 1 June 2004 (Netscape version).

<sup>52</sup>Hall, "Homeland security money does not match terror threat."

battles over grant monies, of course, is not unexpected, given the long history of such fiscal fights in American federalism.

The problems associated with the timely delivery of homeland security funds were investigated by an intergovernmental task force established by Secretary Ridge, and the *Report from the Task Force on State and Local Homeland Security Funding*, issued in June 2004, found that (1) ordinary procurement and cash-management procedures cannot be relied on in extraordinary times because ordinary state and local buying rules at times conflict with the need for rapid procurement, (2) the reimbursement requirement of the 1990 Cash Management Act created problems for many cash-strapped municipalities, (3) many state and local governments lack the purchasing power to obtain goods and services in a timely fashion, (4) a lack of national standards guiding distribution, tracking, and oversight of homeland security funds delays disbursement, (5) while long-term operational plans are important to develop, urgent needs such as risk-based funding and overtime reimbursement must be addressed now, (6) state and local governments are often overwhelmed and understaffed to cope with the complex grant system, (7) communication gaps exist at all levels of government, (8) local jurisdictions may have unrealistic expectations given the limited amount of funding available, so expectations have to be managed, and (9) unavoidable equipment backlogs and vendor delays have slowed the process.<sup>53</sup> The task force made eleven recommendations, among which were (1) exempt for FY 2005 Office of Domestic Preparedness (ODP) homeland security grants from the 1990 Cash Management Act, (2) encourage state and local governments to alter legislative and procurement procedures to expedite the expenditure of homeland security monies, (3) establish multi-state cooperative purchasing consortia, (4) enhance the training of state and local officials involved in the management of security-related grants, (5) establish an Office of the Comptroller within DHS to assume complete responsibility over grant programs, and (6) establish a comprehensive risk-assessment methodology to support identification of high-risk, high-consequence critical infrastructure and major events, and allow grant funds, distributed through states, to be used to directly offset the costs incurred by state, county, municipal, and tribal entities for securing those critical infrastructure and major events identified as high risk by DHS.<sup>54</sup>

Similar issues of disbursement affected DHHS grants for bioterrorism preparedness. Between 11 September 2001 and June 2004, the Health Resources Services Agency (HRSA) spent more than \$3.7 billion on the nation's public health infrastructure, including in FY 2004 nearly \$850 million to states (as well as New York City, Los Angeles, Chicago, and the District of Columbia) as part of the Public Health Preparedness and

<sup>53</sup>U.S. Department of Homeland Security, *A Report from the Task Force on State and Local Homeland Security Funding* (Washington, DC: 17 June 2004), pp. 2-3.

<sup>54</sup>*Ibid.*, 3-4.

Response Cooperative Agreement program.<sup>55</sup> Yet with all of this effort, critics in Congress complained to DHHS Secretary Tommy Thompson that the National Preparedness Plan “is merely a listing of bioterrorism related activities” underway, and that “public health laboratories are poorly equipped, mandatory progress reports have not been filed, hospitals do not have the beds or equipment to handle mass casualties” leaving “America still too vulnerable to a possible bioterror attack.”<sup>56</sup> Secretary Thompson replied to critics by pointing out “the states have not spent almost half of the \$3.7 billion in current grants,” and so he was shifting money away from states back to federal programs. Patrick Libbey, a spokesperson for the National Association of County and City Health Officials, deemed Thompson’s remarks as “misinformation” because “92 percent of the grant money has been obligated by the states, which in many cases are simply waiting to receive bills.”<sup>57</sup> Again, the quarrels over bioterrorism grants mimic those over other homeland security grants. It should also be noted that the problems identified in these disputes were predicted soon after 9/11 by experts within government<sup>58</sup> and by experts outside of government.<sup>59</sup>

#### *Homeland Security and Civil Liberties*

The USA Patriot Act continues to attract opposition. For example, Laura W. Murphy, director of the Washington office of the Americans for Civil Liberties Union, declared, “there is a growing sense among regular Americans of all political stripes—from the most right-wing to the most left—that the Patriot Act went too far, too fast.”<sup>60</sup> In August 2003, the U.S. House of Representatives with its Republican majority surprised the Bush administration by opposing funding for the act’s “sneak and peek” warrants, but the effort failed. At the same time, the number of local governments that passed resolutions denouncing parts or all of the Patriot Act grew to more than 150.<sup>61</sup>

Through much of the year, Attorney General John Ashcroft stepped forward on a frequent basis to make public pleas in support of the act. The Patriot Act became a political football as Democrats campaigning for the presidency criticized Ashcroft’s intermittent raising and lowering of terrorism alerts. Even many in the intelligence community expressed doubts that the attorney general’s declarations that Al Qaeda was “almost ready to

<sup>55</sup>U.S. Department of Health and Human Services, *HHS Awards \$849 Million to Improve Public Health Preparedness*, CDC Press Office (17 June 2004).

<sup>56</sup>Ceci Connolly, “Lieberman Denies Gap in Bioterror Preparedness,” *Washington Post*, 8 May 2004 (Netscape version).

<sup>57</sup>Ibid.

<sup>58</sup>Paul Posner, “Speaker’s Remarks,” *The Role of “Home” in Homeland Security – The Federalism Challenge: The Challenge for State and Local Government* (Albany, NY: Rockefeller Institute of Government, 24 March 2003, Symposium series no. 2), pp. 16-30.

<sup>59</sup>Richard L. Cole and John Kincaid, “Issues of Federalism in Response to Terrorism,” *Public Administration Review* 62 (Special Issue, 2002): 181-192; Donald F. Kettl, *System Under Stress: Homeland Security and American Politics* (Washington, DC: CQ Press, 2004).

<sup>60</sup>Dan Eggen, “Ashcroft Defends Anti-Terrorism Law,” *Washington Post*, 20 August 2003 (Netscape version).

<sup>61</sup>Ibid.

attack the United States” were based on new and solid intelligence. Some persons such as Harold Schaitberger, chief of the International Association of Fire Fighters, suggested that the terror alerts were raised in a “politically convenient” fashion after “we see the president’s approval ratings plummet.”<sup>62</sup> By June 2004, homeland security had become a highly politicized issue, and public opinion polls found the nation equally divided as to whether President Bush or Senator Kerry could be trusted to do a better job of handling the war on terrorism. Secretary Ridge often expressed opinions that differed from Attorney General Ashcroft’s views about how imminent were any threats.<sup>63</sup>

A bipartisan coalition in the House kept trying to muster a majority in support of various measures to trim back the Patriot Act. None of their attempts succeeded, but in early summer 2004 a proposal to block the act’s section permitting the government to investigate the reading habits of citizens came very close. Only heavy lobbying by the White House and the threat of a presidential veto managed to create a 210–210 tie that prevented the amendment’s adoption.<sup>64</sup> In mid-July, Ashcroft released another detailed report in defense of the Patriot Act. The report noted 310 persons had been charged under the act and 179 had been convicted or had pled guilty. Furthermore, the attorney general pointed out the act permitted the DOJ to pursue more traditional criminal investigations using the department’s expanded powers. This revelation prompted another round of bipartisan complaints about the misuse of the act and the attorney general’s willingness to extend the act to non-terrorism cases.<sup>65</sup>

#### *The 9/11 Commission*

Much of the 9/11 Commission’s report focused on the national government and its relationship to terrorism’s international environment. However, as part of its attempt to answer questions about the failure of American government to anticipate and prevent the 9/11 and other terrorist incidents, the commission did offer a few observations and recommendations relevant to the federal character of American government. The commission, while applauding the bravery of first-responders, did note that the rescue efforts of police, fire, and emergency management personnel in New York City were “hampered by problems in command and control and in internal communications.”<sup>66</sup> The commission also highlighted the failure to share information among agencies involved in homeland security as well as the failure of these agencies to engage in joint planning. Key recommendations related to intergovernmental

<sup>62</sup>Richard W. Stevenson and Eric Lichtblau, “As Ashcroft Warns of Attack, Some Question Threat and Its Timing,” *New York Times*, 27 May 2004 (Netscape version).

<sup>63</sup>John Mintz and Mike Allen, “Homeland Security, a Politicized Issue: To Suspicious Candidates, the Threat of Attack Is No Longer Above the Fray,” *Washington Post*, 27 June 2004 (Netscape version).

<sup>64</sup>Anon, “Bush Prevails as House refuses to curb Patriot Act,” *USA Today*, 9 July 2004 (Netscape version).

<sup>65</sup>Dan Eggen, “Justice Dept. Report Details Use of Patriot Act: Document Offered in Bid to Gain Support on Hill,” *Washington Post*, 14 July 2004 (Netscape version).

<sup>66</sup>*The 9/11 Report*, Executive Summary, p. 15.

relations include (a) establish an information system of “need to share” to replace the current system of “need to know,” (b) create a National Counterterrorism Center (NCTC) to serve as a national clearinghouse of information and knowledge related to homeland security and to engage in joint operational planning, implementation, and tracking of homeland security activities, (c) “make homeland security funding contingent on the adoption of an incident command system to strengthen teamwork in a crisis, including a regional approach,” and (d) “base federal funding for emergency preparedness solely on risks and vulnerabilities, putting New York City and Washington, D.C., at the top of the current list. Such assistance should not remain a program for general revenue sharing or pork-barrel spending.” Unfortunately, as mentioned previously, homeland security grant programs already exhibit features the commission warned against.

### **THE INTERGOVERNMENTAL POLICY MIX**

The overarching fact facing policymakers at all levels of government was the decline of total government revenues to 27 percent of gross domestic product (GDP), their lowest level since 1968. Federal revenues as a share of GDP dropped to levels not seen since 1959, and in particular, the federal income tax (personal and corporate) plummeted to levels equivalent to 1942! State and local revenues equaled 10.6 percent of GDP. Despite the efforts of 30 states to increase taxes, state and local revenues were below those in 1988. Overall public spending was restrained, remaining lower than any year from 1980 to 1996. The culprit in the overall revenue shortfall was the federal income tax; in particular, three years of tax cuts reduced federal revenues by \$172 billion in 2003. Put another way, had the tax cuts not been enacted, federal income-tax revenues would have constituted 10.1 percent of GDP in 2003, instead of 8.5 percent.<sup>67</sup> From FY 2002 to FY 2003, corporate taxes fell by 11.1 percent, to 1.2 percent of GDP—the lowest level since 1983—and declined by nearly 29 percent since FY 2000. Individual income taxes in one year fell 7.5 percent and are 21 percent less than in FY 2000. Only Social Security and Medicare revenues continued to show growth, which means the federal government depends heavily on regressive taxes and borrowed funds.<sup>68</sup>

The collapse of federal income taxes consumed the surpluses built up between FY 1998 and FY 2001 and altered the national government’s ledger from the FY 2001 \$127 billion surplus to a \$158 billion deficit in FY 2002 and a \$401 billion deficit in FY 2003.<sup>69</sup> In FY 2001, the Congressional Budget

<sup>67</sup>Isaac Shapiro and Nicholas Johnson, *Total Revenues From All Levels of Government Drop To Lowest Share of Economy Since 1968: Government Spending at Lower Share of GDP Than in All Years from 1980-1996* (Washington, DC: Center on Budget and Policy Priorities, 15 January 2004)

<sup>68</sup>Jonathan Weisman, “Tax Revenue at 44-Year Low in Proportion to U.S. Economy,” *Washington Post*, 11 October 2003, p. A12.

<sup>69</sup>Congressional Budget Office, Department of Commerce and Bureau of Economic Analysis, as quoted in Jake Thompson, “Deficits darken budget picture,” *Omaha World-Herald*, 30 September 2004 (Netscape version).

Office (CBO) projected a \$5.6 trillion surplus for the decade from FY 2002 to FY 2011, but as of August 2003, CBO projected a “best case” \$2.3 trillion cumulative deficit by FY 2011. The \$8 trillion swing is equivalent to “the total revenue collected by the United States government from 1789 to 1983.”<sup>70</sup> This fiscal outlook compelled the International Monetary Fund to issue a warning that the rapid rise in U.S. government debt posed a threat to the global economy.<sup>71</sup>

Multiple causes account for the deficit. No doubt the economic slowdown beginning in 2001 and lasting into 2003 undercut the fiscal base of all governments. But with the economy accelerating from 2003 to 2004, the long-term drivers of the deficit are military-related spending for fighting three wars simultaneously and three years of tax cuts. Military spending for FY 2003 devoured \$389 billion, a 17.2 percent increase in one year, and since FY 2001 military spending has increased by 34 percent. This FY 2003 rate of growth was far above the average 7 percent growth in spending on non-defense programs. By comparison, Medicare and Medicaid grew by 8.4 percent in FY 2003.<sup>72</sup>

These figures ring fire alarms for fiscal conservatives. The libertarian Cato Institute issued an analysis showing the Bush administration raised military spending 27 percent in real terms, and that figure did not include the \$87 billion supplemental appropriation for Iraq. Perhaps more frustrating for fiscal hawks, the Cato study also showed that non-military discretionary spending rose by 21 percent. Of course, homeland security accounts for some of the rise in discretionary spending, but Cato wrung its hands over Bush’s unwillingness to veto appropriation acts loaded with pork-barrel projects.<sup>73</sup> Frustration with Bush and with his colleagues in Congress prompted Senator John McCain (R-AZ) to declare, “The president cannot say, as he has many times, that ‘I’m going to enforce some spending discipline’ and then not veto bills. Congress is now spending money like a drunken sailor.”<sup>74</sup>

The three years of tax cuts, justified originally as the simple return of taxpayers’ money that had resulted in a surplus, but then as necessary to restart the stalled economy, were designed so that the stimulative effect would be at its peak in the period between the summer of 2003 and the summer of 2004. During FY 2003, individual taxpayers (not companies) received \$117 billion in rebates and reductions in tax rates on wages and salaries. Another \$83 billion was scheduled to be doled out during FY 2004. Unless these tax breaks are made permanent, the stimulus begins to shrink in FY 2005.<sup>75</sup>

<sup>70</sup>David Firestone, “Dizzying Dive to Red Ink Poses Stark Choices for Washington,” *New York Times*, 14 September 2003 (Netscape version).

<sup>71</sup>Elizabeth Becker and Edmund L. Andrews, “IMF Says Rise in U.S. Debts Is Threat to World’s Economy,” *New York Times*, 8 January 2004, p. A1.

<sup>72</sup>Wiseman, October 2003.

<sup>73</sup>“America’s deficits: A flood of red ink,” *The Economist*, 10 November 2003 (Netscape version).

<sup>74</sup>As quoted in Bloomberg News, “Congress is spending ‘like a drunken sailor,’ says McCain,” *Omaha World-Herald*, 1 December 2003 (Netscape version).

<sup>75</sup>Louis Uchitelle, “As Stimulus, Tax Cuts May Soon Go Away,” *New York Times*, 20 November 2003 (Netscape version).



