Chapter 4
George W. Bush and the Spirit of Coercive Federalism
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This chapter examines the domestic presidency of George W. Bush in light of the dissipation of the spirit of federalism in the United States over the past 45 years. The federal system continues to function with no constitutional or major institutional change, but it does so without the spirit that animated American federalism during the cooperative days of the past.

The Spirit of Federalism: Elusive or Illusive?

The scholarship for which Michael Burgess is best known is his work on comparative federalism (e.g., 2006, 2012), in which, to paraphrase Star Trek, he sought to boldly go where no federalism scholar has gone before. His most recent work on the federal spirit creatively analyzes the writings of five prominent mid-to-late-twentieth-century students of federalism. What is striking about this august company is that four of the scholars were Americans—three of whom were born in the heartland: William S. Livingston in Ohio and Daniel J. Elazar and William H. Riker in the prairie states of Minnesota and Iowa. Only Carl J. Friedrich, a naturalized American, was born abroad (i.e., Leipzig).

Also striking is that all four Americans wrote during the heyday of cooperative federalism in the United States (roughly 1932–69) when the idea of a federal spirit seemed to capture federal reality. Three of them—Elazar, Friedrich and Riker—wrote their major federalism books during the 1960s. Livingston preceded them by a decade, but wrote when cooperative federalism was undergoing routinization and institutionalization during a decade (i.e., the 1950s) marked by a high tide of bipartisanship and socio-political consensus under the congenial leadership of Republican President Dwight D. Eisenhower (1953–61) who, rhetorically at least, sought to stem the tide of what he called centralization of the American federal system. What also is striking is that these scholars wrote when the states were still robust political partners in the federal system. Indeed, it was the robustness of states’ rights that led Riker (1964) despairingly to equate American federalism with racism.

What is further striking is that three of the Americans wrote on the very cusp of a new era of American federalism, an era of coercive federalism
(approximately 1969–present) marked by unprecedented federal dominance (Kincaid 1990)—although the contours of this new era were not readily evident until the late 1980s. Path dependencies in federal arrangements usually ensure gradual change, especially in a liberal democracy.

The sociological bases of federalism that Livingston observed in the United States in the early 1950s changed dramatically during the decades following US immigration reform in 1965. Riker wrote his major book just before the US Congress passed the Civil Rights Act of 1964 and the US Supreme Court mandated major changes in the redistricting of both state and federal legislative election districts (Wesberry, 1964). Both of these policy revolutions marked the onset of a sea change in American federalism. The Supreme Court’s redistricting rulings especially destroyed the 175-year-old electoral foundation of the party system observed by Riker, thereby also destroying the party foundation of cooperative federalism. Elazar published his *American Partnership* (1962) a year before President John F. Kennedy’s assassination, and the first edition of his celebrated book on American federalism appeared in 1966, just after Congress passed the Voting Rights Act of 1965, which authorized direct federal intervention in 17 states. The lectures underlying Elazar’s *Exploring Federalism* (1987) were delivered just after President Ronald Reagan (1981–89) had conducted an unprecedented series of negotiations with the nation’s governors, state legislators, mayors, county officials, and township officers aimed at striking a grand new intergovernmental bargain (Williamson, 1983). Reagan was the last president to do such a thing, and the last to make federalism an important issue in a presidential campaign and administration, although he dropped federalism as an issue in his 1984 re-election campaign and second administration. Friedrich (1968) published his singular federalism work just as riotous protests at the Democratic presidential nominating convention in Chicago signaled dramatic change in the operation of American political parties, especially the rise of primary elections.

The federal principles such as comity, mutuality, and partnership (Elazar’s favorite term for the American federal system) that Burgess (2012: 22) identifies as elements of the federal spirit were alive and well when the American scholars invoked the federal spirit in their work. But the developments of the mid-to-late 1960s initiated the close of the era of cooperative federalism and, with it, dissipation of the spirit of federalism that arguably animated that cooperative era. This dissipation was reflected in a comment made to this author by US Senator Carl Levin (Democrat, Michigan) in 1988: “There is no political capital in intergovernmental relations.” More and more issues were nationalized as the federal government vastly expanded its reach into American society, and elected federal officials felt less and less need to bargain and negotiate with elected state and local officials on important policy matters. Democrats came to view federalism “as a quaint, 18th-century relic, another disposable constitutional concept that stands in the way of ‘progress’ [...] Republicans pay lip service to federalism but too often toss it aside to achieve their own policy goals” (Rivkin and Foley, 2012).
As a result of nationalization, especially of cultural issues (e.g., abortion and prayer in public schools) that had been managed by the states since 1776, the national political system became more polarized. Today, political party polarization in the US Congress is at an unprecedented height. In turn, public trust and confidence in all governments has declined to historic lows, with trust in the federal government reaching such a low point that 46 percent of Americans believe that “the federal government poses an immediate threat to the rights and freedoms of ordinary citizens” (Newport, 2013). Furthermore, a recent survey of local government officials in Michigan found that they had even less trust in the federal government than did their fellow citizens. Only 4 percent of Republican local officials, 7 percent of Independents, and 12 percent of Democrats said that they trust the federal government always or most of the time (Ivacko et al., 2013).

