

# CONTEMPORARY U.S. FEDERALISM: COERCIVE CHANGE WITH COOPERATIVE CONTINUITY

## John Kincaid

Robert B. & Helen S. Meyner Professor of Government and Public Service and Director of the Meyner Center for the Study of State and Local Government, Lafayette College

SUMMARY: 1. Components of Coercive Federalism. 1.1. Federal Grants. 1.2. Preemptions of State Powers. 1.3. Mandates. 1.4. Taxation. 1.5. Federalization of Criminal Law. 1.6. Demise of Federal Intergovernmental Institutions. 1.7. Decline of Political Cooperation. – 2. The Supreme Court's Federalism Sputter. – 3. Origins of Coercive Federalism. – 4. Federal-State-Local Administrative Cooperation. – 5. State Policy-Activism. – 6. Conclusion. – References. – *Abstract-Resum-Resumen*.

---

Contemporary American federalism exhibits historically unique characteristics while retaining characteristics associated with two previous eras of federal history commonly called “dual federalism” and “cooperative federalism.” U.S. federalism today can be described as “coercive” because major political, fiscal, statutory, regulatory, and judicial practices entail impositions of many federal (i.e., national government) dictates on state and local governments. This era began in the late 1960s and followed a 35-year era of cooperative federalism. Coercive federalism has involved a shift in federal policy-making from the interests of places (i.e., state and local governments) to the interests of persons (i.e., voters and interest groups), thus making the federal government much more like a truly national government than ever before. Elected federal officials, as well as the federal courts, are much more responsive to nationwide election coalitions, campaign contributors, and interest groups and much less responsive to the elected officials of state and local governments than they were during the eras of dual and cooperative federalism. State and local officials have no privileged voice in Congress or the White House as elected representatives of the people; instead, they must act like interest groups and compete with all

the other interest groups in the federal policy-making arena where, frequently, they cannot prevail against powerful interest groups that can bring crucial financial, ideological, and voter rewards and punishments to bear on the electoral fortunes of federal officials. As U.S. Senator Carl Levin (Dem-Michigan) commented to this author in 1988, "There is no political capital [for members of Congress] in intergovernmental relations," that is, in responding to the concerns of governors, state legislators, county commissioners, mayors, and the like.

Somewhat paradoxically, though, substantial characteristics of cooperative federalism still thrive in the administrative interstices of the federal system. Federal, state, and local bureaucrats generally cooperate and coordinate with each other in implementing intergovernmental programs and policies. Federal officials (except for federal judges) are rarely coercive with respect to policy implementation, and state and local bureaucrats rarely obstruct implementation. Even elected state and local officials are usually cooperative with respect to policy implementation. Of course, conflicts arise in intergovernmental administrative relations, but bargaining and negotiation are the principal tools of conflict resolution, with recourse to the courts being a last resort.

A third facet of American federalism echoes dual federalism insofar as it exhibits the continuing vitality of the constitutionally reserved powers of the states, which allow them to enact a wide range of domestic policies, as well as the federal government's willingness to leave some space for independent state action in some policy fields otherwise occupied by the federal government. This third facet further embodies another characteristic of the system, namely, as James Bryce noted in 1893, the ability of federalism to enable "a people to try experiments in legislation and administration which could not be safely tried in a large centralized country" (Bryce 1907: 353). U.S. Supreme Court Justice Louis D. Brandeis later referred to this facet of federalism as the states serving as laboratories of democracy (*New State Ice Company* 1932). Indeed, one of the salient characteristics of U.S. state and local governments today is a high level of policy activism and innovation (e.g., climate-change initiatives, health-care reforms, and stem-cell research programs).

## 1. Components of Coercive Federalism

Coercive federalism consists, mainly, of the following elements.

## 1.1. Federal Grants

For one, federal grants-in-aid to state and local governments display three new characteristics.

First, aid has shifted substantially from places to persons; almost two-thirds of federal aid to state and local governments is now devoted to payments to individuals (i.e., social welfare). Medicaid (health care for the poor), which accounts for almost 45 percent of all aid, is the leading example of this shift in federal aid. By contrast, in 1978, a historic high point for federal aid, more than two-thirds of all federal aid was dedicated to place functions (e.g., highways, education, criminal justice, economic development, and government administration). Among the long-term consequences of this shift is that place-based aid for infrastructure, economic development, education, and the like has declined steeply, thus requiring states and localities to allocate much more of their own monies to those functions. Increased aid for social welfare has also locked state budgets into programs that involve increasing federal regulation and matching state costs. For example, the states pay 22.9 percent to 50.0 percent of the cost of Medicaid, depending on their per-capita personal income. Medicaid has become such a large and expensive program that it consumes, on average, about 23 percent of state budgets. As such, Medicaid is now the second largest category of state spending (the first being elementary and secondary education). Local governments have experienced a steep decline in federal aid because the states manage nearly all social-welfare programs. Thus, nearly 25 percent of state revenues come from federal aid today. By contrast, only about 5 percent (compared to 15 percent in 1977) of municipal revenues come from federal aid. For example, although the number of cities receiving Community Development Block Grant (CDBG) funds directly from the federal government increased from 606 in 1975 to 1,128 in 2006, real per-capita CDBG funding plunged from \$48 in 1978 to \$13 in 2006 (€10.1 in mid-2006).

A second characteristic of federal aid under coercive federalism is increased use of conditions (i.e., regulations) of aid to achieve federal objectives that lie outside Congress's constitutionally enumerated powers and to extract more state-local spending on federal objectives. For example, Congress attached conditions to federal highway aid requiring all states to increase the legal purchasing age for alco-

holic beverages to 21 and later to lower the blood-alcohol level needed for a drunk-driving conviction. Constitutionally, these matters belong to the states, but the federal government was able to compel all 50 states to enact these policies by threatening to withhold federal aid for their highways. Such conditions, now often mistakenly called unfunded or under-funded "mandates," are a powerful federal policy tool. States that refuse to comply with these conditions lose federal program money in increasing proportions, depending on the duration of non-compliance. Because losses can amount to billions of dollars each year, all states comply with all conditions in the big multi-billion-dollar grant programs. The No Child Left Behind Act (NCLB) of 2002, a federal education law, is the states' current *bete noire* because of the act's costly student-testing and school-performance conditions.