Deficit worries collided with the electoral politics of stimulative tax cuts in March 2004 when four moderate Republican senators—Lincoln Chaffee (RI), John McCain (AZ), Susan Collins (ME), and Olympia Snowe (ME)—voted with Democrats to support a new rule requiring a supermajority of 60 votes to approve any tax cuts in the next five years.<sup>76</sup> This action not only was a setback for Bush’s effort to make the tax cuts permanent—a key piece of the president’s campaign platform—but it also pitted the Senate against the House of Representatives where the leadership opposed the so-called “pay-as-you-go” (or “pay-go”) rule. Majority Leader Tom DeLay (R-TX) explained, “We, as a matter of philosophy, understand that when you cut taxes the economy grows, and revenues to the government grow. The whole notion that you have to cut spending in order to cut taxes negates that philosophy, and so I’m not interested in something that would negate our philosophy.”<sup>77</sup> Instead of philosophy, it required power politics for the House leadership to stop a proposal by some in their own party to have the House adopt the Senate’s “pay-go” rule. During the roll-call, 212 members had voted aye, but after lobbying by Bush and House leaders, the final count was 209-209, thus defeating the measure.<sup>78</sup> The rift over “pay-go” continued into early summer as efforts failed to pass a budget that by June 2004 was eight months late. Senator McCain, responding to pressure from House Republicans, justified the “pay-go” stance by scolding “fat cats” who were not willing to make sacrifices while the nation was fighting a war. He also “fondly remember[ed] a time when real Republicans stood for fiscal responsibility. Apparently, those days are long gone for some of those in our party.”<sup>79</sup>

#### *More Tax Cuts*

A decision by the World Trade Organization (WTO) in 2001 had ruled as illegal the 15 percent of net export income American exporters were permitted to exempt from their taxation. The WTO had set 31 December 2003 as the deadline to eliminate this provision from the U.S. tax code. The repeal of the provision would eliminate \$5 billion in subsidies to American companies, and many domestic manufacturers, who had seen their profits and payrolls decline, were not about to accept an increase in taxation. Numerous companies banded together to support a lobbying campaign for a new set of corporate tax breaks to offset the loss of the tax export subsidy. The necessity to change the tax code opened the door to a “gold rush” for all manner of tax breaks reminiscent of the 1986 “Gucci

<sup>76</sup>Richard A. Oppel, Jr., “In Rebuff to Bush, Senate Raises Bar for New Tax Cuts,” *New York Times*, 11 March 2004 (Netscape version).

<sup>77</sup>Richard A. Oppel, Jr., “Bush Plans for Tax Cuts Barely Avert House Setback,” *New York Times*, 31 March 2004 (Netscape version).

<sup>78</sup>Ibid.

<sup>79</sup>Edmund L. Andrews, “Mutiny by Republicans over Bush’s Tax Cutting Forces Delay on the Budget Vote,” *New York Times*, 21 May 2004 (Netscape version).

Gulch” phenomenon.<sup>80</sup> In mid-May 2004, the Senate passed on a 92-5 vote a bill to give \$170 billion in new tax concessions to business while closing some tax shelters.<sup>81</sup> But campaign politics interfered with the bill’s approval by the House when Bush commented that he opposed a multi-billion dollar buyout of tobacco growers that was tied to acceptance of the U.S. Food and Drug Administration’s regulation of cigarette manufacturing. This surprise statement infuriated farmers in North Carolina, Kentucky, and Tennessee, generally Republican states with electoral college votes that would be valuable in the 2004 election.<sup>82</sup> Inability to resolve the issue of the tobacco buyout kept the corporate tax package bogged down into mid-summer 2004.

Another roadblock to change in the tax code was bipartisan opposition from the National Governors’ Association (NGA) of a House proposal to impose a federal limit on the ability of state governments to tax business activity within a state’s borders. State business-activity taxes (BATs) totaled more than \$30 billion in annual state revenue, and governors were loath to lose any revenues during the on-going state fiscal crisis. NGA testimony argued that limits on state BATs would undermine a basic principle of federalism—that state governments may determine their tax policy independently of the national government. The governors stated the House proposal, if adopted, would put Congress in the position of writing state tax laws and thus overturn 225 years of federalism practice.<sup>83</sup>

The deep divisions within Republican legislative ranks bordered on political embarrassment for the party, which controlled both chambers. Republican leadership was unable to gain sufficient support to pass the long overdue budget bill, to resolve the “pay-go” debate, or to enact the large package of corporate tax-breaks. What was at stake for many inside the party was the very future of the party itself. For those philosophically attached to tax cuts, adoption of the “pay-as-you-go” rule would result in all of the \$1.7 trillion in tax reduction over ten years expiring by 2011, much of it sooner, and that meant tax levels would return to higher levels that existed during the Clinton years. Those who supported “pay-go” argued “the deficit is a symptom; spending is the disease. . . . And we have to do something about the disease.” But even the “pay-as-you-go” position, if adopted, would not fully solve the deficit because even if Congress eliminated all domestic discretionary spending (including homeland security), that would yield only \$438 billion in FY 2004. Since the CBO’s mid-summer estimate of the deficit was \$455 billion, the government would still be in debt. With neither side willing to compromise, the situation was best

<sup>80</sup>Jeffrey H. Birnbaum and Alan S. Murray, *Showdown at Gucci Gulch: Lawmakers, Lobbyists, And The Unlikely Triumph of Tax Reform* (New York: Random House, 1987).

<sup>81</sup>Edmund Andrews, “Tax Breaks for Business Are Approved in the Senate,” *New York Times*, 12 May 2004 (Netscape version).

<sup>82</sup>Marc Kaufman, “Tobacco States Fume Over Bush Remarks: President Says He Opposes a Buyout for Growers, Angering Some From His Party,” *Washington Post*, 16 May 2004 (Netscape version).

<sup>83</sup>National Governors’ Association, *Governors Oppose House BAT Bill*, Issue Brief (18 May 2004).

captured by a long-time proponent of fiscal restraint, former Senator Warren B. Rudman (R-NH) who wryly observed that “for a majority of Republicans in Congress, tax cuts are now more important than budget constraints, and they’ve gotten themselves between a rock and a hard place.” Given these polarized positions, it is little wonder that there were no budget negotiations for all of June 2004, nor were any planned for July.<sup>84</sup>

### *Health Care*

The cost of health care continued its unrelenting annual rise as evidenced by the 13.9 increase in the price of health insurance.<sup>85</sup> In 2000, the average health insurance premium for employer-provided coverage was \$6,438 (\$4,819 employer contribution and \$1,619 employee contribution); by 2003, the average premium rose to \$9,068 (\$6,656 employer contribution and \$2,412 employee contribution).<sup>86</sup> With unemployment also rising coupled with an increase in the number of employers cutting employer-provided health coverage, the number of persons without health insurance, according to U.S. Census Bureau figures, jumped to 43.6 million (15.2 percent of the population). However, a study conducted by the Lewin Group for Families USA found that the number of persons without health insurance was 81.8 million, or 32 percent of Americans younger than 65. The study estimated that “one in three Americans younger than 65 were uninsured for a time during 2002 and 2003 . . . half were uninsured for at least nine months, and two-thirds for at least six months.”<sup>87</sup> The upward ascent of costs combined with the decline in employer-provided coverage make health insurance a luxury even for middle-class families. The percentage of families in the \$25,000 to \$49,999 annual income bracket without health insurance increased from 17.3 in 2001 to 19.3 in 2002, with the 2002 percentages for black and Hispanic families at 79.8 and 81.6 respectively.<sup>88</sup>

The Government Accountability Office identified several pressures contributing to the upward march of health care costs: (1) the nation’s wealth, (2) the pluralistic organization of the U.S. health care system, (3) unwarranted variation in medical practices, and (4) ambivalent attitudes toward rationing health care.<sup>89</sup> Harvard University and the Canadian Institute for Health Information studied administrative costs in both countries and discovered that in 1987 U.S. per capita administrative costs were \$450—three times higher than in Canada. By 1999 (the last year for

<sup>84</sup>Jonathan Weisman, “Budget Impasse Reflects GOP Schism: Tax Cutters in Standoff with Advocates of Fiscal Restraint,” *Washington Post*, 30 June 2003 (Netscape version).

<sup>85</sup>Bill Brubaker, “Survey Says Health Insurance Premiums Rose in Past Year,” *Washington Post*, 9 September 2003 (Netscape version).

<sup>86</sup>Stephanie Armour and Julie Appleby, “As health care costs rise, workers shoulder burden,” *USA Today*, 28 October 2003 (Netscape version).

<sup>87</sup>William Welch, “Report: 82M went uninsured,” *USA Today*, 16 June 2004 (Netscape version).

<sup>88</sup>“Number of Americans lacking health insurance rises sharply,” *Knight Rider Newspapers*, 1 October 2003 (Netscape version).

<sup>89</sup>U.S. Government Accountability Office, *Health Care: Unsustainable Trends Necessitate Comprehensive and Fundamental Reforms to Control Spending and Improve Value*, GAO-04-792SP (May 2004).

available data), the U.S. per capita cost was \$1,059 compared to \$307 for Canada. The research report pointed to three factors that accounted for the U.S.-Canadian cost differential: (1) private insurers' high overhead, (2) multiplicity of payment forms and rules used by U.S. hospitals and other health providers, and (3) an expanded bureaucracy associated with American hospitals and private insurers. Overall, 31 percent of U.S. health-care monies went to administrative costs.<sup>90</sup> This continuing stream of bad news about health care and the pressures generated by calls for reform made the final negotiations on Medicare modernization highly contentious.

The June 2003 compromise to provide equal prescription drug benefits for persons in traditional Medicare and in market-based health plans led to the passage of companion but not identical bills in the House and Senate. Numerous differences still had to be resolved, especially the fiscal structure of the drug benefit and the subsidization of private health-care plans. The conference committee remained deadlocked through the summer and far into the fall as a chasm opened between conservative Republicans in the House and Senate. The House faction issued a manifesto in mid-September laying out four conditions for their approval of a Medicare prescription drug bill: (1) "no price controls can be imposed on the drug industry," (2) "the government must offer new tax incentives for people to establish savings accounts from which to pay their medical costs," (3) "the fee-for-service Medicare program must compete directly with private health plans, as envisioned in the House bill," and (4) "the cost of drug benefits must not exceed \$400 billion over 10 years."<sup>91</sup> By contrast, Senate Republicans, while supportive of more competition in the private health market, insisted private plans needed significant strengthening, in the form of billions of dollars, before competition would be effective. Their chief concern was that traditional Medicare would eliminate competitors in some parts of the country, if private providers were not propped up until they could attract a sufficient base of participants.<sup>92</sup> To bolster market competition, House conferees pushed a "premium support" proposal in which beneficiaries would receive a subsidy to help them purchase private health insurance. This idea was denounced by critics who claimed it "could leave Medicare with the sickest and poorest patients, driving up premiums and undermining the program."<sup>93</sup> Senate Democrats and moderate Republican senators pushed the Senate bill's reliance on a government-run "fallback" system to guarantee prescription-drug benefits in areas where only one or no private plan functioned; the House bill did not include such a backup plan.<sup>94</sup> Congressional leaders had set 17 October 2003 as the deadline for the

<sup>90</sup>"Why does the U.S. pay more?" *Omaha World-Herald*, 6 October 2003 (Netscape version).

<sup>91</sup>Robert Pear, "House Conservatives Issue a Make-or-Break Medicare List," *New York Times*, 18 September 2003 (Netscape version).

<sup>92</sup>Robert Pear, "Bush Prods Lawmakers to Step Up Pace of Medicare Talks," *New York Times*, 26 September 2004 (Netscape version).

<sup>93</sup>Patricia Barry, "Getting to Yes: OK, Now Comes the Hard Part," *AARP Bulletin* (September 2003): 4.

conference committee to complete its work, but these hardened positions made it unlikely that date would be met.

At the same time, other contentious issues contributed to the stalemate within the conference committee. Some conferees advocated reinstating the co-payment for home health care that had been eliminated in 1972. The co-payment was dropped 30 years ago to create an incentive to encourage home care as an alternative to more costly nursing home care, but now its reimposition was pushed as an incentive use home health care more prudently. Both home care agencies and senior citizen interest groups condemned the co-payment as a “sick tax” falling especially hard on elderly, low-income women.<sup>95</sup> Another cost-control measure debated fiercely within the conference committee was the controversial old idea of a “means test” for physician and other outpatient care by which wealthier seniors would pay more for these services than the less affluent. Although there was bipartisan senatorial support for a higher part B Medicare premium for the two percent of Medicare patients with incomes above \$100,000, Senator Edward Kennedy (D-MA) threatened to filibuster any bill containing a means test.<sup>96</sup> A third issue arose over the concern that not counting employer contributions toward the out-of-pocket cap on pharmaceutical costs to seniors would ignite a “war between seniors” who have drug benefits provided through employer-funded retiree plans and those who do not. As prices for medicine have increased, employer coverage of retiree health plans has declined. Seniors not on an employer plan would pay a maximum of \$5,800 compared to \$10,000 for seniors on an employer plan (split between the employer and the retiree). Critics noted this difference would accelerate the demise of employer coverage of retirees with the government forced to cover the additional costs.<sup>97</sup>

Ultimately, it was the issue of competition in the form of premium supports that was the sticking point within the conference committee. Democrats opposed competition with private plans because they believed it would undercut the traditional Medicare program. They also objected to limits on Medicare spending for new drug benefits and wanted increased incentives for employers to maintain drug benefits for retirees. Conservative Republicans demanded competition between Medicare and private plans be fostered because they saw competition as a means to control costs. Both parties accepted a prescription-drug benefit, but premium support was the partisan “fault line.”<sup>98</sup> The breakthrough came with a proposal crafted by

<sup>94</sup>Ibid.

<sup>95</sup>Robert Pear, “House and Senate Weigh Co-payment for Care At Home,” *New York Times*, 14 October 2003 (Netscape version).

<sup>96</sup>Amy Goldstein, “‘Means Test’ Deal Near on Medicare,” *Washington Post*, 16 October 2003 (Netscape version).

<sup>97</sup>Jake Thompson, “Drug Plan Will Hurt Retirees, says Nelson,” *Omaha World-Herald*, 24 October 2003 (Netscape version).

<sup>98</sup>Robert Pear, “Democrats Say G.O.P. Endangers Medicare Drug Accord,” *New York Times*, 24 October 2003 (Netscape version); Robert Pear, “Issue of Competition Causes Widest Split over Medicare,” *New York Times*, 10 November 2003 (Netscape version).