Burgess concludes that new federal models are marked by “the absence of the federal spirit” and “that is possible to create a federal state that does not fulfil the conventional requisites of federation” (2012: 319). The United States demonstrates that it is possible to maintain a federal state that loses its federal spirit and, thus, no longer fulfils “the conventional requisites of federation.” There has been no constitutional change in the structure or institutions of US federalism since 1913 (when Amendment 17 authorized voter election of US senators), all of the states remain intact and able to be occasional feisty policy-makers, there is no movement to abolish federalism, and liberal democracy remains alive and relatively well. Yet, the system is no longer animated by the federal spirit.

George W. Bush and Five Historic Federalism Events

This chapter will illustrate this conclusion by examining the two-term presidency of George W. Bush (2001–09). Bush’s presidency is especially illustrative because Republicans have generally been regarded as more friendly to states’ rights and because Bush’s reign was marked by five historic events in American federalism: his controversial 2000 election, Bush v. Gore (2000), the terrorist attacks of September 11, 2001, the No Child Left Behind Act (NCLB) of 2002 and Hurricane Katrina (2005). None of these events, however, altered the course of American federalism. Instead, three of the events, as well as many policies advanced by Bush, furthered the course of coercive federalism (Kincaid, 1990, 2008, 2011a) whereby the federal government imposes its policy will on state and local governments.

Unlike Presidents Lyndon B. Johnson (1963–69), Richard M. Nixon (1969–74) and Ronald Reagan, Bush did not champion a state-friendly New Federalism, nor did he revive Reagan’s states-friendly federalism executive order (EO 12612), which President Bill Clinton revoked in 1998 (EO 13085) but then revived in weaker form in 1999 (EO 13132). Federalism was hardly a whisper in the 2000 presidential campaign. Republicans had largely abandoned federalism and states’
rights as viable issues by the end of Reagan’s presidency. Since then, federalism, to the extent it occasionally becomes a public issue, has been the rallying cry of the minority party in Washington, DC, which sometimes waves the federalism flag in opposition to policies of the majority party. In 2000, the Republicans had been the majority party in Congress since the 1994 elections. They had neither a need nor a desire to appeal to federalism in 2000 because they wished to capture the White House in order to advance a national agenda founded on free-market and socially conservative principles rather than federalism. Likewise, in 2004, and with the “war on terrorism” under way, neither Bush nor his Republican colleagues had incentives to campaign on federalism.

Brief analyses of five historically significant federalist events during the Bush years are presented below. These are not all of the historic domestic events that occurred during Bush’s presidency, but they are the most important intergovernmentally.

**Bush’s Electoral-College Victory: 2000**

The first event was Bush’s 2000 elevation to the presidency by an electoral-college vote of 271 to 266 for Bush against then-Vice-President Al Gore despite Bush’s loss of the popular ballot by 543,895 votes. This was only the fourth time since popular voting for electors was instituted by most states in the early 1820s that the popular-vote loser was the electoral-college winner. The last occurrence was in 1888 when Republican Benjamin Harrison became president despite losing to the incumbent president, Democrat Grover Cleveland, by 98,017 popular votes. Most contemporary Americans were shocked, therefore, by the outcome produced in 2000 by this quintessentially federalist provision of the US Constitution. They also were surprised because many were unaware that their votes do not directly elect the president.

The contentious vote recount in Florida where Bush defeated Gore by only 537 popular votes and, thereby, won the presidency with Florida’s 25 electoral votes, as well as debates over voting irregularities, embittered many Democrats who felt the election had been stolen from Gore and that Bush’s election was illegitimate. However, 83 percent of all Americans, including 68 percent of Gore voters, accepted Bush’s legitimacy (Gallup, 2000). Then, less than a year later, after the terrorist attacks of September 11, 2001, Bush’s popularity soared to unprecedented heights, as did also the public’s trust in the federal government (Cole et al., 2002). Bush was re-elected in 2004 by an electoral-college margin of 35 votes and a popular-vote margin of 3,000,176. Subsequent research, moreover, suggested that weather more than voting irregularities “may have played a critical role in determining the outcome” of the election in Florida because rain in some counties depressed Democratic voter turnout (Gomez et al., 2007: 660).