The third recent notable federal-aid change under coercive federalism is congressional earmarking (i.e., state or local pork-barrel projects). An earmark is an appropriation of money for a specific project requested by a member of Congress. Earmarks in appropriations bills increased from 1,439 in 1995 to 13,997 in 2005 and then dropped to 9,963 in 2006, according to Citizens Against Government Waste. The total price of earmarks increased from \$27.3 billion in 2005 to \$29 billion in 2006. More than 50 bills, such as the Pork-Barrel Reduction Act and Lobbying Transparency and Accountability Act, were introduced in Congress in 2005-07 to end or reduce earmarking. None were successful. In January 2008, President Bush signed an appropriations bill passed by Congress that included a media-estimated 11,144 earmarks costing \$15 billion (Editors 2008).

Many state officials oppose earmarks. As a Colorado transportation department official commented: "Why do we spend 18 months at public hearings, meetings and planning sessions to put together our statewide plan if Congress is going to earmark projects that displace our priorities?" (Quoted in Mullins 2006).

## 1.2. Preemptions of State Powers

Federal preemptions of state laws under the U.S. Constitution's supremacy clause (Article VI) are another characteristic of coercive federalism. Preemption refers to the total or partial displacement of a

power exercised by the states by a federal law (see Zimmerman 1991; U.S. Advisory Commission on Intergovernmental Relations 1992; Epstein and Greve 2007). From 1970 to 2004, a period of 34 years, Congress enacted some 320 explicit preemptions compared to some 200 preemptions enacted from 1789 to 1969, a period of 180 years (National Academy of Public Administration 2006). Put differently, 62 percent of all preemptions in U.S. history have been enacted during the past 15 percent of U.S. history.

U.S. Representative Henry Waxman (Dem-California) reported in June 2006 that during the previous five years, Congress voted at least 57 times to preempt state laws. Of these votes, 27 yielded preemption bills signed by President George W. Bush.

For state officials, the most egregious recent (2006) preemption is the National Defense Authorization Act, which allows the president to federalize (i.e., take command of) any state's National Guard (state army and air-force units commanded by the state's governor) without the consent of the governor in the case of "a serious natural or manmade disaster, accident, or catastrophe" within the United States, Puerto Rico, or U.S. territories. This law was hastened along by the terribly incompetent relief effort in New Orleans that followed Hurricane Katrina in 2005.

It is also evident that President Bush will use the executive rule-making process to advance preemption when Congress drags its feet. For example, the U.S. Food and Drug Administration (FDA) issued a prescription-drug labeling regulation in 2006 saying that the FDA's approval of manufacturers' labels "preempts conflicting or contrary state law." The rule's preamble includes language that preempts state liability laws. Manufacturers who comply with the federal standard cannot be sued in state courts by persons injured by their products. Many Democrats accused the FDA of abusing its power. The National Conference of State Legislatures (NCSL) accused the FDA of inadequate consultation in formulating the rule, and other critics noted that the lawsuit-immunization provision was cleverly placed in the preamble, which is not usually subject to public comment. Ultimately, the federal courts will have to sort out this preemption issue, though meanwhile, some state courts might decide that they are not bound by the FDA's rule unless Congress explicitly affirms the preemption in legislation.

Many state attorneys general and other critics argue that these and other preemptions disadvantage consumers to the benefit of corporations. A spokesman for the president's Office of Management and Budget replied: "State courts and juries often lack the information, expertise and staff that the federal agencies rely upon in performing their scientific, risk-based calculations ... having a single federal standard can be the best way to guarantee safety and protect consumers" (Quoted in Labaton 2006).

The Supreme Court frequently upholds preemptions. Indeed, the formerly "Federalism Five" justices (Anthony Kennedy, Sandra Day O'Connor, William Rehnquist, Antonin Scalia, and Clarence Thomas) most often voted against the states in preemption cases even though they supported the states against federal encroachments in some other areas of law.

### 1.3. Mandates

Mandates are another component of coercive federalism. A mandate is a direct order from the federal government requiring state and local governments to execute a federal policy. The federal government can impose civil or criminal penalties on state and local officials who refuse to comply with a mandate. There has been a significant increase in mandating since 1964 compared to previous periods of federalism. Congress enacted one major mandate in 1931, one in 1940, none from 1941 to 1963, nine from 1964 to 1969, 25 during the 1970s, and 27 in the 1980s (U.S. Advisory Commission on Intergovernmental Relations, 1993). State and local officials especially criticize unfunded mandates, that is, mandates promulgated by the federal government without any federal money to help state and local governments comply with them. However, as a result of considerable state and local pressure as well as the desire of the new Republican majority in Congress to limit government, Congress passed the Unfunded Mandates Reform Act (UMRA) in 1995 (Posner 1998). This law, which constitutes one of the few restraints on coercive federalism, requires Congress to provide states and localities with federal money to pay for mandates that exceed \$50 million per year, unless Congress specifically votes not to fund the mandate's implementation. The law reduced mandate enactments, though it did not eliminate existing mandates. Only seven intergovernmental man-

dates with costs above UMRA's threshold have been enacted since 1995.

The most recent mandate was a 2006 tax law requiring state and local governments that spend more than \$100 million annually to withhold 3 percent of their payments to vendors for federal taxes and to pass that money on to the federal government. The law, which takes effect in 2011, was opposed by state and local officials. However, pursuant to the U.S. Supreme Court's ruling in *Printz v. United States* (1997), the law might be vulnerable to challenge as an unconstitutional commandeering of state and local governments. In *Printz*, the Court ruled that Congress could not compel (i.e., mandate) local officials to conduct federally required background checks on persons wishing to purchase guns.

A sizable new mandate is the anti-terrorism REAL ID Act of 2005. States argue that it is under-funded and could cost \$13 billion (€8.8 billion) for states to produce compliant driver's licenses that contain security features to prevent terrorists from obtaining actual or counterfeit licenses. Hani Hanjour, the man who flew the hijacked airliner into the Pentagon on 11 September 2001, had four driver's licenses and identification cards from three states. States, which must comply with the act by May 2008, can opt out of its rules, but then their residents' licenses will not be accepted for any federal-government purpose, including boarding an airplane, riding Amtrak trains, purchasing a firearm, opening a bank account, applying for federal benefits (e.g., Social Security, Medicaid, and Medicare), or entering a federal building. In May 2006, the NCSL, National Governors' Association (NGA), and the American Association of [State] Motor Vehicle Administrators said that the states need more federal money and another eight years to implement REAL ID.