Senate Majority Leader Bill Frist (R-TN) and House Speaker J. Dennis Hastert (R-IL) to test competition in four metropolitan areas and one region of the country, but not until 2008. This proposed “demonstration project” was an effort by the Republican leadership to appease the pro-competition faction in the House which had stood their ground against party leaders and the president. In an extraordinary session where the vote was held open three hours instead of the more typical twenty minutes, the House passed the Medicare bill on a vote of 220 to 215. It should be noted that through much of the evening the roll call stood at 216 yea to 218 nay. The Speaker and Tommy Thompson, secretary of Health and Human Services, button holed Republican representatives on the floor, and eventually a few more Republicans switched their votes. Democrats branded the vote as “Florida style” politics.<sup>99</sup> The next day, several Senate Democrats announced they would vote for the bill passed by the House. Lacking enough votes to sustain a filibuster, other Senate Democrats could do little but cast “no” votes as the Senate adopted the Medicare bill by a 54 to 44 vote on 25 November 2003.<sup>100</sup> On 8 December 2003, the president signed the Medicare Prescription Drug, Improvement and Modernization Act of 2003.

State governments had a large stake in the passage of Medicare legislation because many states, acting as laboratories of democracy, had established pharmaceutical assistance programs. Some of these programs had more liberal eligibility requirements and/or benefits more generous than those contained in the new Medicare legislation. But as Steven J. Rauschenberger, the assistant Republican leader of the Illinois Senate, noted: “Instead of emphasizing the good work being done by states and encouraging states to continue, the federal government came up with a one-size fits all Potomac solution.”<sup>101</sup> Especially troublesome were coordination issues between the state and federal plans including which drugs were covered under which plan and how much would a senior pay for a prescription under each plan. Where states provided benefits superior to those in the federal plan such as in New York and Wisconsin, there was resistance to move seniors to the inferior program.<sup>102</sup> A critical issue to watch will be whether states continue their pharmaceutical assistance programs as supplements to the federal benefit or whether they begin to terminate their programs.

Meanwhile, the initial implementation of the new Medicare discount drug cards did take some of the luster off the benefit’s political value. Because the full prescription-drug benefit will not go into effect until 2006, the act provides some immediate relief from the high costs of medicine by

<sup>99</sup>Robert Pear and Robin Toner, “Sharply Split, House Passes Broad Medicare Overhaul,” *New York Times*, 23 November 2003 (Netscape version).

<sup>100</sup>Robert Pear, “Sweeping Medicare Change Wins Approval in Congress,” *New York Times*, 26 November 2003 (Netscape version).

<sup>101</sup>Raymond Hernandez and Robert Pear, “State Officials Are Cautious on Medicare Drug Benefit,” *New York Times*, 4 January 2004 (Netscape version).

<sup>102</sup>*Ibid.*

creating federal drug-discount cards to be offered to citizens through a partnership between HMOs and prescription drug manufacturers. Enrollment fees were set at a maximum of \$30, and discounts were expected to range from 10 to 25 percent on prescriptions. This stopgap measure immediately resulted in massive confusion among seniors as 73 sponsors offered competing cards, each with their own combination of approved drugs, fees, savings, and affiliated pharmacies. Adding to the confusion, the federal drug-discount card competed with 11 existing state drug-discount programs as well as eight state programs that had been approved but were not yet fully operational.<sup>103</sup>

The high profile political battle over Medicare overshadowed the growing intergovernmental conflicts over Medicaid. As the state fiscal crisis continued into its fourth year, no end appeared to be in sight for the explosive growth in Medicaid costs. Rising unemployment made the increasing number of eligibles the fastest growing cost factor for 20 states, while prescription drug costs constituted the largest cost factor in 16 states.<sup>104</sup> Nearly every state took some form of action to cut its Medicaid costs, and many states shifted these costs to the federal government. (It is important to remember federal and state governments split the costs of Medicaid.) The National Conference of State Legislatures advised members on how to maximize the use of federal Medicaid dollars, but federal officials viewed these efforts as inappropriate accounting tricks undermining the fiscal integrity of Medicaid. Dennis Smith, director of the Center for Medicaid and State Operations in the Center for Medicare and Medicaid Services (CMS), declared the states were using “complex, creative financing schemes . . . to shift a larger portion of Medicaid costs to the federal government.”<sup>105</sup> This cost shifting was possible because numerous states had discovered what has been labeled as the “intergovernmental loophole” by which states could bill the federal government at the highest rate allowed but then choose to reimburse nursing homes at lower rates. This loophole has been used by 20 states and has allowed them to yield a net gain of hundreds of millions of additional federal funds over the last decade.<sup>106</sup> To close this intergovernmental loophole, CMS in February 2004 published draft regulations to make states provide details of “each source of revenue” used to pay for the state share of Medicaid costs. State Medicaid budgets would be subject to federal approval if the proposed rules were adopted. Opposition by state officials was predictable. Mary B. Kennedy, Minnesota’s

<sup>103</sup>Judith Graham, “Drug cards may trigger headaches: medicare system will be complex,” *The Chicago Tribune*, 8 March 2004 (Online version); John Leland, “73 Options for Medicare Plan Fuel Chaos, Not Prescriptions,” *New York Times*, 12 May 2004 (Netscape version).

<sup>104</sup>Robert Pear, “Rising Costs Prompt States to Reduce Medicaid Further,” *New York Times*, 23 September 2003 (Netscape version).

<sup>105</sup>Robert Pear, “U.S. Nears Clash With Governors on Medicaid Cost,” *New York Times*, 16 February 2004 (Netscape version).

<sup>106</sup>Leslie Reed, “Nebraska Fights Medicaid Effort,” *Omaha World-Herald*, 17 February 2004 (Netscape version).

Medicaid director, observed: “Federal officials see themselves as having prior approval over state budgets. State legislators do not see that as a proper role.”<sup>107</sup> Bipartisan resistance from the NGA forced the secretary of Health and Human Services, Tommy Thompson, to backtrack and “enter into consultations on the proposal with the states through the NGA and the National Association of State Medicaid Directors.”<sup>108</sup>

The federal–state feud over the importation of prescription drugs from Canada grew increasingly acrimonious and demonstrated the ability of state governments to defy Washington. In just three years, the importation of pharmaceutical drugs from Canada rose from a modest few million dollars to about \$800 million. Senior citizens burdened by spiraling prices for medicines took the initiative to buy drugs from Canada where the prices are approximately 50 percent lower than in the United States. Governors and legislatures in states such as Illinois, Iowa, Maine, Michigan, Minnesota, Rhode Island, and Vermont have turned to Canada and established various drug-importation programs. The Food and Drug Administration (FDA) and the White House have vigorously opposed these actions, but in Congress a “politics makes strange bedfellows” coalition of 155 Democrats and 87 Republicans passed legislation making it legal to import drugs from Canada and 24 other nations.<sup>109</sup> This coalition managed to inject the issue of drug importation into the negotiations over the Medicare Modernization Act. Publicly, the administration and congressional leaders argued against importation because of the dangers of unsafe medicines. In the United States, 50 different sets of state regulations as well as federal regulations result in a not well policed “shadow market” of drug diverters in which it is easier to gain a license to buy and sell drugs than it is to become a beautician.<sup>110</sup> Nevertheless, the administration’s opposition was tied closely to the drug industry’s campaign contributions to Republicans – \$22 million in 2002, or three-fourths of all their contributions.<sup>111</sup> Ultimately, drug importation was defeated and not included in the final provisions signed into law.

But the issue refused to die. Cities and states defied federal law by moving forward with drug importation programs. In April 2004 while the Senate appeared close to working out the details of legislation to permit drug importation, CMS approved plans by Alaska, Michigan, Nevada, New Hampshire, and Vermont to establish a purchasing pool to seek lower prices on prescription drugs for Medicaid patients. Governor Craig Benson (R-NH) noted, “Minnesota, Hawaii, and Tennessee intend to join the pool,

<sup>107</sup>Ibid.

<sup>108</sup>Robert Pear, “Bush to Revisit Changes in Medicaid Rules,” *New York Times*, 23 February 2004 (Netscape version).

<sup>109</sup>William M. Welch, “Once just a trickle, Canada’s Rx drugs pouring into USA,” *USA Today*, 7 October 2003.

<sup>110</sup>Gilbert M. Gaul and Mary Pat Flaherty, “U.S. Prescription Drug System Under Attack: Multibillion-Dollar Shadow Market is Growing Stronger,” *Washington Post*, 19 October 2003 (Netscape version).

<sup>111</sup>Welch, “Once just a trickle, Canada’s Rx drugs pouring into USA.”



with more states likely to follow.”<sup>112</sup> CMS opened a website designed to help citizens compare drug prices among retailers that accept the new Medicare drug-discount cards.<sup>113</sup> With prices unchecked—the AARP found the average price increase over the last four years to be 27.6 percent—and legislation stalled in Congress, state and local governments continued to break the law (at least in the eyes of the FDA) and develop various importation programs. Grassroots actions have had a strong effect on many states and localities, but have yet to alter federal policy; whether the pressure of seniors can overcome the influence of the Pharmaceutical Research and Manufacturers of America remains to be seen.

### *Welfare*

Two years after it was scheduled for reauthorization, the 1996 Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) remained stranded in legislative limbo. Its inability to adopt a budget forced Congress to extend the Temporary Assistance for Needy Families (TANF) block grant program through 30 June 2004. By mid-summer 2004, the House agreed to a further extension until 31 March 2005, but the Senate had yet to concur. From a larger perspective, the Bush administration did not see welfare reform as an important issue area, one that needed to be addressed prior to the upcoming presidential election campaign. Bush’s last speech on welfare reform was delivered on 24 February 2003, and the White House web page had not updated material on welfare reform since that date.

### *Energy*

A blackout in August 2004 demonstrated the fragility of the nation’s electricity grid, and prices for petroleum products moved upward through the year. Yet, little movement occurred to make changes in U.S. energy policy. Bills in the House and Senate did not share a common strategy for addressing energy problems, rather the one shared attribute was pork. Instead of bold policy, Congress preferred a list of tax incentives for interest groups, including \$11 billion for the oil and gas industry, \$2.5 billion in production credits for clean coal technology, \$2 billion for alternative motor vehicles, and about \$2 billion in tax breaks for the electric power industry.<sup>114</sup> The congressional preference for tax breaks received support from Bush who opposed conservation efforts via a new energy tax or higher mileage standards for vehicles. Instead, the administration supported targeting tax incentives to traditional energy industry groups located primarily in the South and other solidly Republican states.<sup>115</sup>

<sup>112</sup>Robert Pear, “Washington Approves 5-State Pool to Buy Drugs for 900,000 Medicaid Recipients,” *New York Times*, 23 April 2004 (Netscape version).

<sup>113</sup>Milt Freudenhiem, “Medicare Starts Web Site to Compare Drug Prices,” *New York Times*, 29 April 2004 (Netscape version).

<sup>114</sup>Charli E. Coon, “The Energy Bill Returns: Still a Missed Opportunity,” *The Heritage Foundation*, 15 June 2004.

<sup>115</sup>Dan Morgan, “The GOP Congress, High on the Hog,” *Washington Post*, 18 January 2004 (Netscape version).

Congressional inability to produce an energy bill that could address the nation's long-term energy needs was mirrored by the lack of agreement on energy policy among the nation's governors. After the August 2004 blackout, NGA lobbied Washington to pursue a more conservation-oriented policy and to foster federal-state cooperation in the development and integration of the nation's electricity infrastructure.<sup>116</sup> But NGA is itself divided by the conflicting interests of the 50 states that make consensus on a unified strategy difficult to attain. The NGA's policy positions on energy emphasize the traditional authority of states over economic development and land use, and as would be expected, NGA opposes efforts by the federal government to preempt state prerogatives.<sup>117</sup>

#### *Era of Big Government Returns?*

President Ronald Reagan sought to curb the size and influence of the federal government; so did Speaker of the House Newt Gingrich. President Bill Clinton famously declared the era of big government was over. But the enactment of major new public programs, often with substantial price tags, in the first three years of the Bush presidency raises the question: has the era of "big government" returned? Bush has pushed hard for expensive programs such as the No Child Left Behind Act and the Medicare prescription drug benefit. He has pursued a steady policy of tax expenditures, in particular, by reducing taxation on capital accumulation. He has not stood in the way of large subsidies to farm interests and has not opposed the expansion of earmarked funds for pork-barrel projects.<sup>118</sup> Further, the combination of tax cuts and increased spending has consumed the surplus funds that were on the federal government's ledger at the start of his term, and yet the president has shown little interest in stopping the slide into deep debt. It is little wonder that many conservative groups find this record "appalling" and a "disaster."<sup>119</sup> The level of federal activism and the preference for centralized approaches exhibited by the Bush administration reverse the course charted by recent Republican administrations. Bush's policies abandon the Reagan and Gingrich efforts to shrink government. Instead, Bush aggressively uses government to weaken the opposition and build his electoral base.<sup>120</sup> Whether the first three years of policy choices by the Bush administration have been motivated by an incumbent's natural desire to be re-elected, or whether this policy activism is part of a larger and long-term political strategy will become clear if Bush is re-elected.

<sup>116</sup>The National Governors' Association, "Electric Industry Restructuring and Energy Issues," *Position Letters*, 23 September 2003.

<sup>117</sup>Michael Janofsky, "Governors See Obstacles to a Unified Energy Stand," *New York Times*, 17 August 2003 (Netscape version).

<sup>118</sup>Sebastian Mallaby, "Big Government Again," *Washington Post*, 14 June 2004 (Netscape version).

<sup>119</sup>Jonathan Rauch, "Bush quietly beefs up government's role," *Govexec.com*, 25 July 2003.

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<sup>120</sup>*Ibid.*

## THE STATES

The “silent revolution” of the mid-1960s to 1990 that modernized state governments refurbished their previous poor image and provided a key justification, along with the period’s growing anti-Washington, DC, sentiment, for the devolution of many domestic programs. “Resurgent states” not only developed more capacity to administer federal programs, they also pursued their own initiatives.<sup>121</sup> With their updated institutions, states produced a record of policy accomplishments, and numerous observers claimed “the tide of centralization has turned and the balance of power has generally shifted from the federal government toward the states.”<sup>122</sup> This “ascendancy of the states” also rested importantly on a dramatic rise in the professionalism of state government personnel, whether elected, appointed, or career officials.<sup>123</sup> The old patronage arrangements common in many states were replaced by merit systems and voters chose candidates with higher educational levels than in the past.<sup>124</sup> The revitalized states survived the recession of the early 1990s and even demonstrated sufficient political will to raise revenues necessary to sustain important programs.<sup>125</sup>

At the beginning of the twenty-first century, however, state governments find themselves mired in the fourth year of their most severe financial crisis since the 1930s Depression. Few analysts now discuss states in the previously glowing terms; instead, the old labels such as the “sorry states” have reappeared.<sup>126</sup> Some of this shift in sentiment can be traced to the pattern of state responses to the fiscal crisis, particularly the reluctance of governors and legislators to raise revenues to protect important public functions.<sup>127</sup> But a less noticed contributing factor is the continuing institutional weakness of state legislatures. “Forty-one states have part-time legislatures, and in 22 of those states, legislators have no paid staff. Nineteen legislatures meet less than 80 days a year, and six convene only every other year. These same legislatures annually consider 150,000 bills and enact 75 times more laws than the U.S. Congress.”<sup>128</sup> An especially egregious example of dysfunction is the New York Legislature, in which 95 percent of the laws passed do so without debate and votes may be cast by “empty seat” legislators.<sup>129</sup> By itself

<sup>121</sup>David B. Walker, *The Rebirth of Federalism*, 2nd ed. (New York: Chatham House Publishers, 2000), pp. 260-281.