Although, in 2000, US Senator-elect Hillary Clinton (Democrat, New York) and others called for abolition of the electoral college, no change occurred because historical inertia has protected the electoral college against some 1,030 abolition
bills introduced in Congress since 1789. Dissolution of the electoral college, which would require amendment of the US Constitution, would be a fundamental alteration of the American federal system. Hence, Bush’s first election, while historic, was an anomaly. It left residues of bitterness among Democratic activists, but it did not alter the federal system or mar the Bush presidency with a permanent, public stain of illegitimacy.


The second historic federalism event was the US Supreme Court’s controversial ruling in Bush v. Gore issued two hours before midnight on December 12, 2000. By a 7:2 vote, the Court opined that the Florida Supreme Court’s ordering of a manual recount of ballots violated the equal protection clause of the Fourteenth Amendment to the US Constitution. By a 5:4 (conservative v. liberal) vote, the majority ruled that no other recount method could be established within Florida’s legal time-limit for certifying its presidential electors. Hence, the decision effectively awarded the White House to Bush.

A chorus of critics, mostly Democrats, accused the Republican-dominated Court of precipitating a constitutional crisis through gross partisanship and judicial imperialism. “Our political system blew up on Tuesday,” wrote one nationally prominent liberal columnist (Dionne, 2000). However, a national poll found that 61 percent of Americans trusted the Court to make the final decision, compared to 17 percent who trusted Congress, 9 percent, the Florida Supreme Court, and 7 percent, the Florida legislature. Fully 66 percent of Americans reported that Bush v. Gore had no impact on their confidence in the US Supreme Court, although 54 percent of Gore voters reported reduced confidence.

Critics also accused the Court of violating fundamental tenets of federalism and abandoning the Court’s own federalist jurisprudence by overturning the Florida Supreme Court’s ruling on a state-law question. In reality, Bush v. Gore represented continuation of a long line of Court rulings from U.S. v. Darby Lumber Co. (1941) through Garcia v. San Antonio Metropolitan Transit Authority (1985) and many others in which the Court has held that federalism provisions of the US Constitution, especially the Tenth Amendment, do not afford the states judicial protections against federal-government encroachments on their powers. The so-called “Federalism Five” conservatives on the Court did mount a modest “federalism revolution” from 1991 to 2001 in which they issued a number of surprising state-friendly rulings, such as U.S. v. Alfonso Lopez, Jr. (1995), but Bush v. Gore reflected the denouement of this mini-revolution and the Court’s return to nationalist normalcy. President Bush later replaced two of the “Federalism Five”—William H. Rehnquist and Sandra Day O’Connor—with John G. Roberts (the new chief justice) and Samuel A. Alito, Jr., neither of whom champions federalism and states’ rights. Consequently, Bush v. Gore reaffirmed coercive federalism, and Bush’s two conservative appointments to the Court have not tried to reverse the course of coercive federalism.
Domestic Terrorist Attacks: 2001

The terrorist attacks of 2001 (9/11) constitute the third historic event relevant to federalism during the Bush years. Here, Bush was widely praised for his responses. His popularity soared as a result, although years later, evidence of environmental and health damages produced by the collapse of the World Trade Center towers in New York City generated criticism of the administration that dovetailed with the wider criticism that emerged against Bush’s environmental policies. In 2001, however, the intergovernmental emergency-response system worked well, although numerous flaws were identified by subsequent analyses of the responses to this unprecedented event.

Many commentators predicted that 9/11 would produce a massive centralization of the federal system. Such centralization did not occur, however, even though, arguably, significant centralization occurred within the federal government as the president and his unitary-executive advocates sought to concentrate power in the White House vis-à-vis Congress and the federal courts. Centralization of the federal system beyond that already underway did not occur because (1) the complex constitutional, legal and political structure of the federal system poses a formidable barrier to any sudden, quantum leap in centralization beyond the incrementally coercive centralization that has been occurring since the mid-1960s and (2) the federal government lacks the fiscal and administrative capacity to respond unilaterally to domestic terrorism.