Many state officials also regard costly conditions of federal aid as unfunded mandates, and they lobbied in 2006 and 2007 to amend UMRA so as to include conditions of aid in the act's definition of unfunded mandates. By one estimate, federal programs cost state and local governments some \$51 billion in 2004 and 2005 (Wyatt 2006). However, the likelihood of persuading Congress to add aid conditions to UMRA is almost nil. State and local governments are more likely to convince Congress to increase funding, though not fully, for such costly programs as No Child Left Behind and REAL ID.



## 1.4. Taxation

Another characteristic of coercive federalism is federal constraints on state taxation and borrowing, beginning especially with the enactment of limits on tax-exempt private-activity bonds in 1984. Federal judicial and statutory prohibitions of state taxation of Internet services and interstate mail-order sales are among the most prominent current constraints. In November 2004, Congress extended its 1998 Internet tax ban (i.e., the Internet Tax Non-Discrimination Act) to November 2007, at which time it extended the ban again to 2014. This federal law preempts state powers to levy taxes on Internet access, connections, and services (e.g., software downloads). The Supreme Court also has prohibited state and local governments from collecting sales taxes on their residents' postal, telephone, and Internet purchases of goods from other states. Congress, however, could permit states and localities to collect these sales taxes. In response, a number of states negotiated the Streamlined Sales and Use Tax Agreement to collect sales taxes on interstate mail-order sales. The agreement was implemented voluntarily among consenting states in October 2005. Although several large retailers voluntarily comply with the agreement, Congress has not approved the agreement and authorized states to require sales-tax collection by out-of-state vendors. Obtaining congressional recognition of the agreement, even with the new Democratic majority in Congress, will be difficult.

In 2005, the President's Advisory Panel on Federal Tax Reform recommended eliminating deductions for state and local taxes from individuals' federal income-tax liabilities. Most state and local officials oppose removing these deductions. This issue has a partisan electoral dimension because the average state-local tax payment in blue (Democratic) states was \$7,487 in 2005 compared to \$4,834 in red (Republican) states. State and local tax deductions equaled 5.9 percent of average income in the blue states and 3.7 percent in the red states (Maggs 2005). Because most state income-taxes are coupled to the federal tax code, state officials fear that changes in federal tax laws, especially tax cuts and retroactive changes, will reduce state tax revenues.

## 1.5. Federalization of Criminal Law

Another feature of coercive federalism is the federalization of criminal law, which has historically been predominantly a state respon-



sibility. There are an estimated 3,500 federal criminal offenses, more than half of which have gone into effect since the mid-1960s. These laws cover a wide range of behavior from terrorism to carjacking, disrupting a rodeo, impersonating a 4-H Club member,<sup>1</sup> and carrying unlicensed dentures across state lines. Generally, federal criminal laws are tougher than comparable state laws, including some 50 laws entailing capital punishment. Several federal laws also impose financial penalties on states that fail to incarcerate felons for federally prescribed periods of time.

Another aspect of this federalization of criminal law is an effort by the Bush administration to enforce federal death-penalty statutes more vigorously, and to do so, as well, in states that prohibit capital punishment. In 2006, for example, a federally empanelled jury in North Dakota imposed the death penalty in a murder case tried under federal law rather than state law. North Dakota does not have the death penalty, and this case was the first death sentence issued in the state since 1914.

## **1.6. Demise of Federal Intergovernmental Institutions**

Coercive federalism has been marked, too, by the demise of executive and congressional intergovernmental institutions established during the era of cooperative federalism to foster cooperation. Most notable was the death of the U.S. Advisory Commission on Intergovernmental Relations (ACIR) in 1996 after 37 years of operation. During the 1980s, President Ronald Reagan abolished the intergovernmental unit of the Office of Management and Budget, and congressional committees devoted to intergovernmental affairs declined and disappeared from view. There continues to be an office of intergovernmental affairs in the White House and in many executive Cabinet departments, but these units are primarily political in nature and informational in function.

1. 4-H is a 6.5-million-member youth organization (ages 5-19) with some 90,000 local clubs administered by the Cooperative Extension System of the U.S. Department of Agriculture (USDA). 4-H stands for head, heart, hands, and health.

## 1.7. Decline of Political Cooperation

There has also been a decline in federal-state cooperation in major intergovernmental programs such as Medicaid and surface transportation. Congress earmarks and alters programs more in response to national and regional interest groups than to elected state and local officials, who themselves are viewed as mere interest groups. A coalition led by Americans for Tax Reform (ATR) has even petitioned Congress to terminate the exemption from federal lobbying rules of state and local government lobbyists. The ATR also wants to deprive the NGA of state funding, labeling the NGA as just “another liberal lobbying group” (Ferrara 2005).

Presidential depletion of National Guard personnel and equipment for the Iraq war also reflects diminished cooperation. All 50 governors petitioned the president and the Pentagon for enhanced resources for their National Guard units and for replacements of equipment left in Iraq. About one-third of the U.S. ground troops in Iraq belong to state Army National Guard units.

## 2. The Supreme Court’s Federalism Sputter

From 1991 until 2002, the U.S. Supreme Court seemed to foster a federalism revolution by restricting the reach of Congress under the U.S. Constitution’s commerce clause, reviving state sovereign immunity under the Eleventh Amendment,<sup>3</sup> reinvigorating the Tenth Amendment,<sup>3</sup> and protecting state powers in a number of other ways. This so-called revolution caused a storm of controversy, and even on the Supreme Court, these state-friendly rulings were always 5-4 decisions, reflecting a sharply split Court over these matters (Kincaid 2001). Since 2002, the Court has abandoned this revolution such that federalism, as Justice Ruth Bader Ginsburg put it, has been “the dog that

---

2. This amendment states: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”

3. This amendment states: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

[doesn't] bark" (CNN 2003). This was reflected in two Eleventh-Amendment sovereign immunity cases in 2006, which held that states are not immune from suits from disabled prisoners brought under the Americans with Disabilities Act or from private lawsuits brought under federal bankruptcy law. The Court also ruled unanimously that the Eleventh Amendment does not protect local governments from lawsuits filed under federal law in federal courts (*Northern Insurance Company* 2006). Consequently, the Supreme Court, which had long aided and abetted the rise of coercive federalism and which remains more conservative than liberal, has not acted in any significant ways to reverse the course of coercive federalism.

