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FEDERALISM AND THE EXECUTIVE BRANCH

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FEDERALISM IS OFTEN DESCRIBED AS A DECENTRALIZED political system, a division of responsibilities between a central government and local or regional governments, in which the latter are granted autonomy on selected matters. Such definitions of federalism are not completely wrong. But they do not convey the fluidity of federalism in the United States, the constant fluctuation of who uses which governments to achieve their aims.[1] Doctrines about appropriate federal, state, and local roles rarely exert much control over American politics. When Vermont and Massachusetts extended marital privileges to same-sex couples, many conservatives showed few qualms in using the federal government to reverse such decisions. In the same way, when the second Bush administration limited federal research grants involving embryonic stem cells, those who disagreed with that judgment expressed little concern about getting state governments to support such research.[2]

Yet this opportunistic flux has not lacked structure. Constitutional processes, the strength of state party organizations, and the administrative and political capacities of the federal and state governments long constrained when and how citizens and groups could turn to either the national or the state governments to secure their objectives. These constraints, however, have eroded in recent decades. Both federal and state governments have opened up to nearly all domestic issues, and their policy agendas have become inextricably intertwined and overlapped.

Convergence between state and national agendas has, along with other changes, transformed the federal executive's role in the American federal system. For most of the nation's history, presidents and their appointees have influenced

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state policy choices through the legislative process, by building broad national coalitions around changes in grants, regulations, and other laws affecting states. In the last two decades, however, the executive branch has used a growing range of administrative tools to negotiate directly with states over specific policies or to alter the context of state policy making without specific congressional approval. The federal executive branch and its interactions with the states have thus become a primary locus for producing major changes in domestic policies. These developments have made American federalism more mutable, more responsive to initially small coalitions of federal political executives and groups of states supportive of a national administration's aims, quicker to react to changing conditions, and more capable of generating and diffusing policy innovations. At the same time, this executive-dominated federalism undermines checks and balances *within* the national government, avoids national debates even while major policies spread through the federal system, and creates an even more complex and varied range of policies among the states.

The Constitution and Divided Sovereignty

Rather than assigning sovereignty to either the national or the state governments, the U.S. Constitution gave it to both. Federal and state governments acted in the same territory and derived their authority from the same people. Yet both were given independent powers to govern. How to minimize friction arising from the coincident actions of sovereign governments was a problem not resolved by the Constitution, which did not clearly distinguish the responsibilities of federal and state governments. Still, most of its framers viewed the states as performing roles distinct from those of the federal government. As James Madison put it, "The federal and State governments are in fact but different agents and trustees of the people, constituted with different powers and designed for different purposes."[3]

One reason behind this expectation was the widespread view that the federal government would only exercise powers expressly granted by the Constitution. Madison argued that the jurisdiction of the national government extended "to certain enumerated powers only, and [left] to the several States a residuary and inviolable sovereignty over all other objects."[4] The powers of the federal government were "exercised principally on external objects, as war, peace, negotiation, and foreign commerce," while the powers of the states "extend[ed] to all the objects which, in the ordinary course of affairs, concern[ed] the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the States."[5]

Maintenance of dual federalism depended also on political processes that ensured the national government would respect state prerogatives. The Senate represented the states: their legislatures selected senators, and each state was given

equal representation. States established most rules for electing members of Congress. And state legislatures originally chose members of the Electoral College, which gave each state implicit representation as a sovereignty by setting the number of electors equal to the number of representatives in the House plus its two senators.

States were also protected from the federal government by its extension and institutional divisions. Madison claimed that majority factions were unlikely to form in a large and diverse republic, since the number and diversity of interests in the nation prevented a single faction from gaining control of the federal government.[6] Separation of powers within the federal government also inhibited national action, except actions commanding widespread support and, by inference, not threatening state sovereignty.