Federal officials have little choice but to cooperate with the nation’s 17,876 state and local law-enforcement agencies, which have 1.1 million full-time employees located in 12,766 local police departments, 3,067 county sheriff’s offices, 49 state policing agencies, 1,481 special-jurisdiction agencies, and 513 other local agencies. Likewise, the federal government must depend on the country’s 30,185 fire departments and numerous other governmental and non-governmental agencies that have disaster-prevention and response duties. Although, consistent with coercive federalism, the federal government has imposed various mandates on state and local governments and attached conditions (i.e., regulations) to federal grants-in-aid in the field of homeland security, overall, cooperation with some federal coercion, rather than substantial centralization, characterizes homeland security. In addition, 9/11 produced a significant increase in inter-state and inter-local cooperation, as evidenced, for example, by reinvigoration of the 50-state Emergency Management Assistance Compact (EMAC), originally approved by Congress in 1996, and by EMAC’s response to Hurricane Katrina in 2005, a response generally regarded as superior to that of President Bush’s Federal Emergency Management Agency (FEMA).

No Child Left Behind: 2002

The fourth historic federalism event was enactment of the 670-page NCLB in 2002, which mandates that all US elementary- and secondary-school students
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reach proficiency in reading and mathematics by 2014—a goal not achieved as of mid-2015. This law was Bush’s only major, intergovernmental policy achievement, one that was built on his education-reform experiences when he was governor of Texas. The NCLB was enacted in part because Bush’s popularity was high after 9/11 and he recruited important Democratic congressional support, especially from Senator Edward M. Kennedy of Massachusetts.

Although the NCLB is the descendant of the Elementary and Secondary Education Act of 1965 and its subsequent re-authorizations, the NCLB entails unprecedented federal intrusions into public K-12 education, which, traditionally, has been the domain of state and local governments. Even the governor and legislature of Utah, the state that voted most strongly for Bush, revolted against the NCLB as a violation of states’ rights. The NCLB quickly became the states’ bete noir because it goes far beyond federal funding for education by imposing costly testing and performance requirements for accountability and by mandating sanctions against under-performing schools.

Teachers strongly oppose the NCLB, and because state teachers’ organizations are the single most powerful lobbies in state capitols, they have pushed state legislators and governors to resist the NCLB. In 2005, the National Conference of State Legislatures blasted the NCLB as flawed, under-funded, stifling of state innovation, and unconstitutional. The National Education Association (NEA), the leading teachers’ lobby, and nine school districts unsuccessfully sued the US Department of Education, arguing that the NCLB is an illegal unfunded mandate. Because the NEA is a strong force in the Democratic Party, most congressional Democrats and presidential candidates have criticized the NCLB.

The act also produced rifts among Republicans. Traditional culturally and socially conservative Republicans, along with libertarian Republicans, have opposed the NCLB because they have opposed federal involvement in K-12 education generally. They supported President Reagan’s unsuccessful call to abolish the US Department of Education. For them, the NCLB is another big-government intrusion into a policy field that should be left to parents and local communities.

Nevertheless, key elements of the NCLB, especially its testing and performance-accountability requirements, are likely to endure, in part because the public has supported the idea of such requirements for decades, and the public’s reception of the NCLB remains generally positive. Moreover, a number of leading black and Hispanic civil rights organizations generally support the NCLB, and even the radical black activist, the Rev. Al Sharpton, co-authored an editorial “staunchly” supporting “NCLB’s core concept that schools should be held accountable for boosting student performance” (Klein and Sharpton, 2009). The act also is supported by liberal newspapers such as The New York Times and The Washington Post and by many education reformers, Democratic and Republican. Furthermore, President Barack Obama’s administration has signaled its intention not only to retain but also to strengthen the key testing and accountability provisions of the NCLB while also defusing some teacher opposition by revising certain rules and increasing funding for K-12 education. Consequently, the NCLB is likely...
to mark a major change in federal–state–local relations in public education, a substantial augmentation of coercive federalism, and a lasting legacy of the Bush administration.

Hurricane Katrina: 2005

The fifth historic federalism event, Hurricane Katrina, can be called the biggest intergovernmental failure in the US federal system since the Civil War (1861–65). All four relevant orders of government—city, county, state and federal—failed in their responses to this Category 4 storm, which struck Louisiana and Mississippi on August 29, 2005, devastating an area about as large as Italy and producing the costliest, most destructive natural-disaster in US history.