### 3. Origins of Coercive Federalism

The initial origins of coercive federalism (Kincaid 1993, 1990) lie in the 1930s and 1940s when the federal government became the dominant fiscal partner in the federal system during the Great Depression and World War II. In 1927, spending by the federal government amounted to only 31 percent of all own-source government expenditures, compared to 52 percent for local governments and 17 percent for the states. The federal share had increased to 50 percent by 1940 and to 77 percent in 1958, fluctuating thereafter in the 62-69 percent range (64 percent in 2006). This change placed the federal government in a position to use fiscal tools to influence state and local government behavior.

Additionally, the New Deal of President Franklin D. Roosevelt (1933-45) and the Great Society of Democratic President Lyndon B. Johnson (1963-69) highlighted weaknesses in the ability of state and local governments to solve the problems of an urban-industrial society, cope with national crises, and ensure justice for various minority populations. Americans began to view the federal government as an engine for social change and personal benefits (e.g., Medicare and Medicaid enacted in 1965). The corrupt behavior of many northern urban political-party bosses and the odious practices of southern white supremacists discredited states' rights, prompting William H. Riker to declare: "if in the United States one disapproves of racism, one should disapprove of federalism" (Riker 1964: 155).

Furthermore, the rise of the New-Deal idea that the federal Constitution is a "living document" that judges and legislators must

adapt to modernity through liberal interpretation, coupled with cooperative federalism's view of the federal system as being one government serving one people under conditions of shared responsibilities (Grodzins 1974: 24), fostered a pragmatic federalism that motivated interest groups and public officials to shop among jurisdictional forums for favorable policies and to place policy objectives above traditional constitutional precedents. Constitutional questions of which government – local, state, or federal – is authorized to do what were replaced with political questions of which government can do what, a shift that almost always favored national power.

The rise of coercive federalism was also a massive effort to liberate persons from the tyranny of places, namely, state and local jurisdictions, which since the colonial era had governed all the key aspects of life that by the 1960s had come to be viewed as oppressive of blacks, Hispanics, women, gays, and other groups termed "minorities." Despite the genocidal policies of the federal government toward Indians on the frontier during the nineteenth century and the U.S. Supreme Court's historically weak human-rights record, by the 1950s it was the federal government that put on the mantle of individual-rights champion against reactionary, uncooperative states.

The era of politically cooperative federalism can be said to have collapsed in August 1968 during the Democrats' tumultuous presidential nomination convention in Chicago. Street protestors and inside reformers drove the traditional state and local party bosses out of the nominating system and reoriented the party's representative base from places to persons by mandating rules for proportional representation of blacks, women, young adults, and other minorities and by emphasizing primary elections to allow rank-and-file party members, rather than party leaders, to choose party candidates for state and federal elective positions. Republicans were more resistant to such reforms. Hence, while federalism quickly declined as a value for Democrats, Republicans still defended federalism, at least rhetorically—a position that benefited Richard M. Nixon's southern-state strategy for winning the 1968 presidential election by attracting historically Democratic white voters into the Republican Party.

The Chicago convention dramatically reflected the confluence of political, social, and cultural forces that had been unleashed during the late 1950s and early 1960s—a period of personal and politi-

cal liberation. The preeminent struggle for the liberation of persons from the tyranny of places was the black civil-rights movement, and in order to address movement demands, the federal government had to invade historic realms of state and local authority.

Social-movement demands for nationwide equality assaulted the legitimacy of the place diversity that had long been sustained by federalism, which, in turn, had helped to sustain state and local powers. Reformers asked, for example, why a woman should have a right to an abortion in one state but not in another. Interest groups spawned by these movements fostered public awareness of many other issues, such as environmental degradation and consumer protection, that crosscut state and local boundaries. More and more public matters were said to have negative interstate externalities requiring remedial action by the federal government.

By 1962, moreover, 90 percent of U.S. households had a television—a potent medium for social movements and for focusing public attention on the federal government in Washington, D.C. Television also changed political campaigns, reducing the role of local political-party foot soldiers in mobilizing voters and vastly increasing the role of national interest groups able to fund costly television advertising for their favored candidates.

The U.S. Supreme Court played a pivotal role, too. For one, it nationalized much of the U.S. Bill of Rights so as to protect individuals' rights against infringements by state and local governments, as well as the federal government. Beginning, as well, with *Brown v. Board of Education* in 1954-55, which struck down race segregation in public schools, the Supreme Court massively expanded federal power not only to protect individuals' rights but also to reform state and local governments. Although this judicial activism substantially abated after the Court voided state anti-abortion laws in 1973 (*Roe v. Wade*), the federal courts had achieved unprecedented levels of rights protection and intervention into state and local affairs, from which there has been little retreat, except in rights guarantees for criminals.

Second, the Court's "one person, one vote" rulings in 1964 (*Wesberry* 1964; *Reynolds* 1964) shifted representation in both the U.S. House of Representatives and the state legislatures from places to persons. Before 1964, most election districts conformed to county and

municipal boundaries, thereby emphasizing the representation of local government jurisdictions rather than individuals and social groups in legislative bodies. Counties, moreover, were the key power centers of the political-party system. The full impact of the new apportionment system was felt in the early 1970s, at which time Congress became more individualistic and "atomistic" (Hertzke and Peters 1992) as members became more attentive to interest groups representing nationally organized groups of persons and less attentive to hometown state and local government officials viewed as colleagues bound by ties of both community and party.

The last powerful political-party machines had collapsed by the mid-1970s, as symbolized by the 1976 death of Richard J. Daley, mayor of Chicago from 1955 to 1976. Northern urban machines caved in as white voters moved to the suburbs, the federal government imposed accountability rules on aid to cities, and the courts cleaned up municipal government. In turn, southern white political-party machines were decimated by the civil-rights movement, federal legislation and judicial action, and migrations of northerners into the newly air-conditioned Sunbelt. As a result, southern defenders of states' rights no longer controlled key committee chairs in Congress, thus opening the procedural floodgates for federal legislation to override state and local powers.