Nor were federal courts viewed as a threat to states. Supreme Court justices were selected by the president and the Senate, the two national institutions closest to the states. Federal courts were also circumscribed in dealing with state-to-state controversies by the Eleventh Amendment. In sum, though the Constitution did not clearly distinguish the functions of the national and state governments, the limited powers of the national government, its political processes, social and political barriers to national action, and past political practices were expected to ensure that divided sovereignty produced a workable regime.

Dual Federalism

These constitutional processes and structures, and the assumptions underlying them, permitted a rough dual federalism to survive until the Civil War. John Marshall's Supreme Court in *McCulloch v. Maryland* (1819) offered an opening for an expansive national government through the Court's broad interpretation of the "necessary and proper" clause of the Constitution. Yet the federal government generally refused to push its functions beyond narrow interpretations of constitutionally enumerated powers, while state and local governments dominated most domestic policies.

States, for the most part, controlled slavery. They exerted nearly exclusive control over the electoral process, apportionment, education, property rights, labor conditions, and criminal and family law. Although the national government provided some financial assistance, local and state governments controlled transportation policies and projects. And after President Andrew Jackson vetoed the recharter of the Bank of the United States in 1832, responsibility for banking, monetary policy, and commercial credit reverted to the states.[7]

Early presidents helped enforce this dualism. In a veto message concerning a bill passed by the Congress to build roads and canals, President Madison argued that "the permanent success of the Constitution depends on a definite partition

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of powers between the Federal and State Governments," a view that most early presidents supported.[8] Some even refused to enforce the *express* powers of the federal government. President Andrew Jackson rejected the appeals of the Cherokee Indians when Georgia forced them to leave the state, despite the fact that Georgia's actions violated federal treaties.[9] Yet presidential preferences were not the main obstacles to an expanded national government. Divisions between the Northern and Southern states over slavery, and related differences over economic policies, made vigorous actions by the federal government impossible—until events completely nationalized the slavery issue, and the divisions erupted in war in 1861.

The Civil War and the Breakdown of Dual Federalism

The Civil War had, of course, an enormous nationalizing effect. President Abraham Lincoln's wartime actions temporarily extended the powers of the federal government, especially the presidency, over the states and the people. In the course of the war, Lincoln shifted the initiative over the raising of troops from the Northern governors to the federal government.[10] He intervened in the political processes of the Northern states, as when he jailed a Democratic candidate for the Ohio governorship for suspected disloyalty. The Civil War also gave rise to the nationalization of credit mechanisms and currency as well as a temporary income tax. Passage of the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution—and civil rights legislation enacted after the war—established, albeit briefly, a new role for the federal government in the enforcement of civil rights.

One lasting legacy of the war was Lincoln's rhetoric, which diminished the states and linked the federal government to a nearly religious conception of the nation. The word "state" was not mentioned in two of his greatest speeches, the Gettysburg Address and his second inaugural address. The combatants were not two groups of independent states but two "parties" of the same Union, who "read the same Bible and pray[ed] to the same God." Lincoln's articulation of the war's meaning and the Union's primacy helped create national citizenship; only after the Civil War was "the United States" a singular noun.

Other visions of a strong national government evolved after the war, most of which involved the role of the federal government in managing the expanding American economy. One view was represented in the U.S. Supreme Court, which, especially after the mid-1880s, interpreted the Commerce Clause in favor of increased federal power over economic transactions, often to prevent states from regulating the national economy and its multistate corporations. Congress also supported this conception by chartering and granting land to the transcontinental railroads, and by attempting to centralize business regulation through the Interstate Commerce Act (1887) and the Sherman Antitrust Act

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(1890). After that, from the 1890s through the 1930s, federal judges used the Due Process Clause of the Fourteenth Amendment to strike down state laws regulating corporate activities and labor relations. Yet the Supreme Court decisions were not entirely consistent, and states continued to fashion regulations in the chinks left by the Court. In the early twentieth century, the Progressive vision called for a more positive regulatory role for the federal government. President Theodore Roosevelt argued that, "as no State has any exclusive interest in or power over [large corporations], it has in practice proved impossible to get adequate regulation through State action." To serve the whole people, then, the nation should "assume power of supervision and regulation over all corporations doing an interstate business."[11]