Although mayors, county executives, and governors have the first and largest set of responsibilities for responding to natural disasters, and even though governors at the time of Katrina had to request federal assistance through the president before the president could send federal aid, it is a mark of the nationalization of government and politics in this era of coercive federalism that the president has come to be viewed as the rescuer-in-chief. Consequently, even though the Democratic mayor of New Orleans, C. Ray Nagin, and the Democratic governor of Louisiana, Kathleen Blanco, failed in their first-response duties and were less than cooperative with Bush, the Republican president bore the brunt of the criticism for failing to respond quickly and effectively.

Natural disasters are political goldmines or landmines for presidents, depending on how they respond to them. The Bush administration failed catastrophically to respond to Katrina in a politically effective manner. Bush did declare a state of emergency for Louisiana from his home in Crawford, Texas, on Saturday, August 27, before the storm, but he continued his vacation. On Monday, while Katrina hit New Orleans, he went to Arizona and California to campaign for his Medicare prescription-drug program. On Tuesday, while New Orleans flooded, he went to San Diego and was photographed playing the guitar before returning to his vacation in Texas. Then, on Wednesday, he merely flew over New Orleans while thousands of people were trapped in the city clamoring for help. The president did not visit New Orleans until Friday, September 2. That was a huge political mistake in the face of internationally televised images of the more than 25,000 people who, under city direction, had taken refuge in the New Orleans Superdome and over 3,000 people who were stranded in the city’s Convention Center where there was little food, water and sanitation for days. Most of these people, as well as others stranded on rooftops around the city, were poor and black.

Along with the Iraq War and “war on terrorism,” the Katrina debacle is one of the most often cited failures of the Bush administration. One prominent commentator dubbed it “the Chernobyl of the American system” (Galbraith, 2008: xi). The governmental response to Katrina reflected an unusual coincidence of cascading institutional failures precipitated by three less-than-competent executive officials—Nagin, Blanco and Bush—who lacked the ability to correct those
failures in midstream. For example, FEMA, which has principal responsibility for federal responses to disasters, had been placed, as a result of 9/11, in the new US Department of Homeland Security (DHS) where it experienced institutional debilitation, partly because it also became a dumping ground for patronage appointees. Bush was widely ridiculed for patting the director of FEMA, Michael D. Brown, on the back on September 2, 2005 (during the then-obvious FEMA failure to respond adequately to Katrina) and saying, “Brownie, you’re doing a heck of a job.”

Katrina reaffirmed but did not alter the rising federal role in disaster responses. The Bush administration (as well as state and local officials) responded much more adroitly to subsequent disasters, including Hurricane Ike (2008), which was the third most destructive hurricane ever to hit the United States. Future presidents will not likely forget the lessons of Hurricane Katrina, and President Obama certainly did not do so when Hurricane Sandy slammed into New York City and northern New Jersey, ultimately affecting 24 states in October 2012. In an effort to enhance considerably the president’s ability to serve as rescuer-in-chief, Bush convinced Congress in 2006 to enact the Insurrection Act Rider to authorize the president to federalize any state’s National Guard without the consent of the governor in any case of “a serious natural or manmade disaster, accident or catastrophe.” This rider was repealed, however, in January 2008 after all 50 governors lobbied vigorously for its repeal and after Democrats gained control of Congress in 2007. This repeal is one of the few examples of state officials obtaining reversal of an enhancement of coercive federalism.

**Overall Public Opinion**

Despite Katrina, however, the public appears not to have had an overly negative view of Bush’s intergovernmental actions. In February 2007, a national poll asked:

> Considering President George W. Bush’s response to New York City after 9/11 in 2001, his response to New Orleans after Hurricane Katrina in 2005, and his support for the NCLB education law, overall, would you say that President Bush’s policies for our state and local governments have been very helpful, somewhat helpful, not very helpful, or not at all helpful?

Despite Bush’s low job-approval ratings of only 32.7 percent at that time, 16.3 percent of the respondents termed Bush’s intergovernmental actions as “very helpful,” while 35.4 percent said “somewhat helpful,” 23.5 percent responded “not very helpful,” and 24.8 percent declared “not at all helpful.” In short, 51.7 percent fell on the positive side. Notable, though, is that 70.5 percent of Democrats fell on the negative side, while 81.2 percent of Republicans fell on the positive side of the question. In turn, 78.9 percent of black respondents fell on the negative side, while 63.3 percent of Hispanics and 55.8 percent of whites fell on the positive side (Kincaid and Cole, 2008).
These results are not necessarily surprising if one considers that Congress’s job-approval ratings were lower than Bush’s ratings in early 2007 and that, aside from Katrina, most criticism of Bush focused on the war in Iraq, foreign policy, domestic anti-terrorism actions, tax policies, consumer protection, and environmental protection. Most of these policies have federalism implications, but those implications are dwarfed by concerns about the substantive dimensions of these policies.