The machines' demise facilitated the rise of professional state and local bureaucracies and public-employee unions. When the political-party bosses controlled patronage employees, they faced little opposition to their prerogatives. Civil-service employees and unions, however, frequently welcome federal intervention, as in extensions of the U.S. Fair Labor Standards Act of 1938 to employees of state and local governments in 1968, 1974, and 1985. Civil-service employees sometimes solicit federal intervention to compel their state and local employers to provide better job benefits, more funds for their agencies, and more personnel for programs. In some cases, state and local bureaucrats have used the federal courts to extract funds or policy concessions from elected state and local officials.

The collapse of the traditional political-party system also opened the door for greater influence by large corporations and other national business interests over members of Congress and executive agencies. These interests (as well as business interests in the European Union)

have pressed the federal government vigorously and often successfully for federal preemptions of state and local regulatory powers. Ordinarily, corporations and other businesses prefer regulation (or deregulation) by one national regime rather than 50 state regimes and 87,525 local governments.

In short, contemporary coercive federalism reflects a historical culmination of forces set in motion at the founding of the United States. One such force was the purposes for establishing the federal union as articulated by Alexander Hamilton, James Madison, and John Jay in *The Federalist Papers*, namely, the protection of liberty for individuals and the construction of a great commercial republic. Fulfilling these purposes ultimately required increased assertions of federal power over the powers of the states and their local governments. A second force was set in motion by the existence of slavery at the time the U.S. was founded. This produced two tremendous upheavals in U.S. federal development—a military civil war from 1861-65 and a political-legal civil war from 1954-65—both of which generated federal coercion of state and local governments on behalf of black Americans. In addition, the first Earth Day demonstrations in April 1970 symbolized the emergence of new forces and issues, such as environmentalism, that were not contemplated by the founders but which generated public demands for action by the federal government.

#### **4. Federal-State-Local Administrative Cooperation**

Leaving behind political and judicial policy-making and entering the realm of intergovernmental administration of public policies, however, one finds fairly consistent patterns of intergovernmental administrative cooperation, the catastrophe of Hurricane Katrina in 2005 notwithstanding. Indeed, the failure of intergovernmental cooperation and coordination in 2005 triggered enormous controversy and almost universal condemnation because that failure was a shocking violation of long-standing federalism norms. By contrast, in January 2008, the Bush administration acknowledged persistent state complaints about implementation of the REAL ID Act. (For example, about 17 states—Arkansas, Colorado, Georgia, Hawaii, Idaho, Illinois, Maine, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Dakota, Oklahoma, South Carolina, Tennessee and Washington—passed leg-



islation or resolutions objecting to the REAL ID Act.) The administration extended the deadline for states to provide Americans born after 1 December 1964 with secure driver's licenses until 2011. The deadline for those born prior to that date was extended until 2017. The administration also reduced the states' compliance costs.

Administrative cooperation has deep roots in American federalism, dating back especially to concepts of intergovernmental cooperation articulated by Albert Gallatin in the early nineteenth century (Rothman 1972). Cooperation was, as Daniel J. Elazar pointed out, quite prevalent during the nineteenth-century era of so-called dual federalism when such state-federal interaction was, *a priori*, deemed non-existent (Elazar 1962). Such cooperation accelerated tremendously, of course, during the twentieth-century's era of so-called cooperative federalism (e.g., Clark 1938). Having such old and deep roots, therefore, coercive federalism has not smothered this cooperation; on the contrary, implementation of many of the federal policies imposed on state and local governments requires intergovernmental cooperation for their success. This state and local cooperation with federal coercion may seem paradoxical; however, it endures because various forces seek to sustain it.

For one, the carrots and sticks of federal grants-in-aid help to ensure cooperation. Federal aid accounts for about one-quarter of state-local budgets. All 50 states, for example, complied with the federal drinking-age condition attached to surface-transportation aid because no state could afford to lose the funds and because there is no apparent mechanism for the states to withhold the federal gasoline tax collected within their borders. Second, many federal statutes associated with coercive federalism contain penalties, including, in some cases, civil or criminal penalties, aimed at uncooperative state and local officials.

The courts also play roles in intergovernmental relations. Following the period of massive resistance by southern state and local governments to race-desegregation orders issued by federal courts in the 1950s and 1960s, state and local officials became generally cooperative with judicial decisions, which are seen as central to the rule of law. The federal courts stand as potential hammers to compel compliance; hence, state and local officials have incentives to cooperate with federal officials. In turn, federal officials, in seeking to foster compli-

ance, ordinarily negotiate and bargain with state and local officials before seeking judicial intervention.

Additionally, the U.S. federal system is not one of executive federalism (e.g., Germany) whereby states are constitutionally obligated to execute federal framework-legislation (see also *Printz* 1995). The federal government is expected, for the most part, to carry out its own policies or pay the states to do so. Given its very limited administrative capabilities, the federal government must seek the assistance of state and local officials. Federal administrators, therefore, usually have incentives to work cooperatively with their state and local counterparts. Furthermore, the federal government does not, per se, share revenue with the states or engage in fiscal equalization; thus, it does not need the administrative control and co-decision mechanisms usually required for such policies. Instead, the federal government operates a sprawling grant-in-aid system consisting of about 608 categorical grant programs and 17 block grants. Given that most federal-aid money flows through categorical grants, the federal government exercises control through the purposes for which the grants are established, but otherwise works cooperatively on the administration of those grants and usually allows state and local officials discretion in implementing those grants so long as each grant's purposes are realized, at least approximately. Block grants afford state and local officials even more discretion, although block grants have never accounted for more than about 18 percent of all federal aid.

Since the fall of massive resistance to race desegregation in the South, there has been no cultural, ethnic, religious, or linguistic region in the United States that has had strong incentives to thwart or distort intergovernmental administrative relations. Similarly, partisanship does not play a major role in intergovernmental administration. A predominantly Democratic state, for example, is not necessarily uncooperative, or less cooperative, than a predominantly Republican state with policies emanating from a Republican Congress and/or White House. In the political arena, there may be vigorous partisan conflict over such huge intergovernmental grant programs as Medicaid and surface transportation and over costly mandates such as environmental regulations, but once federal policies on these matters are enacted into law, there are strong incentives for local, state, and federal bureaucrats to cooperate across party lines to administer the programs as effectively and efficiently as possible.