Congressional opposition limited Roosevelt's ability to put this view into effect, though he won some legislative victories, such as the 1906 Pure Food and Drug Act. President Woodrow Wilson was more successful by securing congressional passage of laws extending federal power over labor relations in the railroad industry, farm credit, and currency and credit (with the establishment of the Federal Reserve System). But these victories ended soon after the first years of Wilson's presidency.

Although no single vision of the national government was fully implemented, the struggle for control helped erode the institutional foundations of dual federalism. In their efforts to advance their agendas, Roosevelt and Wilson connected directly with the people, and showed that presidents could challenge the leadership of the state parties. Wilson's presidency also produced, in 1913, the Seventeenth Amendment, which completely ended the selection of senators by state legislatures; and the Sixteenth Amendment, which gave Congress the power to "collect taxes on incomes . . . without apportionment among the several States," thereby giving the federal government a large, permanent, peacetime source of stable revenues. The mobilization for World War I and Wilson's international leadership after the war further expanded the capabilities and public role of the national government.[12] Finally, the temperance movement, which culminated in the ratification of the Eighteenth Amendment in 1919, revealed the potential of moral fervor, religiosity, and social movements in overcoming the barriers to national action that Madison had expected to protect states in the "extended republic."

The Rise of Legislative Federalism: The New Deal

When Franklin Roosevelt was elected president in 1932, the institutional pillars sustaining dual federalism had thus weakened, and dualism was ready to be toppled by the economic crisis and the unifying and democratizing leadership of the new president. His first inaugural address called for a national response to the Great Depression. The president saw the day as one of "national consecration," as

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a "dark hour of our national life." He called for "a national scale in the redistribution" of great populations between urban and rural areas, and for "the unifying of relief activities which today are often scattered, uneconomical, and unequal."

Roosevelt's "New Deal" greatly expanded the size and scope of the federal government's control over banks and other financial institutions, labor relations, child labor, minimum wages, hours worked, agriculture, rural electrification, and other economic activities.[13] The early New Deal programs also created assistance programs to cash-strapped state and local governments, including programs distributing surplus food to the poor, free school lunches, emergency highway projects, and emergency and general relief.[14] Some of these initiatives, especially the economic regulations, were initially struck down by the U.S. Supreme Court as unconstitutional attempts to expand federal power; and many of the relief programs were only temporary efforts. However, some economic programs survived after the Court moved away from its initial hostility toward New Deal programs in 1937.

The New Deal perhaps produced its greatest effect on American federalism with the enactment of the Social Security Act in 1935. The act, especially after its expansion in 1939, created a nationally administered pension program for retirees and survivors, one available to most Americans. It thus helped democratize the federal government by establishing direct connections between the national government and the basic needs of its citizens. The Social Security Act also established several permanent grant-in-aid programs in which states were given federal money as well as substantial discretion over benefit and eligibility policies. In exchange, states paid part of the program costs and satisfied administrative requirements. Unemployment Insurance, for example, offered short-term aid to unemployed workers. Federal grants to states were also enacted to support programs for Old-Age Assistance, Aid to the Blind, and Aid to Dependent Children, which provided benefits to poor children raised by their mothers.

Grants-in-aid were not intended to change the functions of state and local governments. They were a form of cooperative federalism, that is, efforts to help states perform traditional functions despite their fiscal weakness during the Great Depression. Grants-in-aid had been a major intergovernmental tool for the federal government at least since the mid-nineteenth century.[15] However, the New Deal launched their growth as a primary mechanism by which the federal government carried out its domestic priorities. The New Deal assistance programs were typically categorical grants, which were devoted to specific purposes written into the legislation. To receive funds, states had to show a federal agency how they planned to satisfy the grant's requirements, such as their rules and procedures for determining individuals' eligibility for benefits. Once state plans were approved, the federal government reimbursed states according to a formula, such as one federal dollar for every two state dollars spent, often up to some maximum level.