<sup>122</sup>Alice M. Rivlin, *Reviving the American Dream: The Economy, the States & the Federal Government* (Washington, DC: The Brookings Institution, 1992), p. 109.

<sup>123</sup>John D. Donahue, *Disunited States* (New York: Basic Books, 1997), pp. 11-12.

<sup>124</sup>Keith E. Hamm and Gary F. Moncrief, “Legislative Politics in the States,” *Politics in the American States: A Comprehensive Analysis*, eds., Virginia Gray and Russell L. Hansan, 8th ed. (Washington DC: CQ Press, 2004), pp. 171-172.

<sup>125</sup>Richard P. Nathan and Fred C. Doolittle, *Reagan and the States* (Princeton, NJ: Princeton University Press, 1987)

<sup>126</sup>John Maggs, “Sorry States,” *National Journal*, 8 August 2003 (Netscape version).

<sup>127</sup>Alan Greenblatt, “States of Frustration,” *Governing* 17 (January 2004): 26-30.

<sup>128</sup>Center for Policy Alternatives, *Progress in the States: A Report on Proactive, Progressive Victories in 2004* (Washington, DC: July 2004), p. 2.

<sup>129</sup>Michael Cooper, “So How Bad Is Albany? Well Notorious,” *New York Times*, 22 July 2004 (Netscape version).

the blame for the states' woes derives from the frustration of state and local government officials with three areas of federal policy—"block grants, unfunded mandates and federal preemption of local authority, and the impact of the state and federal deficits on local governments."<sup>137</sup> Considerable evidence has long existed that the shift from cooperative federalism to a coercive one undercut the ability of states and localities to make and fund their own policy decisions.<sup>138</sup> The truly surprising blow to advocates of state and local government is the centralizing position taken by the Bush administration. Instead of coming to the aid of the states, Bush with the support of conservative allies has pushed vigorously for the expansion of national government powers. The leader of the political party long associated with a defense of states' rights has adopted policy positions that have subordinated the states and resulted in "a big, big turnaround" of established Republican dogma opposing federal power.<sup>139</sup> Little wonder then that state and local officials see the intergovernmental relationship as threatened and the ability of states and localities to function undercut.

*State Finances—Improving, Less Worse, or Not Better?*

After three years of the worst fiscal crisis since the Depression, state governments, according to some observers, have begun to recover as indicated by increases in revenues and in year-end budget balances.<sup>140</sup> Other observers are less sanguine, emphasizing the "mega-choices" still necessary to avoid a financial relapse.<sup>141</sup> The good news for state governments is that FY 2004 revenues were up 5.4 percent over FY 2003 and projections for FY 2005 signal further growth.<sup>142</sup> Consequently, 33 states began FY 2005 with a budget gap compared to 42 states with budget gaps in FY 2004.<sup>143</sup> The bad news is that many causes of the states' fiscal ills continue unchecked. For example, Medicaid spending is expected to grow by more than 13 percent in FY 2005.<sup>144</sup> Similarly, states face rising costs from unfunded federal mandates such as new federal guidelines on voting technologies, from demographic pressures of longer life spans and immigration, and from security against terrorism. State budgets may have "bottomed out," but as Ray Scheppach, NGA's executive director wryly noted, "it's going to get better, but not a lot better."<sup>145</sup>

<sup>137</sup>Lance Davis, "Panel Examines Federal-State-Local Partnership Viability," *The Nations' Cities Weekly*, 8 September 2003 (Netscape version).

<sup>138</sup>John Kincaid, "From Cooperative to Coercive Federalism," *Annals of the American Academy of Political and Social Science* 509 (May 1990): 139-152.

<sup>139</sup>Associated Press, "States' rights backers have a surprising foe in the White House," *Omaha World-Herald*, 11 January 2004, p. 8A.

<sup>140</sup>National Conference of State Legislatures, *State Budget & Tax Actions 2004: Preliminary Report*.

<sup>141</sup>Neal Peirce, "State Budget Quandaries: Any Heroes Out There?" *Washington Post*, 4 January 2004 (Netscape version).

<sup>142</sup>National Conference of State Legislatures, *State Budget and Tax Actions 2004*.

<sup>143</sup>NCSL NEWS, "State Budget Gaps Shrink, NCSL Study Finds," 28 April 2004.

<sup>144</sup>NCSL News, "State Budgets Rebounding, But Tough Road Looms Ahead For Lawmakers," 20 July 2004.

<sup>145</sup>John M. Broder, "Despite Rebound, States' Budgets are Still Reeling," *New York Times*, 5 January 2004 (Netscape version).

Because state governments must balance their budgets, they used several different means to resolve a nearly \$200 billion cumulative budget shortfall over the past three years. First and foremost, states cut spending by \$80.9 billion, which covered 41.5 percent of the cumulative budget deficit. States also engaged in creative accounting and borrowing to generate \$47.7 billion, or 24.4 percent of needed funds. Reserve funds and other general funds were drawn down by \$20 billion, or 10.3 percent. Tax and fee increases produced \$26.4 billion, or 13.5 percent of needed monies. The Jobs and Growth Tax Relief Reduction Act of 2003 gave states \$20 billion of temporary grants, which accounted for 10.3 percent of the three-year cumulative state shortfall.<sup>146</sup> States relied on different budget tactics as they struggled to cope with the continuing crisis. In the first year (FY 2002), states emptied their reserve funds, which had grown to a year-end balance in FY 2000 of \$48.8 billion (or 10.4 percent of state expenditures), did some creative accounting, and made some modest reductions in spending. But with revenues falling short by nearly 14 percent and with rainy-day funds drained, officials in many states resorted reluctantly to tax and fee increases of \$11 billion, but these new monies constituted less than 20 percent of the FY 2003 deficit. Even significant accounting gimmicks and borrowing coupled with temporary federal aid could not stop the flow of red ink.<sup>147</sup> Consequently, state officials were forced to slash spending by over \$26 billion and, as a result, “in constant dollars, total state expenditures actually declined.”<sup>148</sup> By FY 2004, states could do little else but continue to reduce expenditures by nearly \$42 billion and further raise revenues, mostly in the form of higher fees and user charges, by \$25.7 billion.<sup>149</sup>

The last time states faced budget shortfalls occurred during the recession of the early 1990s. Then states managed the fiscal situation by relatively equal parts of tax increases, spending cuts, and reserve funds coupled with other measures. Instead of expenditure reductions and revenue increases each contributing about one-third of the needed funds, this time state officials have relied more narrowly on spending cuts and other measures.<sup>150</sup> The resistance to raise taxes is evident when one considers that in 1991 states increased taxes 5.4 percent (\$15.4 billion) over 1990 compared to a meager 1.5 percent (\$7.8 billion) increase from 2002 to 2003. Some see in this “tax shyness” the lesson of the electoral defeats of Governors Florio and Cuomo after they had raised taxes in the previous recession. Current examples confirming the political risk of tax increases even to save vital

<sup>146</sup>Elizabeth McNichol, *States' Heavy Reliance on Spending Cuts and One-Time Measures to Close Their Budget Gaps Leaves Programs at Risk* (Washington, DC: Center on Budget and Policy Priorities, 29 July 2004).

<sup>147</sup>*Ibid.*

<sup>148</sup>Robert D. Behn and Elizabeth K. Keating, *Facing the Fiscal Crises in State Governments: National Problem, National Responsibilities*, 29 July 2004, Taubman Center for State and Local Government, Harvard University, p. 7.

<sup>149</sup>McNichol, *States' Heavy Reliance on Spending Cuts*.

<sup>150</sup>*Ibid.*

state programs include the rejection by Alabama voters of Governor Riley's \$1.2 billion tax proposal, the defeat in Oregon of a bipartisan plan to raise \$800 million, and the recall of Governor Davis in California.<sup>151</sup>

Another important comparison that sheds light on the current state fiscal crisis is the role played by federal aid. The cooperative federal–state relationship that prevailed during the “stagflation” of the 1970s engendered countercyclical relief for the states in the form of General Revenue Sharing, the Antirecession Fiscal Assistance program, and the Intergovernmental Anti-Recession Act. Congress designed these programs to stabilize the finances of state and local governments during a period of high unemployment and high inflation. The temporary aid to state governments provided in 2003 resulted from a deal cut by Bush with a small number of Senate centrists who held pivotal votes necessary to the passage of his 2003 tax-cut bill.<sup>152</sup> That the \$20 billion temporary aid package was insufficient is obvious when it is compared to the \$38 billion budget shortfall in California.

Further, debate exists as to whether the \$20 billion package actually helped the states. The GAO reported that the aid arrived 19 months after the end of the recession and thus was too late to make a difference. Furthermore, the GAO argues because the aid was allocated on a per capita basis, it was not well targeted to those states with the least ability to raise new revenues.<sup>153</sup> Analysts at the Center on Budget and Policy Priorities (CBPP) issued a study rebutting the GAO's conclusions. The CBPP report argues that the aid, although coming after the official end of the recession, arrived in 2003 while national employment—a key factor in state revenue capability—was lower than it had been in 2001. Additionally, half of the aid was targeted to Medicaid costs, the fastest growing component of state budgets, and the other half, although unrestricted, was a very modest amount of assistance (\$10 billion) compared to the total budget shortfall (\$195 billion).<sup>154</sup>

The divided opinion over whether Washington should aid states and localities when the national economy slows down is reflected in a public exchange of views between Barry Anderson, deputy director, Congressional Budget Office (CBO), who observed, “We almost always get it wrong, providing relief just as the economy starts picking up on its own,” and Alice Rivlin, senior fellow, the Brookings Institution, who suggested, “At the very least, a program of countercyclical revenue-sharing would reduce the pressure on cities and states to make things worse by cutting services or raising taxes precisely when we should be avoiding those steps at all costs.”<sup>155</sup>

<sup>151</sup>Broder, “Despite Rebound, States' Budgets are Still Reeling.”

<sup>152</sup>Krane, “The State of American Federalism, 2002-2003,” 11.

<sup>153</sup>U.S. Government Accountability Office, *Letter to U.S. Senator Don Nickles*, Chairman, Committee on the Budget, U.S. Senate, 7 May 2004, GAO-04-736R *Temporary State Fiscal Relief*.

<sup>154</sup>Nicholas Johnson and Edwin Park, *A Response to GAO's Criticisms of State Fiscal Grants* (Washington, DC: Center On Budget and Policy Priorities, 15 June 2004).

<sup>155</sup>National League of Cities, *The Impact of Federal Fiscal Policy on State and Local Fiscal Crises: Roundtable Proceedings* (Washington, DC: NLC, 27 May 2003), p. 8.

These competing assessments of the one-time federal aid to the states are a small sample of a larger debate on the obligations of the national government to state governments and on the merits of “fend-for-yourself federalism” in which each sphere of government functions independently of the others.<sup>156</sup>

The debates over the federal–state relationship are driven not just by principle or partisanship, but also by the policy realities of the state fiscal crisis. Massive reductions in state spending have had serious impacts on citizens. State aid to municipalities declined by 2.1 percent in 2003 and dropped another 9.2 percent in 2004. Kansas went so far as to end state aid to cities.<sup>157</sup> Given Medicaid’s large presence in state budgets, all 50 states reduced or froze provider payments and enacted policies to constrain the growth in prescription-drug costs. Benefits were reduced in 35 states and eligibility reduced in 34 states.<sup>158</sup> These reductions occurred even with the infusion of \$10 billion of federal aid. Similar reductions also occurred in the State Children’s Health Insurance program.<sup>159</sup> Mid-year FY 2002 budget cuts were made by 37 states, and in FY 2003 half the states further reduced spending on higher education, with an average cut of 5 percent (the range was from New Mexico’s 7 percent increase to Colorado’s 26 percent decrease).<sup>160</sup> To compensate, university governing boards approved double-digit increases in tuition that drove tuition beyond the reach of an increasing number of students, even those assisted by Pell grants. Twenty-three states reduced child-care eligibility, thus making it harder for low-income, single parents to work, and in 34 states real per-pupil aid to school districts has declined since 2002.<sup>161</sup> Nineteen states froze public employee hiring or salaries.<sup>162</sup> The fiscal crisis undercut the “tough-on-crime” stance of many state legislators as “about two-thirds of all states have lowered prison sentences or begun steering convicts into incarceration alternatives such as drug treatment or community corrections programs—and in many cases, Republican governors and/or legislators have been leading the way.”<sup>163</sup>

The fiscal interdependency inherent in America’s federal system is coming under increasing scrutiny over the ways its current features contributed to the states’ fiscal crisis. Henry Cisneros, a former secretary of the U.S. Department of Housing and Urban Development pointed out, “You cannot ignore the fact that the intergovernmental structure is tied to

<sup>156</sup>Krane, “The State of American Federalism, 2002-2003,” 31-34.

<sup>157</sup>Christopher Hoene, “States decrease their aid to cities,” *American City & County*, 1 October 2003 (Netscape version).

<sup>158</sup>National Governors’ Association & National Association of State Budget Officers, *The Fiscal Survey of States*, April 2004, p. 4.

<sup>159</sup>Broder, “Despite Rebound, States’ Budgets are Still Reeling.”

<sup>160</sup>Will Potter, “State Lawmakers Again Cut Higher-Education Spending,” *The Chronicle of Higher Education*, 8 August 2003, p. A22.

<sup>161</sup>Elizabeth McNichol and Mekeda Harris, *Many States Cut Budgets As Fiscal Squeeze Continues* (Washington, DC: Center on Budget and Policy Priorities, 26 April 2004).

<sup>162</sup>Alan Greenblatt, “Making Do,” *Governing* 17 (December 2003): 33.