Bush’s Enhancements of Coercive Federalism

American federalism has been marked by periods of what have been termed dual federalism in the nineteenth century, followed by cooperative federalism in the early-to-mid-twentieth century and then coercive federalism. Under dual federalism, the federal and state governments were viewed as separate, independent spheres of government. Under cooperative federalism, the federal and state governments were seen as partners cooperating to solve national problems and serve public needs. Coercive federalism has been marked by unprecedented federal abridgements of state and local powers through regulations attached to federal aid, mandates, preemptions, and other devices intended to align states and localities with federal policy preferences.

Federal Aid

Under Bush, federal aid to state and local governments increased by 63.2 percent in nominal dollars (to $466.6 billion in 2008) and by 31.2 percent in constant (2008) dollars (compared to 60.5 percent and 30.7 percent respectively under Clinton). Hence, to the dismay of fiscal conservatives, federal aid continued its upward march under Bush, although Bush was not entirely responsible for the increase. Bush repeatedly proposed cuts in various federal-aid programs (e.g., the Community Development Block Grant), but congressional Republicans and Democrats refused to cut, or to cut deeply.

Federal aid under coercive federalism has been characterized by policy dictates attached to grants, a shift of federal aid from places to persons, and earmarking.

In terms of coercive conditions of aid, those attached to the NCLB are leading examples. The Adam Walsh Child Protection and Safety Act of 2006 also imposed various requirements on the states. For instance, each state must establish a statewide registry of sex offenders that conforms to federal standards and is compatible with a new National Sex Offender Website. All states must have a three-tier classification of sex offenders. States failing to comply by July 2009 were slated to lose 10 percent of their funding under the 1968 Omnibus Crime Control and Safe Streets Act. Reauthorization of the Temporary Assistance for Needy Families (TANF) block grant in 2005 imposed tougher policy dictates on the states.
The Bush administration did, however, grant some waivers of federal law to allow states to experiment with policy innovations. One example was a Medicaid waiver to facilitate the introduction of a universal health-insurance program in Massachusetts under Republican Governor Mitt Romney. When Romney ran for the presidency against Obama in 2012, this state program became an albatross around his neck. President Obama sarcastically praised Romney for having originated the model for Obama’s major health-industry overall (dubbed Obamacare by critics), which Romney attacked during the campaign.

Although states need not accept federal aid, and they do reject aid when they dislike the purposes or conditions of some small programs (e.g., abstinence-only sex education), states are not fiscally able to reject many grants or to reject the federal government’s large grants. There were 1,099 grant programs in 2014 (up from 953 when Bush left office), and because most of the grants are important to various state and local governments and their constituents, the Bush administration was no exception to the long-term trend of using the federal government’s spending power to accomplish policy objectives that cannot be accomplished directly under the federal government’s constitutionally delegated powers.

Federal aid also has shifted from places to persons. In 1978, a historical high point of federal aid, only 31.8 percent of federal aid to states and localities was dedicated for payments to individuals for social welfare, Medicaid (health care for the poor) and the like. By 2000, aid for persons amounted to 64.4 percent, despite the fact that Bush restrained Medicaid spending and vetoed attempts by congressional Democrats to increase funding for the State Children’s Health Insurance Program. The single largest aid program is Medicaid, which accounts for about 45 percent of all federal aid to state and local governments. Some long-term consequences of this shift are that place-based aid for infrastructure, economic development, education, and the like has declined sharply; increased aid for social welfare has locked state budgets into programs ripe for escalating federal regulation and matching state costs; and local governments have experienced a steep decline in federal aid.

Another change has been congressional earmarking (i.e., state or local pork-barrel projects). Earmarks in appropriations bills increased from 1,439 in 1995 to 13,997 in 2005 and then dropped to 9,963 in 2006. The price of earmarks increased from $27.3 billion in 2005 to $29 billion in 2006. An estimated 11,144 earmarks costing $15 billion were embedded in Congress’s FY 2008 spending bills. Earmarking flourished under Bush because congressional Republicans used earmarks to curry favor with constituent interests; Democrats like earmarks too; and Bush did not wield his veto pen against spending (until Democrats took control of Congress in 2007). Although earmarks account for a tiny percentage of all federal spending, they symbolize the large increases in federal spending that occurred under Bush—who signed the first $2 trillion federal budget and then the first $3 trillion budget in US history.