In addition, before promulgating regulations to implement laws enacted by Congress, executive-branch agencies solicit public comment on their proposed regulations. State and local officials participate in this commenting process and otherwise lobby executive agencies to write regulations compatible with state and local preferences. State and local officials do not always prevail in this process, although they frequently prevail when they are united and vigorous in opposing the content of a specific proposed federal regulation.

Due to similar civil-service rules and shared professional norms, most federal, state, and local administrators blunt the edges of political partisanship so as to focus on cooperative task execution under existing rules and budgets. In addition, federal, state, and local administrators within policy fields often share the same education and training backgrounds and interact with each other in the same national and regional professional associations, which are usually more important to them than political-party affiliations. Federal, state, and local law-enforcement officials, for example, have common training and professional backgrounds as well as a general professional camaraderie that facilitate interagency cooperation.

Additionally, state and local administrators are often advocates of stronger standards and higher spending in their policy field. Thus, they often welcome federal intervention. State and local environmental officials, for example, are likely to welcome federal rules that set stricter environmental standards and require more state and local spending on environmental protection. Indeed, it is not uncommon for state and local bureaucrats to lobby for federal policies that are opposed by state and local elected officials who can be punished at the ballot box for implementing unpopular federal policies or raising taxes in order to pay for state or local implementation of those policies. By contrast, administrators are immune from electoral retribution.

Interest groups play a role, too. After achieving a federal policy objective, they pressure state and local governments to cooperate in implementing that objective. There has been tremendous growth in interest-group activity within the states since the late 1960s. One cause of this growth has been the need for interest groups to induce cooperative state and local compliance with national policy objectives.

A process of socialization has occurred as well. The dominance of the federal government in so many policy fields for the past 40-some years of coercive federalism has simply become an unquestioned fact of administrative life. Furthermore, many of today's senior federal, state, and local administrators entered public service in the late 1960s and early 1970s with a common passion for reform. For rank-and-file administrators, the origins of their work dictates are less important to them than their preoccupation with how to implement those dictates and satisfy the citizens who will ultimately vote for or against the elected officials who preside only in a general and distant way over policy implementation.

For these and perhaps other reasons, cooperative federalism endures in the administrative interstices of coercive federalism. As a consequence, moreover, state and local officials have not uniformly resisted the rise of coercive federalism.

## **5. State Policy-Activism**

A seemingly contrary development under coercive federalism has been state policy-activism, especially since the early 1980s. As a journalist who often writes about federalism noted in 1985, the "biggest gap in elective politics these days is not between Republicans and Democrats. It is the gap between state officials who are meeting responsibilities and gaining confidence and federal officials who are falling down in their jobs and suffering a loss of self-esteem" (Broder 1985). This statement remains true in 2008. For example, while the federal minimum wage remained stuck at \$5.15 (€3.83 in mid-2007) per hour from 1997 to 2007, 32 states mandated higher minimum wages for their workers, and while Congress has not been able to propose an amendment to the U.S. Constitution prohibiting gay marriage, 26 states have a constitutional amendment prohibiting same-sex marriage, and 43 states have statutes restricting marriage to a woman and a man. At the same time, Massachusetts legalized same-sex marriage in 2004. California, Connecticut, New Jersey, and Vermont have established civil unions that, while not labeled "marriages," offer gay couples all the legal rights and responsibilities of marriage. Hawaii, Maine, and the District of Columbia provide same-sex civil unions that provide various rights and responsibilities associated with marriage under their laws.

However, it is important to note that this policy activism has been both (a) a response to coercive federalism as states have bucked some federal policies and filled federal policy voids and (b) a stimulant of coercive federalism as interest groups have sought federal tranquilization of hyperactive state policy-making. Thus, this activism is the third major facet of contemporary American federalism.

This activism is often attributed to the reform and resurgence of state governments during the 1950s and 1960s. Although reforms did strengthen state capacities, state policy-activism switched into high gear in reaction to the rise of coercive federalism under which both conservatives and liberals have found ever more reasons to seek refuge in state policy-making when they cannot achieve their objectives through federal policy-making.

This facet of contemporary U.S. federalism has featured prominently in the so-called culture wars, often producing strange political bedfellows and partisan flip-flops. Many liberals, traditionally champions of federal power, have become guardians of states' rights, seeking to protect assisted suicide, gay marriage, medicinal marijuana, and a range of state consumer-protection, environmental, labor, and tort laws against federal preemption. A writer for *The Nation* (a left-wing magazine founded in 1865) catalogued recent liberal legislation from the states and urged liberals to pursue policy goals through the states (Huevel 2006). In turn, many conservatives, traditionally hostile to federal power, now champion federal power, with social conservatives seeking to overturn state policies friendly to abortion, assisted suicide, gay rights, marijuana, and the like, and economic conservatives seeking federal preemption of state regulations.

For instance, moral conservatives appalled by U.S. Supreme Court rulings on abortion and sodomy have sought to thwart such policies through state regulation. Pro-life (i.e., anti-abortion) activists, for example, have been pressing for state laws to add requirements to abortions (e.g., a 24-hour waiting period and parental notification), to prohibit state funding of abortions, and to criminalize injury to a fetus. According to the American Life League, "You can do a lot more in the [state] legislatures than on the federal level right now" (quoted in Associated Press 2003).

In turn, liberal activists responding to conservative Supreme Court rulings and to deregulation since the Reagan era have also stimulated considerable state policy-activism. For example, several multi-state lawsuits have been initiated against the U.S. Environmental Protection Agency alleging lax enforcement or lack of enforcement of federal environmental standards. State officials have pursued litigation and regulation in many policy areas, especially environmental and consumer protection. Connecticut's attorney general, Richard Blumenthal, expressed a leading justification for such activism: "Our action is the result of federal inaction" (Quoted in Masters 2005). Also, in an effort to compete with the conservative American Legislative Exchange Council (ALEC), several hundred state legislators launched the Progressive Legislative Action Network (PLAN) in 2005. According to the policy director of the liberal Center for Policy Alternatives, "states are now the vanguard of the progressive movement" (Quoted in Cauchon 2003).