<sup>163</sup>Christopher Swope, “Revising Sentences,” *Governing* 17 (July 2004): 38.



revenues and their distribution. ...And that makes it hard to look at this issue without looking at the fiscal relationships among the different levels of government.”<sup>164</sup> That unfunded federal mandates impose costs on states and localities has long been demonstrated,<sup>165</sup> but what has been striking is the failure to remedy the situation and the continuing imposition of new mandates even during the current fiscal crisis. Cost estimates of current mandates range from NCSL’s \$29 billion to CBPP’s \$73 billion, with the true figure somewhere in between.<sup>166</sup>

In addition to the widely discussed issue of unfunded mandates, Iris Lav and Andrew Brecher identify four other areas of federal policy that add to the states’ red ink.<sup>167</sup> The three years of successive cuts in federal taxes, occurring simultaneously with the severe decline in state “own-source” revenues, have penalized states that did not “decouple” or alter the state’s tax structure to accommodate the phase-out of the federal estate tax and the accelerated depreciation provisions for business. Second, current federal policy prohibits state and local governments from levying a consumption tax on transactions over the Internet, effectively denying state and local governments an estimated \$45 billion in 2006.<sup>168</sup> A similar stop sign has been erected by the Federal Communications Commission with its ruling that cities may not collect revenue on the use of right-of-ways for cable modem services, even while the federal government continues to tax telecommunications. Third, Congress has failed for more than a decade to remedy a 1992 Supreme Court ruling barring states from imposing a sales (use) tax on vendors not physically present in the state. Since 2000, 34 states have worked on the Streamlined Sales Tax Project with the aim of coordinating and harmonizing the differences in state tax laws so as to reduce the tax remittance burden on out-of-state vendors. While the work of the states on this project is not quite complete, it is not apparent that Congress would enact enabling legislation. Fourth, the national government continues to shift health-care services for the disabled and the low-income elderly from the federally funded Medicare program to the federal–state funded Medicaid program. Those persons enrolled in both programs are referred to as “dual eligibles,” and it is the costs for these individuals, in particular, that is being shifted to Medicaid, primarily because Medicaid covers long-term care and pays for prescription drugs. Medicare will assume payment for prescription drugs for “dual eligibles” beginning in 2006, but

<sup>164</sup>As quoted in National League of Cities, *Is the Federal-State-Local Partnership Being Dismantled? Roundtable Proceedings* (Washington, DC: NLC, 2 September 2003), p. 4.

<sup>165</sup>Paul L. Posner, *The Politics of Unfunded Mandates: Whither Federalism?* (Washington, DC: Georgetown University Press, 1998).

<sup>166</sup>National Conference of States Legislatures, *The Mandate Monitor*, 31 March 2004; Iris J. Lav and Andrew Brecher, *Passing Down the Deficit: Federal Policies Contribute to the Severity of the State Fiscal Crisis* (Washington, DC: CBPP, 12 May 2004), p. 10.

<sup>167</sup>*Ibid.*

<sup>168</sup>Donald Bruce and William F. Fox, “State and Local Losses from E-Commerce: Updated Estimates,” Center for Business and Economic Research, The University of Tennessee, October 2001, p. 1.

the new Medicare legislation requires states to remit back to the federal government 90 percent of the savings realized by Medicare's pickup of drug costs for the Medicaid program. Lav and Brecher estimate the combined costs of federal policies for the four years of the state fiscal crisis (2002–2005) to be \$175 billion.<sup>169</sup> If one subtracts the temporary 2003 federal aid, the net cost is \$155 billion, or approximately 80 percent of the cumulative fifty state budget shortfall for the same period. It should be pointed out that the remaining \$40 billion could have been covered by equal parts of state reserve funds and spending reductions equivalent to 25 percent of actual cuts.

Federal policy not only contributes significantly to the fiscal crisis, it also affects states differently. As one would expect, "states with a heavy reliance on federal funding for their budgets also are among those that have been hardest hit," in particular, Missouri, Mississippi, Louisiana, Arkansas, South Carolina, and South Dakota.<sup>170</sup> This list also demonstrates another effect of federal policy. The costs fall disproportionately on many of the least affluent states. Third, the restrictions in federal tax policy impose a relatively larger burden on those states that depend on the sales tax for the bulk of their revenues, such as Florida, Nevada, Mississippi, Texas, and South Dakota.<sup>171</sup>

The fiscal impact of federal policy is not limited to state government, its burden increasingly falls on local governments which are "at the bottom of the fiscal food chain."<sup>172</sup> Federal aid to municipalities, for example, has declined from about 15 percent of total general revenues in 1978 to 3.7 percent in 2000; put another way, current federal aid to local governments is 75 percent less than what it was in 1980. Through much of this period, state aid to local governments stayed relatively flat, though municipalities from 1992 to 1997 did experience an average annual gain in state aid of approximately 4.6 percent. However, with the onset of the fiscal crisis, state aid to cities fell by 9.2 percent (\$2.3 billion) in 2003 and 2004.<sup>173</sup> While federal and state aid to local governments has shrunk, programmatic responsibilities have been passed from the federal and state governments to local governments.<sup>174</sup> This "second-order" devolution simply exacerbates the fiscal mismatch that has been inherent in "fend-for-yourself" federalism since its onset in the Reagan era.<sup>175</sup> All levels of government have experienced growing fiscal stress for the last 20 years, and the outlook for the next 20 years is not better. "Despite some improvements in the states'

<sup>169</sup>Lav and Brecher, "Passing Down the Deficit," 3.

<sup>170</sup>*Ibid.*, 2.

<sup>171</sup>*Ibid.*

<sup>172</sup>Michael A. Pagano and Jocelyn M. Johnston, "Life at the Bottom of the Fiscal Food Chain: Examining City and County Revenue Decisions," *Publius: The Journal of Federalism*, 30 (Winter/Spring 2000): 159-170.

<sup>173</sup>National League of Cities, 2 September 2003, p. vi.

<sup>174</sup>Jonathan Walters, "Cry, the Beleaguered County," *Governing* 10 (August 1996): 31-37.

<sup>175</sup>Dale Krane, Carol Ebdon, and John Bartle, "Devolution, Fiscal Federalism, and Changing Patterns of Municipal Revenues: The Mismatch Between Theory and Reality," *Journal of Public Administration Research and Theory*, 14 (October 2004): 513-533.

fiscal situations,” says Scott Pattison, executive director of the National Association of State Budget Officers, “the picture is far from rosy. If the states were patients, you could say they are out of intensive care, but they’re not out of the hospital yet.”<sup>176</sup>

#### *State Policy Actions*

State governments maintained their reputation as “laboratories of democracy” by enacting innovative and often controversial policies. A particularly busy area of state policymaking was health care. Rising prescription-drug costs prompted governors in both parties to confront the FDA over its ban on imported pharmaceutical drugs. The governors of Minnesota, New Hampshire, North Dakota, and Wisconsin issued executive orders creating websites that would direct state residents to reliable and safe pharmacies in Canada. Rhode Island permitted foreign pharmacies to obtain state licenses, and Canadian pharmacies may now fill prescriptions for the state’s citizens. Other state actions to reduce prescription-drug costs include (1) the first-ever multi-state purchasing pool for Medicaid drug programs (Alaska, Minnesota, New Hampshire, Nevada, and Vermont),<sup>177</sup> (2) laws requiring drug manufacturers to disclose prices, gifts, and marketing expenditures (Maine, Vermont), (3) laws lowering drug prices by setting up a state-run discount program (Hawaii), establishing a bulk purchasing program (Indiana), and directing state agencies to negotiate for rebates or lower prices (Massachusetts, New Hampshire, Rhode Island).<sup>178</sup>

Kentucky removed the single most expensive drug (the antipsychotic Zyprexa) from the state’s list of Medicaid preferred medications. This action pitted the state against the drug’s manufacturer as well as against the National Alliance for the Mentally Ill and the Kentucky Consumer Alliance. While Kentucky succeeded in its effort to use similar but cheaper drugs in its Medicaid program, New York did not because Governor George Pataki vetoed a proposal and pushed through new legislation preventing the use of a preferred drug list by state Medicaid officials. The battle over antipsychotic drugs is one of the most challenging dilemmas in the effort to reduce drug costs. Brand-name drugs are extremely expensive, so there is an incentive to substitute generic or less expensive counterparts, but drug companies are reluctant to negotiate a discounted price because once they do so for one state, federal Medicare law requires the discount to be offered to all states. At the same time, the use of preferred drug lists restricts the choices available to physicians, but the lists are a tool by which state governments can control the fastest rising component of health care. Prescription drug prices went up 19 percent in 2003.<sup>179</sup>

<sup>176</sup>As quoted in T.R. Reid, “States Feel Less Pinch in Budgets, Service: Implementation of Taxes and Fees Are Credited For Economic Recovery,” *Washington Post*, 9 May 2004 (Netscape version).

<sup>177</sup>Plan was approved by U.S. DHHS on 22 April 2004.

<sup>178</sup>Center for Policy Alternatives, *Progress in the States*, July 2004, pp. 6-7.

<sup>179</sup>Gardiner Harris, “States Try to Limit Drugs in Medicaid, but Makers Resist,” *New York Times*, 18 December 2003 (Netscape version).

State efforts to ensure clean air and to slow global warming resulted in a new round of conflicts with power generators and with the U.S. Environmental Protection Agency (EPA). In November 2003, the EPA announced a series of exemptions to the New Source Review regulations that required new pollution controls be installed at older coal-burning power plants and oil refineries whenever they were renovated in ways that increased emitted pollutants. Additionally, the EPA terminated a number of on-going investigations into these older power plants. These federal actions provoked New York, New Jersey, and Connecticut to initiate lawsuits against midwestern and southern utility companies whose plants are the principal source of air pollution in the Northeast.<sup>180</sup> Eight states (California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont, and Wisconsin) plus New York City in July 2004 sued four large utility companies plus the Tennessee Valley Authority because the 174 power plants operated by these enterprises burn fossil fuels and emit approximately 10 percent of the nation's carbon dioxide, a prime cause of global warming.<sup>181</sup> Less controversial state government actions to protect the environment included new air emission standards in Connecticut, New Jersey, and Rhode Island. Each of these states based its new laws on California's Low Emission Standard for automobiles.<sup>182</sup>

A long-running fight over the distribution of Colorado River water was ended in October 2003 when California agreed to reduce its use of this source. California has been in violation of the 1922 Colorado River Compact, which, among other provisions, limited the state to 4.4 million acre feet per year. Colorado and other states also dependent on the river for water increasingly resisted California exceeding its limit. A key element in obtaining agreement among the states was California's action to transfer at market prices in-state water from the agricultural areas of the Imperial Valley to the urban areas in the south. The agreement allows California 14 years in which to make this transition.<sup>183</sup>

In November 2003, the Massachusetts Supreme Judicial Court ruled that same-sex couples are constitutionally entitled to marry. Chief Justice Margaret H. Marshall's opinion declared:

The question before us is whether, consistent with the Massachusetts Constitution, the commonwealth may deny the protections, benefits and obligations conferred by civil marriage to two individuals of the same sex who wish to marry. We conclude that it may not. It forbids the creation of second-class citizens. . . . Whether and whom to marry, how to express sexual intimacy, and whether and how to establish a family—these are among

<sup>180</sup>Richard A. Oppel, Jr. and Christopher Drew, "States Planning Their Own Suits on Power Plants," *New York Times*, 9 November 2003 (Netscape version).

<sup>181</sup>Andrew C. Revkin, "New York City and 8 States Plan to Sue Power Plants," *New York Times*, 21 July 2004 (Netscape version).

<sup>182</sup>Center for Policy Alternatives, *Progress in the States*, July 2004, p. 12.

<sup>183</sup>Dean E. Murphy, "Pact in West Will Send Farms' Water to Cities," *New York Times*, 17 October 2003 (Netscape version).

the most basic of every individual's liberty and due process rights. And central to personal freedom and security is the assurance that the laws will apply equally to persons in similar situations.<sup>184</sup>

Previously, courts in Alaska and Hawaii had decided gay couples could not be denied the right to marry (but the state legislatures prevented further action) and the Vermont Supreme Court in 1999 upheld civil unions for homosexuals. But the Massachusetts high court is the first court to uphold a right to same-sex marriage. Its decision ignited a nationwide cultural war over the definition of marriage.

The Massachusetts ruling initiated a fierce political battle between the state high court, the governor, and the state legislature. Governor Mitt Romney (R-MA) attacked the ruling by saying

Marriage is an institution between a man and a woman. I will support an amendment to the Massachusetts Constitution that makes that expressly clear. Of course, we must provide basic civil rights and appropriate benefits to nontraditional couples, but marriage is a special institution that should be reserved for a man and a woman.<sup>185</sup>

The state senate sought guidance as to whether the high court would uphold a bill to grant the same rights and benefits of marriage to gay couples, but label the relationship a civil union. The court replied by reaffirming its decision to support the term *marriage*.

The dissimilitude between the terms 'civil marriage' and 'civil union' is not innocuous. It is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status. [The bill] would have the effect of maintaining and fostering a stigma of exclusion that the Constitution prohibits. It would deny to same-sex 'spouses' only a status that is specially recognized in society and has significant social and other advantages.<sup>186</sup>

With the legal obstacles removed, same-sex couples rushed to get married, and the opportunity attracted homosexuals from other states. The governor invoked a 1913 state law preventing the marriage of out-of-state couples if the marriage would be void in their home state. But Provincetown, a community with a large gay population, voted to issue marriage licenses to out-of-state same-sex couples even if they had no intention of moving to Massachusetts. The town of Worcester also declared its intention to issue licenses to out-of-state couples.<sup>187</sup>

<sup>184</sup>Pam Belluck, "Marriage by Gays Gains Big Victory in Massachusetts," *New York Times*, 19 November 2003 (Netscape version); Associated Press, "Massachusetts Court: State Wrong to Ban gay Marriage," *Washington Post*, 18 November 2003 (Netscape version).

<sup>185</sup>Associated Press, "Massachusetts Court: State Wrong to Ban gay Marriage."

<sup>186</sup>Pam Belluck, "Massachusetts Gives New Push to Gay Marriage in Strong Ruling," *New York Times*, 5 February 2004 (Netscape version).

<sup>187</sup>Pam Belluck, "Town Set to Defy Governor on Same-Sex Marriage Issue," *New York Times*, 11 May 2004 (Netscape version).