The rise of earmarks is due, as well, to the shift of federal aid from places to persons. Faced with declining federal aid for place-based functions, members of
Congress scramble to find money for public facilities (i.e., roads and museums) and other tangible projects in their states and districts for which they can claim personal credit. In turn, state and local officials have been forced to lobby for earmarks as second-best sources of place-based funding, although members of Congress frequently ignore those officials and earmark money for projects that conflict with the needs and plans of state and local governments.

Mandates

Mandates (i.e., direct federal orders) also characterize coercive federalism. However, the 1995 Unfunded Mandates Reform Act (UMRA) reduced mandate enactments. Only 13 intergovernmental mandates having costs above UMRA's threshold have been enacted since 1995. One was a complex Bush-supported tax mandate that affected local governments in 2011.

Bush, however, forged creative circumventions around UMRA by developing de facto mandates, such as the REAL ID Act of 2005, which requires all states to replace all Americans' driver's licenses with licenses conforming to federal homeland-security standards. States argue that REAL ID is under-funded and could cost $11 billion for them to produce compliant licenses. States had to comply by May 2008. Strictly, REAL ID is not a mandate because states can opt out of it, but then, their residents' licenses will be unacceptable for federal-government purposes, such as boarding an airplane, riding Amtrak trains, purchasing a firearm, opening a bank account, applying for federal benefits and entering a federal building.

About 17 states (e.g., Maine and Washington) enacted anti-REAL ID measures in which they refused to participate, expressed opposition to the law and/or asked Congress to amend or repeal the law. In 2007, Senator Susan Collins (Republican, Maine) introduced a bill in Congress to delay implementation. When it appeared that she had a veto-proof majority behind her bill, the DHS issued new rules in early 2008 that extended compliance deadlines and allegedly reduced state implementation costs to about $3.9 billion.

Preemption of State Law

Federal preemptions (i.e., displacements) of state laws under the US Constitution's supremacy clause are another characteristic of coercive federalism. Bush furthered this trend. US Representative Henry Waxman (Democrat, California) reported in June 2006 that during the previous five years, Congress had voted at least 57 times to preempt state laws; of those votes, 27 yielded preemption bills signed by President Bush.

This was well symbolized by the Class Action Fairness Act of 2005, strongly supported by Bush. This law moved from state to federal courts most class-action lawsuits involving at least 100 plaintiffs, two-thirds of whom live in different states, seeking $5 million or more in damages. Federal judges will apply state consumer-protection laws in such cases, but federal procedural law will govern
the cases. This act, complained Senator Harry Reid (Democrat, Nevada), "turns federalism upside down by preventing state courts from hearing state law claims" (Labatan, 2005).

The Protection of Lawful Commerce in Arms Act of 2005 preempted state laws by prohibiting civil-liability suits in state courts against firearm and ammunition manufacturers, distributors, dealers, and importers when their products are used criminally or unlawfully by a third party. This law also dismissed existing lawsuits.

In an extraordinary action in March 2005, Congress enacted a bill signed by President Bush allowing a federal court to review the vegetative-state case of Terri Schiavo in Florida and possibly order her feeding tube reinserted. Only 58 House members voted against the bill. One dissenter, Representative Charlie Dent (Republican, Pennsylvania), said, this matter was "really a province of the states" (Anon, 2005). The case reached the US Supreme Court quickly, but the Court declined to hear it. The state-court ruling was thus upheld, and Schiavo died a week later. This action, however, damaged Bush and congressional Republicans because polls showed that most Americans, including Republicans, opposed federal intervention.

Bush also used executive rule-making aggressively to advance preemption when Congress dragged its feet. For the first time in its 33-year history, for example, the Consumer Product Safety Commission issued a rule in 2006 on mattress flammability that preempted state laws that set higher standards and included language in the preamble to protect mattress manufacturers from state-court lawsuits when their mattresses conform to the new federal standard.

The pace of preemption under Bush was consistent with that of presidents since Lyndon B. Johnson, but differed from the policy preferences of most Democrats because most of Bush's preemptions displaced state business regulation and consumer protection laws in response to business preferences to be regulated (or de-regulated) by one 500-pound gorilla in Washington, DC, rather than 50 monkeys on steroids. Consequently, many Bush statutory preemptions could be repealed by congressional Democrats, and President Obama has reversed some of Bush's administrative preemptions; however, Democrats enact preemptions that advance their policy preferences.