State action on environmental protection captured considerable media attention in 2006-07, especially when California's governor, Arnold Schwarzenegger, joined Prime Minister Tony Blair of the United Kingdom to sign an accord on global warming in August 2006. In September, Schwarzenegger signed a bill to reduce California's greenhouse gas emissions by 25 percent by 2020. In 2004, California implemented rules on vehicular greenhouse gases that are stricter than the federal standards. Ten other states have adopted California's rules, which limit the amount of carbon dioxide and other gases that automobiles can expel into the atmosphere. In addition, California, New York, and eight other states sued the U.S. Environmental Protection Agency for failing to regulate carbon dioxide emissions from power plants. Some 23 states have set standards requiring utilities to generate up to 33 percent of their energy from renewable sources by 2020.

In short, using their still considerable powers retained within the U.S. constitutional system, the states are major actors in domestic policy-making and, occasionally, minor actors in foreign policy-making, such as economic sanctions against various countries (Kincaid 1999). As such, it should be noted that many U.S. states are huge polities individually. California, for example, with 37.7 million residents, has a larger population than Canada and all but 34 countries in the world. According to the U.S. Central Intelligence Agency, California's economy ranked tenth in the world in 2005 (with Spain's

economy being fourteenth), though the California Legislative Analyst's Office contended that the Golden State's economy ranked eighth in the world in 2005 (with Spain's economy being ninth). In January 2008, Governor Schwarzenegger proposed to the legislature an austere \$141 billion (€94.8 billion) 2008-09 state operating budget that includes a 10 percent reduction in state spending in order to cope with an expected \$14.5 billion (€9.7 billion) deficit. Indeed, most U.S. states have larger economies, revenues, and government budgets than the majority of the world's nation-states.

## 6. Conclusion

In 2009, a new president and a substantially new Congress will come into power in Washington, D.C. Although these new actors will certainly make many changes, they will make no significant changes to the long-term trends in U.S. federalism identified above. Coercive federalism will remain in place because there are no political incentives, either Democratic or Republican, to initiate a new non-coercive federalism, there are no longer any credible constitutional grounds for challenging coercive federalism, and most state and local officials have acquiesced to the basic tenets of coercive federalism. At the same time, intergovernmental administrative cooperation will continue to flourish because, in the final analysis, the federal system cannot function and serve its citizens without such cooperation. Dual federalism will persist, as well, because state and local governments are still strong and important political and governmental arenas with high citizen expectations of performance. Thus, over the course of 219 years, U.S. federalism has developed in a complex, multifaceted way that defies both simple description and linear projection.



## References

ASSOCIATED PRESS. "Activists push for limits on abortion through legislation at state level," *Express-Times* (Easton), 12 March 2003, p. A-5.

BRODER, David S. "The Governing Gap." *Dallas Morning News*, 12 December 1985, p. A18.

*Brown v. Board of Education*, 347 U.S. 483 (1954).

*Brown v. Board of Education*, 349 U.S. 294 (1955).

BRYCE, James. *The American Commonwealth*. New York: Macmillan, 1907.

CAUCHON, Dennis. "Fed-up states defy Washington," *USA Today*, 8 December 2003 at [www.usatoday.com/news/washington/2003-12-08-states-usat\\_x.htm](http://www.usatoday.com/news/washington/2003-12-08-states-usat_x.htm).

CLARK, Jane Perry. *The Rise of a New Federalism: Federal-State Cooperation in the United States*. New York: Columbia University Press, 1938.

CNN. "Justice Ginsburg: Supreme Court Faces Stormy Times," 12 June 2003 at [www.cnn.com/2003/LAW/06/12/ginsburg.aclu.ap/](http://www.cnn.com/2003/LAW/06/12/ginsburg.aclu.ap/).

Editors, "The Pork King Keeps His Crown," *New York Times*, 14 January 2008, p. A24.

ELAZAR, Daniel J. *The American Partnership: Intergovernmental Co-operation in the Nineteenth-Century United States*. Chicago: University of Chicago Press, 1962.

EPSTEIN, Richard A. and Michael S. GREVE. eds. *Federal Preemption: States' Powers, National Interests*. Washington, DC: The AEI Press, 2007.

FERRARA, Peter J. "The NGA Should Pay Its Own Way," *Policy Brief*. Washington, DC: Americans for Tax Reform, 2005.

GRODZINS, Morton. "Centralization and Decentralization in the American Federal System" in *A Nation of States*, ed. Robert A. Goldwin, 2d ed. Chicago: Rand McNally, 1974.

HERTZKE, Allen D. and RONALD M. Peters, eds. *The Atomistic Congress: An Interpretation of Congressional Change*. Armonk, NY: M. E. Sharpe, 1992.

HUEVEL, Katrina van den. "Taking It to the States," *The Nation*, 20 January 2006, <http://www.thenation.com/blogs/edcut?bid=7&pid=2137>, accessed February 1.

KINCAID, John. "The State of U.S. Federalism, 2000-2001," *Publius: The Journal of Federalism* 31 (Summer 2001): pp. 1-69.

KINCAID, John. "The International Competence of U.S. States and Their Local Governments," *Regional & Federal Studies* 9 (Spring 1999), pp. 111-130.

KINCAID, John. "From Cooperation to Coercion in American Federalism: Housing, Fragmentation, and Preemption, 1780-1992," *Journal of Law and Politics* 9 (winter 1993). Pp. 333-433.

KINCAID, John. "From Cooperative to Coercive Federalism," *Annals of the American Academy of Political and Social Science* 509 (May 1990), pp. 139-152.

LABATON, Stephen. "'Silent Tort Reform' Is Overriding States' Powers," *New York Times*, 10 March 2006, p. C5.

MAGGS, John, 2005. "Limping Toward Tax Reform," *National Journal* 37 (22 October 2005), p. 3280.

MASTERS, Brooke A. "Who's Watching Out for the Consumer?" *Washington Post National Weekly Edition*, 17 January 2005, p. 30.

MULLINS, Brody. "As Earmarked Funding Swells, Some Recipients Don't Want It," *Wall Street Journal*, 26 December 2006, p. A10.