The Massachusetts court's legal position differs sharply from the 1996 federal Defense of Marriage Act and the laws of 38 states where marriage is defined as a heterosexual institution. Gay rights groups applauded the decision and claimed that it was in line with the legal reasoning in the U.S. Supreme Court's June 2003 decision overturning the Texas sodomy law, thereby legalizing gay sex. Conservative political groups and numerous religious denominations vehemently condemned the Massachusetts court. Tony Perkins, president of the Family Research Council, argued, "If same-sex couples 'marry' in Massachusetts and move to other states, the Defense of Marriage Act will be left vulnerable to the same federal courts that have banned the Pledge of Allegiance and sanctioned partial-birth abortion."<sup>188</sup> Opponents quickly mobilized to accelerate the passage of constitutional amendments banning same-sex marriages that have been introduced in 19 state legislatures.<sup>189</sup>

Opposition to the Massachusetts court decision was not universal. Gavin Newsom, mayor of San Francisco, California, decided to recognize same-sex weddings. More than 3,000 couples immediately sought marriage licenses. Because San Francisco is both a city and a county, and because marriage licenses are granted by county government, Mayor Newsom argued he had the authority to allow gay marriages. Newly elected Governor Arnold Schwarzenegger directed the state attorney general to file a lawsuit in San Francisco Superior Court to block same-sex marriages. Proponents of gay marriage immediately sued California over its laws defining marriage as between a man and a woman.<sup>190</sup>

African-American legislators in some states found themselves in a quandary and often divided over the issue of gay marriages. The political constituency of many black legislators is based in local churches, many of which have a traditional theology on marriage. Although hometown voters demanded support for constitutional amendments banning gay marriage, black legislators expressed considerable reluctance to do so. Some African-American officials were uncomfortable with the use of laws and constitutional amendments to treat one group of people differently from another group. But others were offended by comparisons of the black civil-rights struggles to the support of gay marriage. Georgia state representative Earnest Williams argued "You just can't equate sexual orientation to racial discrimination . . . You can make a choice of who you want in your bedroom, but you can't choose your skin color." His colleague, state representative Georganna Sinkfield observed, "What I see in this is hate . . . I'm a Christian, but if we put this in the Constitution, what's next? People with dark hair?

<sup>188</sup> Belluck, "Massachusetts Gives New Push to Gay Marriage."

<sup>189</sup> James Dao, "Legislators Push for State Action on Gay Marriage," *New York Times*, 27 February 2004 (Netscape version).

<sup>190</sup> Dean E. Murphy, "San Francisco Mayor Exults in Move on Gay Marriage," *New York Times*, 19 February 2004 (Netscape version); Dean E. Murphy, "San Francisco Sues State Over Same-Sex Weddings," *New York Times*, 20 February 2004 (Netscape version).

You're opening the floodgates for people to promote their own prejudice."<sup>191</sup> Complicating the position of black legislators was how the issue of same-sex marriages would be used in the 2004 elections. The real possibility existed of this issue driving a wedge within the African-American community and thereby siphoning off votes to Republican candidates.

That state governments may enact laws regulating all manner of activity, including personal conduct and intimate relationships, rests importantly on their police power, which "in effect endows them with responsibility for protecting the health, morals, safety, and general welfare of the citizens."<sup>192</sup> As is typical of the incremental development in many policy areas, the court decisions to permit same-sex marriages are the latest step in the more equal treatment of homosexuals. Over the past decade, the gay community and civil-rights activists have pressured state and local governments to provide equal benefits for domestic partners in areas such as health, property ownership, insurance, taxes, and child custody. This political activity has paid off as states such as California, Hawaii, Maine, and New Jersey have adopted various benefits for domestic partners. Some city governments across the country for nearly a decade have sought to create "gay-friendly" images so as to attract homosexuals with higher-than-average incomes and fewer dependents. Philadelphia, Pennsylvania, exemplifies this welcoming orientation in its television ads touting itself as the "City of Brotherly Love and Sisterly Attraction."<sup>193</sup>

Students of federalism have long noted that policy changes have their roots in transformations in the larger culture and economy. Movies, music, and television in the 1950s contributed significantly to changing white attitudes toward black citizens, and so did actions by business corporations. The same pattern is repeating itself in respect to gay rights. Currently, approximately 20 television shows include gay characters or themes.<sup>194</sup> Since 1990, Fortune 500 companies have offered "spousal equivalent" benefits to the domestic partners of lesbian and gay employees, and "more than 7,400 companies now offer equal benefits to the same sex partners of their employees."<sup>195</sup> Companies with multi-state operations increasingly face more variation in state laws related to domestic partnerships, and this legal diversity complicates corporate human resource policies. At the same time, the market value of the gay population cannot be ignored by many businesses. Same-sex marriage, like stem cell research, is a multi-faceted issue that poses uncomfortable options for public officials. Like stem cell research, which

<sup>191</sup>Andrew Jacobs, "Black Legislators Stall Marriage Amendment in Georgia," *New York Times*, 3 March 2004 (Netscape version).

<sup>192</sup>Richard H. Leach, *American Federalism* (New York: W.W. Norton, 1970), p. 39.

<sup>193</sup>Deborah Sharp, "Cities come out about wooing gays—and their dollars," *USA Today*, 8 December 2003 (Netscape version).

<sup>194</sup>Ibid.

<sup>195</sup>Bob Witek and Gary Gates, "Same-Sex Marriage: What's at Stake for Business?" *The Urban Institute*, 21 July 2004 ([www.urban.org](http://www.urban.org)).

government—federal or state—should make decisions is a critical choice that will affect future outcomes.

### *Election Imbroglia*

The Massachusetts court decision on same-sex marriage may have caused the most widely felt political earthquake of the past year, but a potentially catastrophic tremor is building because of the fumbled efforts to avoid the election-procedures fiasco of 2000. Congress enacted The Help America Vote Act (HAVA) of 2002 to assist state governments replace old-fashioned punch-card and mechanical-lever voting machinery with new technologies that would reduce confusion and error in vote counts, improve vote security, and raise the public's confidence in final tabulations. Although a number of states have had good experiences with established technologies such as optical scan readers, many states moved to purchase digital recording electronic (DRE) voting machines. DRE voting machines use technology similar to that used in automated teller machines (ATMs), in particular, touch-screen voting. The advantages, as described by their manufacturers, include more clarity in displaying vote choices, independent use by many disabled or elderly voters, lower costs for paper and maintenance, and less cumbersome administration by poll workers. Unfortunately, as some states started to utilize DRE voting machines, problems and even scandals emerged. Soon the list of complaints far exceeded the list of advantages—lack of a paper audit trail by which votes can be verified by voters, insecure programming codes, cost of the machines, cost of training poll workers, lack of privacy, malfunctions, improper installation by vendors, and intrusion by hackers into vendor networks.<sup>196</sup> By mid-2003, several bills had been introduced in Congress to create a national voter-verified paper audit trail (VVPAT), but as of mid-2004, none of these bills had become law, even though nearly a third of the nation's voters would use DREs in the November 2004 presidential election. The Brennan Center for Justice at New York University's School of Law and the Leadership Conference on Civil Rights issued a report on 30 June 2004 calling for prompt action to reduce the vulnerability of DRE equipment to tampering and mischief.<sup>197</sup> Some commentators pointed out that casino slot machines are significantly more secure and more stringently regulated than are the new digital voting machines. The nonpartisan League of Women Voters withdrew its previous support of the new technologies.<sup>198</sup>

Many of the snafus occurred in California, where about 40 percent of all touch-screen voting equipment is used. By the end of 2003, California, Washington, and Nevada had passed or had introduced legislation to require

<sup>196</sup>Emily Montandon, "The Price of Democracy," *Government Technology*, 17 (April 2004): 30, 32.

<sup>197</sup>John Schwartz, "Report Calls for Fixes in High-Tech Voting," *New York Times*, 30 June 2004 (Netscape version).

<sup>198</sup>Cynthia Webb, "The Man From Sacramento," *Washington Post*, 17 June 2004 (Netscape version).



VVPATs; other states did so in 2004. In April 2004, California Secretary of State Kevin Shelley decertified electronic voting machines in several counties, ordered some counties to halt plans to switch to the new machinery, mandated stricter security for e-voting machines, and issued new standards for creating and using verifiable paper trails with DREs. In some counties, vendors and officials agreed to go along with the secretary of state's orders, but in other locations such as San Bernardino, Riverside, and Kern counties, officials chose to sue over the decertification decision. Further purchases and installation of digital voting systems came to a standstill in the state, and the presidential election was a mere four months away.<sup>199</sup>

The federal Election Assistance Commission (EAC) established by HAVA, is supposed to serve "as a national clearinghouse and resource for information and procedures with respect to the administration of Federal elections" as well as "to establish minimum election administration standards for States and other units of local government with the responsibility for the administration of Federal elections..."<sup>200</sup> Pursuant to these purposes, Congress appropriated in 2003 \$1.5 billion, of which \$650 million for Title I activities was distributed by the U.S. General Services Administration (GSA) to the states. These funds could be spent to (1) improve the administration of elections for Federal office, (2) educate voters concerning voting procedures, voting rights, and voting technology, (3) train election officials, poll workers, and election volunteers, (4) develop the state plan required for payments to be submitted under part 1 of subtitle D of title II, (5) improve, acquire, lease, modify, or replace voting systems and technology and methods for casting and counting votes, (6) improve the accessibility and quantity of polling places, including providing physical access for individuals with disabilities, providing nonvisual access for individuals with visual impairments, and providing assistance to Native Americans, Alaska Native citizens, and to individuals with limited proficiency in the English language, and (7) establish toll-free telephone hotlines that voters may use to report possible voting fraud and voting rights violations, to obtain general election information, and to access detailed automated information on their own voter registration status, specific polling place locations, and other relevant information. Because the four commissioners were not confirmed until mid-December 2003, the remaining \$830 million for FY 2003 was not disbursed. Compounding the aid situation was the HAVA requirement that states had to develop state election plans and have them published in the *Federal Register* at a cost to the EAC of \$800 million. This led to a classic implementation predicament, as described by Leslie Reynolds, executive director of the National Association of Secretaries of State: "They [EAC] can't send out the grant money until the state plans are published, but they

<sup>199</sup>Ibid.

<sup>200</sup>U.S. Election Assistance Commission, *About the EAC* ([www.eac.gov/about.asp](http://www.eac.gov/about.asp)).

don't have enough money in their budget to publish the state plans. So it is a bit of a mess right now."<sup>201</sup>

The EAC has more on its agenda than publication of state election plans. HAVA mandated numerous changes in election procedures and standards, and the EAC is responsible for their enforcement. However, as the commission's chairman, DeForest Soaries, Jr., lamented, the agency suffers from a massive lack of funding,<sup>202</sup> yet an increase from \$1.5 billion to \$10 billion is only proposed for FY 2005. Tim Storey, an NCSL senior fellow, captured the implementation dilemma for the states by pointing out that:

States are sort of reeling with the implementation of HAVA, so the thought of a new federal mandate across the one [VVPAT] the states haven't even implemented—I'm not sure it's the right time for that . . . HAVA mandates a lot of new equipment purchases, and of course, you don't want to get too far down the line and have the feds come back in and change the law again when you've already done a fair amount of purchasing.<sup>203</sup>

If the shift to DRE voting machines in California and other states was problematic, the situation in Florida bordered on the chaotic. In 2001, Florida committed \$32 million to reform its electoral system and to purchase optical scanning machines to replace the punch-card machines that were at the heart of the 2000 election fiasco.<sup>204</sup> Governor Jeb Bush declared the new voting system a "model for rest of the nation," but this optimism was dashed by blunders and failures that continued to make Florida, in the words of the *Miami Herald*, "a cause for shame."<sup>205</sup> The Republican-led legislature, for example, passed new laws overhauling the state electoral system, but refused to change county election commissioners to a nonpartisan status. A new state rule excluded new touch-screen machines from manual recounts, prompting voting rights groups to file lawsuits to overturn the ban. The legislature also tried to keep registration records secret, but was stopped by the state courts. This judicial decision paved the way for an examination of voter rolls to remove suspected felons. The state sent each county a new list of registered voters whom it suspected were felons and asked the counties to verify the list, and if felons were discovered, to remove them from the voter rolls.<sup>206</sup> Given that this procedure was one of the biggest problems in 2000, especially associated with discrimination against black voters, civil rights groups were infuriated. The CNN television

<sup>201</sup>Emily Montandon, "The Price of Democracy," *Government Information Technology* 2 (April 2004): 50.

<sup>202</sup>M. Mindy Moretti, "Commission publishes state voting plans, money to follow," *National Association of Counties*, 5 August 2004.

<sup>203</sup>Montandon, "The Price of Democracy," 50.

<sup>204</sup>John Kincaid, "The State of American Federalism, 2000-2001: Continuity in Crisis," *Publius: The Journal of Federalism*, 31 (Summer 2001): 8-9.

<sup>205</sup>Jim DeFede, "Absentee ballot law is a joke that isn't funny," *Miami Herald*, 27 May 2004 (Netscape version).

<sup>206</sup>Abby Goodnough, "Election Troubles Already Descending on Florida," *New York Times*, 15 July 2004 (Netscape version).

network filed a lawsuit to obtain the state list in June 2004, and the Brennan Center sued the state to overturn the ban on felons, which the Center claims has affected more than one in four black men.<sup>207</sup> To make matters worse, when the Miami-Dade Election Reform Coalition filed a public records request for an audit of the 2002 governor's election, county officials said the records were missing from the new \$25 million electronic voting network. Upon consulting with technicians from Elections Systems, and Software, the firm based in Omaha that produced the new voting system, county officials found the records on a misplaced disk.<sup>208</sup> This appearance of a new disk raised more questions about the integrity of the new voting system. "It is becoming more and more clear every day—one obstacle after another, one mismanagement after another—that Florida's secretary of state's office cannot manage its election," said Sharon Lettman, deputy national field director of People for the American Way. For Lettman, "Democracy is in question in the state of Florida."<sup>209</sup>

The country-wide doubts about the integrity of the new voting machinery prompted Democratic members of the U.S. House of Representatives to write to U.N. Secretary-General Kofi Anan asking for international observers to monitor the November elections. Republicans reacted by passing legislation barring federal funds being used by the U.N. to monitor U.S. elections. However, the U.S. Department of State invited the Organization for Security and Cooperation in Europe to act as election monitors, and the Democrats agreed. The organization has a track record of election watching and had sent a small team in 2002 to monitor the midterm elections.<sup>210</sup> Serious concerns by African-American groups as well as other civil rights groups about Republican activities to keep minority voters away from voting booths underlies the calls for international monitoring of U.S. elections.<sup>211</sup>

### *The California Recall*

California's political culture is often held to be the most exotic of the 50 states, in part because it is the product of the three principal American political cultures originally identified by Daniel Elazar and in part because the state attracts a steady stream of new migrants, especially from overseas.<sup>212</sup> The recall election of Governor Gray Davis confirmed the state's reputation for idiosyncratic politics. Once the secretary of state certified the recall petition as valid on 23 July 2003, the lieutenant governor, as required by law, had to set an election date sometime during the next 60 to 80 days; 7

<sup>207</sup>Manuel Roig-Franiza, "Florida Again Faces Disputes Over Elections," *Washington Post*, 29 July 2004 (Netscape version).

<sup>208</sup>Anon, "ES&S defends system after '02 vote data found," *Omaha World-Herald*, 31 July 2004 (Netscape version).

<sup>209</sup>Roig-Franiza, "Florida Again Faces Disputes Over Elections."

<sup>210</sup>David de Sola, "International team to monitor presidential election," *GNN.com*, 9 August 2004 (Netscape version).