Other Characteristics of Coercive Federalism

Other dimensions of coercive federalism include a decline of intergovernmental tax immunities (mainly federal intrusions into state and local tax bases); federalization of state criminal law, primarily to "get tough" on crime; the demise of cooperative intergovernmental institutions; a decline of intergovernmental political cooperation; and numerous federal court orders issued against state and local governments.

For example, the Economic Growth and Tax Relief and Reconciliation Act of 2001 had substantial negative impacts on state tax systems (e.g., reduction
of the estate tax), largely because most state tax systems have been coupled to the federal tax system since the era of cooperative federalism. The number of federal criminal laws increased from about 4,000 in 2000 to about 4,450 by 2007 (Baker, 2008). The Bush administration did nothing to revive intergovernmental institutions such as the US Advisory Commission on Intergovernmental Relations (de-funded by congressional Republicans in 1996), and the White House Office of Intergovernmental Affairs played a minor role and virtually no policy role in the Bush administration. Local officials were continually irate about Bush’s unwillingness to address their annual conventions (e.g., the National Association of Counties and National League of Cities), which have been addressed by most previous presidents since the 1950s. By contrast, Barack Obama engaged local officials even before he entered the White House because big-city mayors, especially, are mostly Democrats.

Conclusions

Consistent with previous presidents since Lyndon Johnson, President Bush pursued continuity, not reaction or revolution, in American federalism. This continuity was virtually inevitable because coercive federalism is the outcome of fundamental political changes in American government as well as socio-economic and demographic changes in American society that bloomed during the 1960s. Both Democratic and Republican presidents and members of Congress have fostered coercive federalism in order to achieve their policy objectives. That is, federalism or, more accurately, the path-dependent structure of the federal system, is a means, not an end to which one can attach some “spirit.”

Continuity was further ensured because Bush was a weak leader in most domestic respects. His administration rode the institutional momentum of coercive federalism and never articulated an alternate federalism vision. This momentum facilitated Republican policies because ever since Reagan sought to banish liberal activism from the federal government, Republicans in Washington, DC, have wanted to crush the liberal activism present in many state governments. However, the intergovernmental policy arena hosts a thicket of entrenched interests, especially liberal interests, that pose formidable barriers to Republican-preferred reforms. During Bush’s two terms, moreover, Democrats captured more governorships and state legislatures, from which they launched lawsuits and other attacks on Bush’s policies. Thus, after his hard-fought victory with the NCLB in 2002, Bush invaded Iraq but never triggered an intergovernmental turf war over Medicaid or other major federal–state–local programs.

These trends have not changed under President Obama. In fact, the political system is more polarized. The nine-member US Supreme Court, when considering federalism cases, almost always divides 5:4. After the November 2012 elections, Republicans controlled the US House of Representatives and Democrats controlled the US Senate and White House. The election also resulted in 30
Republican and 19 Democratic governors plus one independent. Strikingly, single-party control of most state legislatures (i.e., 27 Republican and 17 Democratic) and state governments (i.e., 24 Republican and 13 Democratic) marked a new high in party polarization among state governments. Consequently, even state and local officials, divided along party lines, do not cooperate as much among themselves in pressing their interests in the federal arena as they did during the days of cooperative federalism. The peak organization, the National Governors Association, was remarkably bipartisan from its founding in 1908 until the late 1980s, at which point it began to fracture. Today, the Democratic Governors Association and the Republican Governors Association are more important than their parent national association.

Yet American federalism endures despite the loss of a federal spirit because the constitutional terms and institutional structures of the federal system are deeply path dependent, and political actors have seen no need to alter those terms and structures in order to achieve their political objectives. After all, one of the most common observations about federalism is its flexibility. In fragile federal democracies, such developments might doom the federal system and liberal democracy too, but liberal democracy remains entrenched in the United States, and all governments—federal, state and local—remain highly protective of individual rights.

Furthermore, the American system remains predominantly cooperative in the realm of policy implementation. State and local officials have become accustomed to implementing federal policies and complying with federal rules, and federal officials often try to accommodate the concerns of state and local officials and even extend compliance deadlines, sometimes for years (Kincaid, 2011b). Federal, state and local law-enforcement officials, for example, have strong incentives to cooperate regularly. This administrative cooperation probably reflects more of a spirit of professionalism than of federalism, although when federal administrators regard their state and local counterparts as equals, as they sometimes do, glimmers of the spirit of federalism shine through the institutional interstices of the federal system’s administrative underbelly.

References


*U.S. v. Darby Lumber Co.*, 312 U.S. 100 (1941).