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Enactment of the New Deal grant programs was not easy, though federalism often made the legislation easier to pass. The Roosevelt administration maintained unity among congressional Democrats by allowing states to adjust benefits and need standards to their own political cultures and fiscal capacities. Although the original Social Security bill introduced in the Congress required states to provide "reasonable subsistence compatible with decency and health" in the aid to dependent children and old age assistance programs, those requirements were replaced before final passage with language permitting each state to assist the elderly "as far as practicable under the conditions in each State." One obstacle to the adoption of national standards was the variation in states' fiscal capacities.[16] Racial differences constituted another. Many southern members objected to federal determinations of "adequacy" because they "feared that northern standards might be forced on the South in providing for Negro and white tenant families."[17] Southern officials also believed their region's major economic draw was its low labor costs, and national standards in unemployment insurance and a minimum wage were thought to threaten this comparative advantage. By allowing states to adopt their own standards in unemployment insurance, national legislation was possible despite these regional divisions. When decentralization was rejected in favor of a single minimum wage in 1938, the Fair Labor Standards Act split the Democratic Party and effectively ended the New Deal.[18]

Once grants were enacted, they intensified interactions between the federal and state bureaucracies and the influence of federal agencies over the states. In administering grants supporting indigent elderly and dependent children, for example, states had to designate a single agency as responsible for receiving and accounting for federal funds; submit state plans to the federal agency for review; administer the program throughout the state, not just in selected localities; use merit systems to recruit, pay, and retain persons administering the grants; and submit to *post hoc* reviews by the federal agency to ensure that the state complied with its plans.[19]

Federal agencies leveraged these requirements to professionalize state agencies, centralize operations, and influence state agency missions and state policies.[20] Federal agencies convinced some states, for example, to end their reliance on local welfare boards to implement assistance programs and give greater control to professionals to ensure statewide "uniformity" in the administration of assistance programs. Once federal agencies got states to professionalize their operations, it was easier for federal officials to influence the states. For example, federal welfare administrators could more readily convince state colleagues with similar training that assistance programs ought to be operated as income support programs rather than rewards for persons who complied with social norms, such as "suitable home" requirements that had been used by local (and often volunteer) welfare boards to deny eligibility to never-married mothers.[21] Federal

agencies also influenced fellow professionals in state agencies by producing and disseminating research and policy arguments, which state administrators drew on in promoting changes in their own political systems. Federal and state agencies, in short, became policy-making allies.

The Growth of Federal Grants

For four decades after the New Deal, federal grants expanded both in money spent and functional areas supported. Yet the character of grants also changed, along with the roles performed by federal executive officials. Grants generally became more prescriptive, selectively targeted, and accessible to a wider array of public and private institutions. These changes allowed federal executives to take on new functions in selecting grant recipients, approving details of plans, monitoring implementation, and generally interacting with subnational governments in a more intensive, wide-ranging manner.

Grants resumed their growth under Harry Truman's administration soon after World War II, when programs supporting hospitals, mental health, and disaster relief were added. The next major change occurred in 1956, when Dwight Eisenhower persuaded Congress to establish the interstate highway system. Spending on federal grants grew under both administrations, even after controlling for inflation and population, as they added new grants without cutting old ones. Figure 1 shows this cumulative growth by displaying per capita spending in constant (inflation controlled) dollars by the federal government on grants to state and local governments. The figure also shows the distribution of grant functions, such as education and health. Eisenhower shifted these functions dramatically in the late 1950s, from a governmental tool mostly supporting income security programs to one in which transportation spending was predominant.