<sup>211</sup>Jo Becker, "Groups Say GOP Moves to Stifle Vote," *Washington Post*, 26 August 2004 (Netscape version).

<sup>212</sup>Daniel J. Elazar, *American Federalism: The View From the States* (New York: Crowell, 1972), pp. 114-115.

October 2003 was selected. Two hundred and forty seven individuals filed candidacy papers, and the secretary of state certified 135 as official candidates. The variety among the candidates was stunning; the list included (a) elected officials such as the sitting Democratic governor, the Democratic lieutenant governor, Republican state legislators, and local officials of both parties, (b) candidates of third parties such as the Green, Natural Law, Libertarian, and American Independent parties, (c) numerous Republican and Democratic business and professional persons, (d) celebrities such as political commentator Arianna Huffington, porn star Mary Carey Cook, adult-magazine publisher Larry Flynt, television child actor Gary Coleman, and action-film star Arnold Schwarzenegger, (e) ordinary citizens, often with names that mimicked more famous personages such as Michael Jackson, Edward Kennedy, and Richard Simmons, and (f) individuals pushing unique causes, including “fairness for singles,” the elimination of public schools, and amnesty for all illegal aliens.<sup>213</sup>

While the candidates campaigned in what became labeled as a political “Gong Show,”<sup>214</sup> the election itself was held hostage by several legal challenges. Most important, the ACLU filed a lawsuit in federal court to stop the election on the grounds that thousands of persons would be disenfranchised by the use of punch-card voting machines, as had happened in Florida. Because the counties still using punch-card equipment encompassed 44 percent of the state’s population, and several of these counties accounted for large portions of the state’s minority voters, the ACLU argued that the “equal protection” clause of the U.S. Constitution would be violated. A three-member panel of the Ninth U.S. Circuit Court decided to halt the election, but on further review by the full 11-member court, the election was reinstated a mere 14 days before its scheduled date.<sup>215</sup> The final winner of this turbulent election was Arnold Schwarzenegger, who exploited his celebrity name recognition and demonstrated his media and political savvy to define himself as a political moderate more interested in action than in partisan posturing. Although voters were split in their opinion of Schwarzenegger, an overwhelming percentage of voters disapproved of Governor Davis’ performance; thus, Davis’ defeat rested primarily on the voters’ perception of his performance in office and less on the remedies proposed by his opponents.<sup>216</sup>

Questions quickly arose as to whether Schwarzenegger, a political amateur, could solve California’s fiscal crisis. Half of the state’s money pays

<sup>213</sup>Larry N. Gerston and Terry Christensen, *Recall!: California's Political Earthquake* (Armonk, NY: M.E. Sharpe 2004), pp. 60-81.

<sup>214</sup>Dean E. Murphy, “In California, Legal Moves and Lap-Dancing, Too,” *New York Times*, 18 September 2003 (Netscape version).

<sup>215</sup>Gerston and Christensen, *Recall!: California's Political Earthquake*, p. 66; William Booth, “Appeals Court Reinstates Oct. 7 Recall Election,” *Washington Post*, 23 September 2003 (Netscape version).

<sup>216</sup>John M. Broder, “Voters Voice Deep Dissatisfaction With Governor’s Record,” *New York Times*, 8 October 2003 (Netscape version); Dan Balz, “Voters Turn Davis Into The Fall Guy,” *Washington Post*, 8 October 2003 (Netscape version).

for education, which both parties promised to protect. As with other states, medical and social services plus corrections and prisons consume nearly another two-fifths of the budget, and a spending limit, though toothless, has been in place since the late 1970s. On the revenue side, 33 percent of California's money comes from its income tax (compared to the national average of 24 percent), and 22 percent comes from the property tax (compared to 29 percent nationally). The state's tax structure, like most states, is relatively regressive, with families in the top one percent of income accounting for only 7 percent of total state tax-burden (compared to 11 percent for the lowest 20 percent of families).<sup>217</sup> Schwarzenegger, with advice from counselors such as investment expert Warren Buffet and the newly appointed state finance director, Donna Arduin, who had held senior finance positions in Michigan, New York, and Florida, put forward a budget titled the California Recovery Plan.<sup>218</sup> The proposed budget would cut \$3.8 billion in state spending, of which 42 percent would come from health and social services and 25 percent would come from transportation. Programs for the mentally disabled, for immigrants, and for universities also were axed. The plan relied on borrowing up to \$15 billion to pay for the current state deficit and proposed a constitutional limit on state spending. Democrats derisively noted the plan was filled with reductions they had proposed previously, while conservative Republicans demanded even deeper cuts.<sup>219</sup> In less than a month, the new governor discovered the power of the state legislature as it rejected his recovery plan.

Governor Schwarzenegger went public and launched a statewide media campaign to convince voters to support his proposals to borrow funds to pay down the state debt and to reduce state spending. While the governor claimed that without approval of his plan the state would collapse into fiscal chaos, some of his opponents labeled the borrowing plan as an irresponsible transfer of the current debt to future generations. Other opponents demanded more radical budget cuts, and others argued for a temporary increase in income taxes. With the success of his governorship resting on the fate of two ballot measures (Propositions 57 and 58), the governor committed his own money as well as funds raised from his supporters and had over \$10 million for a publicity blitz that overwhelmed his underfunded and politically divided opponents.<sup>220</sup> Voters approved the plan in early March 2003, and by mid-May the governor sent the legislature a revised budget plan.

<sup>217</sup>William Booth, "Calif. Budget Fix Is Easier Said Than Done," *Washington Post*, 8 September 2003 (Netscape version).

<sup>218</sup>Dean E. Murphy, "Schwarzenegger Outlines Plan to Handle California Debt," *New York Times*, 19 November 2003 (Netscape version); Alan Greenblatt, "The Calculator," *Governing* 17 (January 2004): 18.

<sup>219</sup>Dean E. Murphy, "Schwarzenegger Aide Offers First List of Proposed Budget Cuts," *New York Times*, 26 November 2003 (Netscape version).

<sup>220</sup>John M. Broder, "Schwarzenegger Selling Bond Act, and Himself," *New York Times*, 20 February 2003 (Netscape version).

The new budget was crafted through a series of negotiations with important and powerful interest groups, including local government officials, teachers' unions, and the leadership of the state's colleges and universities. The governor convinced these groups to trade short-term budget cuts for promises of restored financing in the future. As he had done with the ballot proposals, Schwarzenegger went over the heads of the legislators and left them on the sidelines as he cut deals with many of the legislators' key constituents.<sup>221</sup> Legislative opponents were not pleased by this strategy. It is important to note that the budget fight was not simply one of a Republican governor frustrated by "girlie-men" Democratic legislators.<sup>222</sup> Republican legislators as well as local government officials were not pleased with parts of the plan, nor were they supportive of Democratic counter proposals.<sup>223</sup> The legislature's two-thirds vote requirement for passage of a budget, as it had done in previous years, contributed to the gridlock. This situation was nothing new to California nor to many other states as it resulted fundamentally from the intransigence of those opposed to any new taxes versus those opposed to any further cuts in human services programs and education. The 30 June constitutional deadline for an approved budget was ignored, and the bargaining continued to the end of July when a budget compromise appeared to gain sufficient support to be passed. The revised plan exemplifies the compromises necessary to obtain the required supermajority: \$5 billion in borrowing, \$1.5 billion in creative accounting, no new taxes, \$5 billion in spending cuts, and an agreement to reform local government spending.<sup>224</sup>

*"Defend Yourself Federalism"*

Across the country, Virginia replayed the California budget battle, but the partisan lines were a Democratic governor squared off against a Republican legislature. However, the basic policy division was essentially the same—the collision of a "no new taxes" stance with a "no more cuts in expenditures" stance. Also, Virginia Republicans were as factionalized as California Republicans—between those who opposed taxes because they hampered economic growth and those who opposed reductions in state spending to maintain a quality of life that is critical to attracting new investment and skilled workers. The results were different; Virginia enacted tax increases.<sup>225</sup>

<sup>221</sup>John M. Border, "The Schwarzenegger Game Plan: Bypass the Politicians," *New York Times*, 14 May 2004 (Netscape version).

<sup>222</sup>John M. Broder, "Schwarzenegger Calls Budget Opponents 'Girlie Men'," *New York Times*, 19 July 2004 (Netscape version).

<sup>223</sup>Associated Press, "The Political Spat Is Intensifying in California," *USA Today*, 6 July 2004 (Netscape version).

<sup>224</sup>Associated Press, "Schwarzenegger and lawmakers agree on budget," *USA Today*, 27 July 2004 (Netscape version).

<sup>225</sup>James Dao, "A Governor's Hard Sell: Higher Taxes in Virginia," *New York Times*, 20 January 2004 (Netscape version); Michael D. Shear and Chris L. Jenkins, "Va. Passes Landmark Increases in Taxes: \$1.36 Billion Measure Freezes Car Relief," *Washington Post*, 28 April 2004 (Netscape version).

Solutions to state fiscal problems ultimately turn on how compromises can be crafted between these two camps. This political fault line has a long history in state government. The issue not only pits Democrats against Republicans, but in today's political alignment with numerous states (and the federal government) governed by Republican majorities, the issue splits Republicans into factions. These intraparty factions are also intergovernmental in composition because state aid to localities as well as local authority to tax are elements bargained over by the opposing factions and relevant interests. The intergovernmental relations of state and local policy problems is a critical political arena influencing their resolution.

The ratcheting up of ideological positions, evidenced by the rise of ALEC and ALICE, raises the level of rancor and further hardens positions among state policymakers. Conflict occurs not just along the tax-resistance versus service-demand axis, but it also occurs along other issue axes of civil rights, culture, lifestyle, and morals. The fiscal problems minimize the money available, and the ideological polarization makes the search for acceptable solutions even more difficult. As each order of government struggles with tax resistance in the face of growing service demands, heightened factionalization among policymakers increases barriers to intergovernmental solutions and has the effect of transforming "fend-for-yourself" federalism into "defend yourself federalism"—a Hobbesian version of competitive federalism.

### FEDERALISM IN COURT

If the goal of the U.S. Supreme Court's "federalism revolution" has been to more firmly fix the boundaries of national versus state authority, then the Court stepped back from that goal by ruling against states in several cases during the 2003–2004 session. The Court's federalism revival, according to Shep Melnick, addresses two key legal issues (1) *federal regulation of state and local government and officials*, and (2) *the jurisdiction of the federal courts*.<sup>226</sup> These two issues are "closely linked" around the use of private lawsuits to interpret and enforce federal regulation of state and local government. "To the extent the Court reduces the jurisdiction of the federal courts it reduces federal control over subnational governments."<sup>227</sup> Melnick further argues that critical to the effort to restrain the federal government is the Court's actions to restrict statutory claims against state and local governments.

In the major federalism case decided this last term, the Court rejected state government immunity from lawsuits under Title II of the Americans with Disabilities Act (ADA). Six disabled persons in Tennessee, including

<sup>226</sup>R. Shep Melnick, "Deregulating the States: Federalism in the Rehnquist Court," *Evolving Federalism: The Intergovernmental Balance of Power in America and Europe* (Syracuse, NY: Campbell Public Affairs Institute, Maxwell School of Citizenship and Public Affairs, Syracuse University, 2003): 109-141 [italics in original].

<sup>227</sup>*Ibid.*, 115.

one who refused to crawl or be carried up to a second floor county courtroom to answer a criminal traffic complaint, sued the state for access to the court. Justice John Paul Stevens, joined by Justices Sandra Day O'Connor, David Souter, Stephen Breyer, and Ruth Bader Ginsburg (concurring), ruled in *Tennessee v. Lane* that "states that fail to make their courthouses accessible to people with disabilities can be sued for damages under the ADA."<sup>228</sup> Although the opinion confined itself narrowly to the question of access to the courts, the ruling affirmed Congress' power to enforce equal protection and due process guarantees by abrogating state government immunity to suit. Congress based its authority on the Fourteenth Amendment (Section 5) to open the states to private lawsuits for failure to provide a broad array of public services and programs as part of the ADA. A year earlier, the Court declared Congress properly removed state immunity from suit under the Family and Medical Leave Act. *Lane*, in a direct way, continues the Court's insistence that state governments may not hide behind the Eleventh Amendment to restrict civil rights. It is interesting to note that in the Family Leave decision Chief Justice William Rehnquist voted in the majority, but dissented in the *Lane* case.<sup>229</sup>

Another Eleventh Amendment case in which the Court did not protect states from lawsuits brought under federal statute was *Frew v. Hawkins*.<sup>230</sup> Here, a class-action suit filed against Texas sought to hold state officials to a 1996 court-approved consent agreement that required the provision of a broad range of procedures as part of the state's Medicaid programs. When Texas made changes in its Medicaid program, the plaintiffs sued, charging Texas reneged on its agreement. The Fifth Circuit Court of Appeals backed the state by rendering a decision under the Eleventh Amendment. But a unanimous Supreme Court overruled the Fifth Circuit and declared state officials were bound by the consent agreement, even if they were not in office at the time the agreement was signed. The Court did suggest the state could seek a revision of the agreement if it found the requirements burdensome.

Other cases with a federalism effect included *Aetna Health Care Inc. v. Davila* and *Cigna HealthCare of Texas Inc. v. Calad* in which a unanimous Court ruled that the 1974 Employment Retirement Income Security Act (ERISA) preempted the laws of Texas and nine other states from granting patients in managed care plans a right Congress had not provided – the right to sue the managed care company for damages caused by refusing to cover treatment a doctor had deemed medically necessary.<sup>231</sup> Previously, the Fifth Circuit determined Congress had not intended to preempt damage

<sup>228</sup> *Tennessee v. Lane*, 541 U.S. 509 (2004).

<sup>229</sup> Marci Hamilton, "The Supreme Court's Federalism Cases This Term: A String of Decisions Upholding Federal Power Show the Portrayal of the Court as Extreme is a Caricature," *The Federalist Society for Law and Public Policy Studies* (Washington, DC: 3 June 2004).

<sup>230</sup> *Frew v. Hawkins*, 540 U.S. 431 (2004).