NATIONAL ACADEMY OF PUBLIC ADMINISTRATION. *Beyond Preemption: Intergovernmental Partnerships to Enhance the New Economy*. Washington DC: National Academy of Public Administration, 2006.

*New State Ice Company v. Liebmann*, 285 U.S. 262 (1932).

*Northern Insurance Company New York v. Chatham County*, 126 S.Ct. 1689 (2006).

POSNER, Paul. *The Politics of Unfunded Mandates: Whither Federalism?* Washington, DC: Georgetown University Press, 1998.

*Printz v. United States*, 521 U.S. 898 (1997).

*Reynolds v. Sims*, 377 U.S. 533 (1964).

RIKER, William H. *Federalism: Origin, Operation, Significance*. Boston: Little, Brown, 1964.

*Roe v. Wade*, 410 U.S. 113 (1973).

ROTHMAN, Rozann, "Political Method in the Federal System: Albert Gallatin's Contribution," *Publius: The Journal of Federalism* 1 (Winter 1972): pp. 123-141.

U.S. Advisory Commission on Intergovernmental Relations, *Federal Statutory Preemption of State and Local Authority*. Washington, DC: U.S. Advisory Commission on Intergovernmental Relations, 1992.

U.S. Advisory Commission on Intergovernmental Relations, *Federal Regulation of State and Local Governments*. Washington, DC: U.S. Advisory Commission on Intergovernmental Relations, 1993.

*Wesberry v. Sanders*, 376 U.S. 1 (1964).

WYATT, William. "Washington Watch: 10 Top Issues for States," *State Legislatures* 32 (January 2006): p. 15.

ZIMMERMAN, Joseph F. *Federal Preemption: The Silent Revolution*. Ames: Iowa State University Press, 1991.

## ABSTRACT

Contemporary U.S. federalism is a complex mixture of coercive, cooperative, and dual elements. Constitutionally and politically, the federal system has become coercive because there has been a vast expansion of federal-government power over the states since the 1960s. This coercion involves, among other things, increased regulations attached to federal grants-in-aid, mandates imposed on the states, and federal preemptions of state powers. Neither the U.S. Senate nor the Supreme Court or the president serves as a protector of state powers today. Administratively, however, intergovernmental relations between the federal, state, and local governments remain highly cooperative. State and local officials implement and comply with federal-government policies and occasionally obtain concessions and adjustments in implementation from federal officials. At the same time, the states still retain considerable residual powers, which, along with their substantial fiscal capacities, allow them to engage in independent and innovative policy-making in a large number of policy fields. State policy activism in such fields as consumer protection, criminal justice, environmental protection, health care, and worker rights has, in part, been a reaction against coercive federalism and, in turn, has often highlighted weaknesses in comparable federal-government policies.

**Key words:** American federalism; grants-in-aid; preemption; mandates; coercive federalism; intergovernmental cooperation; U.S. States; U.S. Supreme Court.

## RESUM

L'actual sistema federal dels EUA és una complexa barreja d'elements del federalisme coercitiu, del federalisme cooperatiu i del federalisme dual. Des d'un punt de vista constitucional i polític, el sistema federal des de la dècada de 1960 ha tendit cap a un sistema coercitiu arran de l'àmplia expansió del govern federal en els àmbits dels estats. Aquesta coerció implica, entre altres coses, un augment de les regulacions vinculades a subvencions federals, mandats imposats als estats i invasions federals de les competències dels estats. Actualment, ni el Senat ni la Cort Suprema ni el president actuen com a garants de les competències estatals. No obstant això, des d'una perspectiva administrativa les relacions intergovernamentals entre el govern federal, el dels estats i els governs locals es mantenen en una situació de forta cooperació; de fet, els responsables de l'administració local implementen i compleixen amb les polítiques federals i de vegades aconseguen que l'administració federal els faci concessions i els permeti ajustaments a l'hora d'implementar-les. Al mateix temps, els estats mantenen, malgrat tot, impor-

tants competències residuals, les quals, juntament amb les seves substancials capacitats fiscals, els permeten endegar en un ampli número de camps, unes polítiques públiques independents i innovadores. Així doncs, la forta activitat dels estats en àmbits com ara la protecció dels consumidors, justícia, protecció mediambiental, sanitat i drets dels treballadors, ha estat en part una reacció en contra del federalisme coercitiu i, a més, ha posat sovint en evidència la debilitat de les polítiques federals en aquests mateixos àmbits.

**Paraules clau:** federalisme als EUA; subvencions; prevalença; assignacions; federalisme coercitiu; cooperació intergovernamental; estats als EUA; Tribunal Suprem als EUA.

## RESUMEN

El actual sistema federal de los EEUU es una compleja mezcla de elementos coercitivos, cooperativos y del federalismo dual. Desde una perspectiva constitucional y política, desde la década de 1960 el sistema federal se ha convertido en un sistema coercitivo por la amplia expansión del gobierno federal en los ámbitos estatales. Tal coerción implica, entre otras cosas, un aumento de las regulaciones vinculadas a subvenciones federales, mandatos impuestos a los estados e invasiones federales de las competencias de los estados. Actualmente, ni el Senado ni el Tribunal Supremo ni el presidente actúan como garantes de las competencias estatales. Sin embargo, desde una perspectiva administrativa, las relaciones intergubernamentales entre el gobierno federal, los gobiernos estatales y los gobiernos locales se han mantenido altamente cooperativas; de hecho, los responsables de la administración local implementan y cumplen con las políticas federales y, en algunas ocasiones, consiguen que la administración federal les haga concesiones y les permita llevar a cabo ajustes en el momento de la implementación. Al mismo tiempo, los estados todavía mantienen importantes competencias residuales, que, junto con sus substanciales capacidades fiscales, les permiten llevar a cabo unas políticas públicas independientes e innovadoras en un buen número de campos. Así pues, la importante actividad de los estados en ámbitos tales que la protección de los consumidores, justicia, protección medioambiental, sanidad y derechos de los trabajadores, ha sido, en parte, una reacción ante el federalismo coercitivo y, a su vez, ha puesto en evidencia la debilidad de las políticas federales en estos mismos ámbitos.

**Palabras clave:** federalismo en EUA; subvenciones; prevalencia; asignaciones; federalismo coercitivo; cooperació intergovernamental; estats en EUA; Tribunal Suprem en EUA.