<sup>231</sup> *Aetna Health Care Inc. v. Davila*, 124 S. Ct. 2488 (2004), and *Cigna HealthCare of Texas Inc. v. Calad*.



suits based on state law that defined “ordinary care.” The Court based its reasoning on the managed care company’s right to include or not include particular treatments in the coverage provided by one of its plans.<sup>232</sup> In *Sabri v. United States*, the Court unanimously upheld Congress’ authority to criminalize acts of bribery by local officials who administered federal grant funds. Here, the Court rested its decision on the spending clause.<sup>233</sup> By a 5-4 vote, the Court undercut a 1937 law that protected state governments from interference by the federal courts in the area of the assessment, levy, or collection of state taxes. A challenge to Arizona’s use of income-tax credits for donations to private school education argued the credits constituted an unconstitutional support for religion. Arizona, in the Ninth Circuit Court, took the position that state courts were the proper venue to resolve a challenge to the state’s tax policy. Although 40 states backed Arizona’s position, the Ninth Circuit ruled the federal courts could hear constitutional challenges of state taxation. The Supreme Court in *Hibbs v. Winn* upheld the Ninth Circuit. Justice Ginsburg, writing for the majority, noted: “In decisions spanning near a half century, courts in the federal system, including this court, have entertained challenges to tax credits authorized by state law.”<sup>234</sup> Justice Anthony Kennedy in dissent opined, “state courts are due more respect than this.”<sup>235</sup>

The Court was not consistently hostile to state governments. State laws in 20 states that require persons in suspicious circumstances to identify themselves when stopped by the police were upheld in *Hiibel v. Sixth Judicial District Court*.<sup>236</sup> The case arose out of a suspected domestic assault in Nevada where a rancher refused to provide identification to a deputy sheriff investigating a telephone report of violence in the cab of a truck parked along a rural road. Hiibel was charged with a misdemeanor and fined \$250 after refusing 11 requests to identify himself. The Nevada Supreme Court upheld his conviction, so Hiibel appealed on Fourth Amendment (unreasonable search) and Fifth Amendment grounds (self-incrimination). The existing Court position on a person’s right to privacy had been enunciated in a 1968 decision, *Terry v. Ohio*, that permitted police to briefly detain and question citizens based on “reasonable suspicion” so that police may obtain information including a person’s identity as a routine part of their work (known as a “Terry stop”).<sup>237</sup> The question of identification during a “Terry stop” had never been clarified by the Supreme Court, and the case prompted the support of privacy advocates who feared in the Internet era the police would be able to obtain a large amount of information

<sup>232</sup>Linda Greenhouse, “Justices Limit Ability to Sue Health Plans,” *New York Times*, 22 June 2004 (Netscape version).

<sup>233</sup>*Sabri v. United States*, 541 U.S. 600 (2004).

<sup>234</sup>*Hibbs v. Winn*, 124 S. Ct. 2276 (2004).

<sup>235</sup>Gina Holland, “Supreme Court: Taxpayers Can Bring Federal Suits Challenging State Taxes,” *Washington Post*, 14 June 2004 (Netscape version).

<sup>236</sup>*Hiibel v. Sixth Judicial District Court*, 124 S. Ct. 2451 (2004).

<sup>237</sup>*Terry v. Ohio*, 392 U.S. 1 (1968).

about a person by merely entering his or her name in a database. By a 5-4 vote, the Court held: "Obtaining a suspect's name in the course of a Terry stop serves important government interests. The request for identity has an immediate relation to the purpose, rationale and practical demands of a Terry stop . . . answering a request to disclose a name is likely to be so insignificant in the scheme of things as to be incriminating only in unusual circumstances."<sup>238</sup> Justice Stevens strongly dissented to Justice Kennedy's majority opinion by arguing Hiibel had "acted well within his rights when he opted to stand mute." Libertarians were unhappy about the decision and commented that "the ruling makes it extremely difficult now for ordinary people to assert their constitutional rights against the government [the Court had] blurred the line between asserting your rights and committing the crime of obstruction of justice."<sup>239</sup>

The Court also supported state authority in *Nixon v. Missouri Municipal League* by holding the language of the Telecommunications Act was not sufficiently clear about whether it included the subdivisions of state government.<sup>240</sup> This case continued the Court's position that if Congress intends to displace state authority, Congress has to craft legislation so that its intention was manifestly clear.

However, *State of Alaska v. U.S. Environmental Protection Agency* offers an example where the Court overruled a state decision because Congress did explicitly express its intent on the power of a federal agency.<sup>241</sup> Alaska environmental officials wanted to permit the operators of the Red Dog zinc and lead mine to use less expensive pollution control equipment that would reduce pollutants by 30 percent. The EPA had ordered the mine to eliminate 90 percent of the pollution. The Court decided by a 5-4 vote that Congress gave the EPA wide latitude to enforce environmental laws. Surprisingly, Justice O'Connor, who normally supports states' rights, joined the Court's nationalists (Stevens, Ginsburg, Breyer, and Souter). Kennedy in dissent lamented, "After today's decision, however, a state agency can no longer represent itself as the real governing body. No matter how much time was spent in consultation and negotiations, a single federal administrator can in the end set all aside by a unilateral order."<sup>242</sup>

The Court's five-year debate over the role of judges and juries produced a 5-4 decision that invalidated the State of Washington's criminal sentencing system. Washington allowed judges to increase a convicted defendant's sentence beyond the normal range for the crime. Ten other states also use

<sup>238</sup> *Hiibel v. Sixth Judicial District Court*, 124 S. Ct. 2451 (2004).

<sup>239</sup> Associated Press, "People can't keep names from police, court says," *Omaha World-Herald*, 21 June 2004 (Netscape version); Linda Greenhouse, "Justices Uphold a Nevada Law Requiring Citizens to Identify Themselves to Police," *New York Times*, 22 June 2004 (Netscape version).

<sup>240</sup> *Nixon v. Missouri Municipal League*, 541 U.S. 125 (2004).

<sup>241</sup> *State of Alaska v. U.S. Environmental Protection Agency*, 540 U.S. 461 (2004).

<sup>242</sup> Associated Press, "Supreme Court Rules EPA Can Overrule State in Clean Air Case," *Washington Post*, 21 January 2004 (Netscape version).

sentencing guidelines that permit judges some “guided discretion.” The majority consisted of Justices Scalia, Stevens, Souter, Thomas, and Ginsburg. Scalia, in his majority opinion, held Washington’s procedure violated the Sixth Amendment right to trial by jury. “Juries, rather than a lone employee of the state, should make these decisions,” Scalia argued in *Blakely v. Washington*.<sup>243</sup> The line up of justices in this case matched the line up in *Apprendi v. New Jersey*, where four years ago New Jersey’s hate-crime statute was invalidated because state judges could increase the sentence if they found the crime was motivated by bias.<sup>244</sup> The majority then also reasoned that “any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.” The minority—O’Connor, Kennedy, Breyer, and Rehnquist—feared the new ruling would call into question federal guidelines where judges determine sentences based on a “preponderance of the evidence,” the legal system’s lowest standard of proof, and not on the highest standard of “beyond a reasonable doubt.” Breyer, who was an author of the current federal sentencing guidelines, worried that the ruling would result in separate jury trials for sentencing, a procedure now used only in death penalty cases. As a result of *Blakely*, the federal guidelines may now be on uncertain constitutional ground, leaving at risk the validity of thousands of sentences, both state and federal.<sup>245</sup>

Two cases involving religion and state governments contained questions pertaining to federalism. Joshua Davey, a college student in Washington, was refused financial aid from the state’s Promise Scholarship Program. The scholarship program grants awards to students on a merit basis and allows students to use the funds to attend colleges accredited in the state, even colleges with a religious affiliation. Davey wanted to study pastoral ministry, but he was denied aid because the scholarship program must comply with the state constitution’s prohibition on the use of public funding for religious instruction. Thirty-seven states have this type of constitutional provision, often termed a Blaine amendment. The Supreme Court on a 7-2 vote in *Locke v. Davey* upheld Washington’s refusal to grant aid to Davey.<sup>246</sup> The ruling may be a setback for advocates of publicly financed vouchers as a mechanism for allowing parents “school choice,” including schools offering religious instruction. In 2002, the Court supported vouchers as a neutral form of aid in *Zelman v. Simmons-Harris*.<sup>247</sup> Chief Justice Rehnquist stated in his majority opinion that Washington “has merely chosen not to fund a distinct category of instruction.”<sup>248</sup> The chief justice argued, “there are

<sup>243</sup>*Blakely v. Washington*, 124 S. Ct. 2531 (2004).

<sup>244</sup>*Apprendi v. New Jersey*, 530 U.S. 466 (2000).

<sup>245</sup>Linda Greenhouse, “Justices, in 5-4 Vote, Raise Doubts on Sentencing Rules,” *New York Times*, 25 June 2004 (Netscape version).

<sup>246</sup>*Locke v. Davey*, 540 U.S. 712 (2004).

<sup>247</sup>*Zelman v. Simmons-Harris*, 122 S. Ct. 2460, 2472 (2002).

<sup>248</sup>Fred Barbash, “High Court Allows States to Deny Scholarships for Religious Study: Ruling Is Departure From Recent Church-State Fights,” *Washington Post*, 25 February 2004 (Netscape version).

some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause.”<sup>249</sup> While the case put into opposition the two main constitutional clauses on religion, it also spoke to the authority of a state to develop its education policies as well as to whether state Blaine amendments are constitutional vis-a-vis the U.S. Constitution.

The most controversial state court opinion delivered in 2003 was the 4-3 ruling by the Massachusetts Supreme Judicial Court that homosexual couples are constitutionally entitled to marry. This decision in *Goodrich v. Department of Public Health* was quickly appealed by state lawmakers and religious conservatives.<sup>250</sup> The appeal was denied by a U.S. district court and by the First Circuit Court of Appeals in Boston. A stay request was filed with Justice Souter who referred it to the full Supreme Court. In May 2004, the Court refused to block the Massachusetts decision; thus, the nation’s first state-sanctioned marriages of same-sex couples could proceed.<sup>251</sup> The Massachusetts court decision was clearly based on the state’s constitution, but it is also clear that the U.S. Supreme Court’s decision in *Lawrence v. Texas* to strike down state government laws criminalizing sodomy established the position that homosexuals have a constitutional right to freedom, dignity, and “respect for their lives.”<sup>252</sup>

These cases suggest that the “Federalism Five” coalition of Rehnquist, Scalia, Thomas, O’Connor, and Kennedy is quite fragile and the “federalism revolution” has come to a standstill. The coalition fell apart in a number of cases, and its leader, the chief justice, often wound up in the minority. While there were some victories for state authority, there were more losses. A good example of the Court’s lack of interest in federalism as a first principle is the decision in *McConnell v. F.E.C.*<sup>253</sup> The case was a test of the Bipartisan Campaign Reform Act, or “McCain–Feingold” (the names of its sponsors in the U.S. Senate), designed to reduce the influence of money in campaigns by banning unlimited donations to political parties. Opponents argued the law violated states’ rights by limiting the ability of state political parties to raise funds. In a 300-page ruling, a 5-4 majority ignored the states’ rights claim despite the chief justice’s strong dissent. Kennedy, who was the swing vote, agreed to uphold the law’s ban on “soft money”—monies “not subject to existing federal caps on the amount individuals may give and which is outside the old law prohibiting corporations and labor unions from making direct campaign donations”—only if it would apply to federal candidates and officeholders.<sup>254</sup> It is also clear from *McConnell*, as well as many of the

<sup>249</sup>Linda Greenhouse, “Court Says States Need Not Finance Divinity Studies,” *New York Times*, 26 February 2004 (Netscape version).

<sup>250</sup>*Goodrich v. Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941 (Mass. 2003).

<sup>251</sup>Associated Press, “Supreme Court refuses to block gay marriages in Massachusetts,” *Omaha World-Record*, 14 May 2004 (Netscape version).

<sup>252</sup>*Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>253</sup>*McConnell v. F.E.C.*, 540 U.S. 93 (2003).

<sup>254</sup>Ann Gearan, “Supreme Court Upholds Political Money Law,” *Washington Post*, 20 December 2003 (Netscape version).

other cases, that the rationale for rulings rests less on principles of a fixed federalism and more on the individual justices' political positions. In a sense, federalism rests as much on the "political safeguards" within the Supreme Court as it does on the "political safeguards" within the American larger political system.

## CONCLUSION

By the end of 2003, partisan divisions in the national capital and throughout the country produced a return to the "50-50 nation" of November 2000. Although Republicans controlled all three branches of the federal government, this officially "unified" government behaved as if it were a "divided" government. The president continued to encounter stiff opposition to many of his proposals by members of his own party. Furthermore, certain factions within his party were openly critical, for different reasons, of presidential decisions. Some congressional Republicans criticized the conduct of the war on terror and the management of the post-invasion administration of Iraq. Other Republicans were dismayed by Bush's abandonment of conservative fiscal principles. Others worried that Congress did not engage in sufficient oversight of the executive branch, and thus had lost power relative to the White House.<sup>255</sup>

Within Congress, inter-institutional conflicts were common as the House and Senate frequently locked themselves into hardened positions that stalled important legislation such as the budget. The struggle for control of one chamber over the other was less a product of Republican inexperience with unified government than it was a product of each chamber's institutional features and how each chamber's leadership managed the institution. The majoritarian control by House Republican leaders clashed with the more consensual bipartisanship necessary in the Senate. But institutional features and management styles are not insurmountable obstacles to action if sufficient members in both chambers are willing to compromise. The inter-institutional conflicts reflect serious ideological differences within and between the chambers. Factions such as supply-side advocates or traditional fiscal hawks prefer inaction to any compromise of principle. To obtain votes from philosophical true believers, legislative leaders were forced to resort to unusual legislative provisions (e.g. the temporary nature of the tax cuts).

However, the increasing polarization among elected officials encompasses more than different positions on economic matters. The current inter- and intra-party clashes are fueled by issues of civil rights, culture, lifestyle, morals, and religion, and the positions expressed by elected officials are grounded in divisions within the general public. The rifts within American

<sup>255</sup>Carl Hulse, "Even Some in C.O.P. Call for More Oversight of Bush," *New York Times*, 31 May 2004 (Netscape version).

society over issues such as gay rights, the war in Iraq, the place of religion in the public sphere, freedom of expression in the media, have produced, according to some observers, “two parallel universes [in which] each side seeks to reinforce its thinking by associating with like-minded people.”<sup>256</sup> While debates exist over the validity of the divided nation thesis,<sup>257</sup> the polarization of the nation’s populace around strong ideological viewpoints has become so evident that the mass media has labeled this phenomenon as “Red–Blue America.” The sharp divisions within the general public offer opportunities for candidates and parties to exploit for their advantage. If political leaders such as a president take a public position on one side of a hot-button issue, the effect is to increase the degree of polarization as compared to an official who searches for common ground. The clash of cultures and lifestyles trumps the democratic art of compromise. The spirit of federalism embodied in the ideas of “shared rule,” respect for the integrity of others, and the pursuit of the common good in society withers in an ideologically driven political environment. Will the behavior of the candidates and parties in the 2004 presidential election bridge the gap between Red and Blue America or will it reinforce the division?

<sup>256</sup>John Kenneth White as quoted in David Von Drehle, “Political Split Pervasive: Clash of Cultures Is Driven by Targeted Appeals and Reinforced by Geography,” *Washington Post*, 25 April 2004 (Netscape version).

<sup>257</sup>John Tierney, “A Nation Divided? Who Says?” *New York Times*, 13 June 2004 (Netscape version).