Federal grants continued to grow and diversify through the 1960s and 1970s. President Lyndon Johnson's legislative skills and large Democratic Party majorities in Congress produced an explosion of grant programs, from 132 in 1960 to 379 in 1967.[22] The greatest increase in spending, as evidenced in Figure 1, occurred in education, training, and job services. Yet the new programs were also distinctive in their ambitions. Unlike previous grants, the Great Society's Model Cities Program, Head Start, the Community Action Program, Mass Transit Aid, Educational Aid for the Disadvantaged, and the Economic Opportunity Act were designed not to support traditional state and local functions but to change their priorities in favor of goals supported by national legislative coalitions, especially the goal of expanded economic opportunity for disadvantaged people.

Because Congress and the Johnson administration suspected that states would divert federal funds from Great Society goals, the new grants stressed close federal control of state and local spending. Many were project grants, distributed competitively among applicants at the discretion of federal administrators, not

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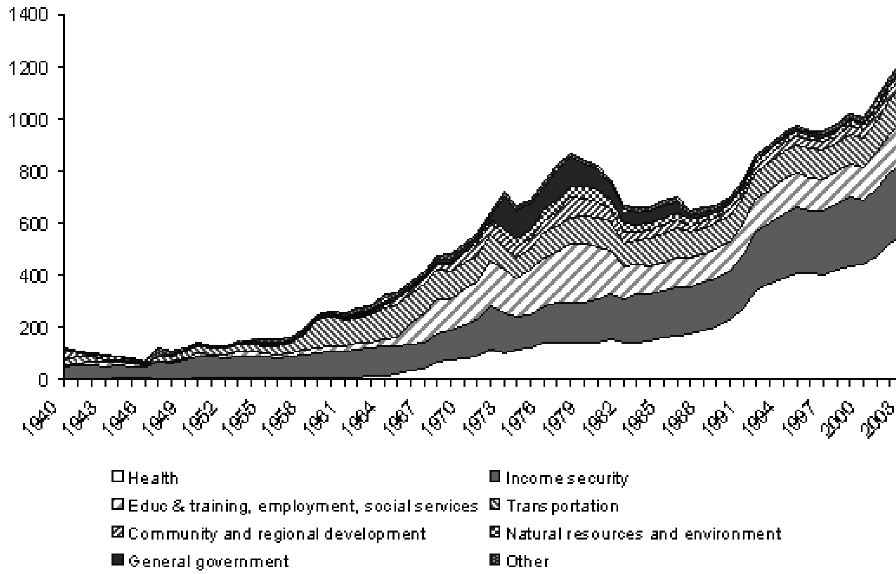

SOURCE: U.S. Office of Management and Budget, Budget of the United States Government, Fiscal Year 2005.

Figure 1 Per capita federal assistance to state and local governments, constant dollars (2000), 1940–2003

according to a fixed formula among governments, and federal administrators closely monitored their implementation. Most grants were designed to be insulated from state and local elected officials, whom federal officials distrusted, especially in their dealings with African Americans. To maintain professional control over programs without interference from local politicians, grants were often awarded to single-purpose special districts, such as mass transit and urban renewal authorities, or private nonprofit agencies.[23] When grants were made to states, they typically went to specialized agencies that were administratively isolated from other state functions. Federal agencies resisted state efforts to fold their grant programs into large departments of human services or other umbrella agencies because that gave power to agencies that did not share the federal program's particular priorities. Governors and mayors often complained that the resulting collection of fragmented state and local agencies resisted their program initiatives, using federal rules as excuses not to cooperate.[24]

The Nixon administration nudged the grant system in a different direction, away from extensive control by federal bureaucrats and in favor of local elected officials. Nixon did this in part by transforming some project grants that had been awarded competitively into grants allocated by formulas. The Community Development Block Grant (CDBG) and the Comprehensive Employment and

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Training Act (CETA) consolidated several community development and job training project grant programs into two block grant programs that were distributed by formulas to cities, counties, or other governments. Block grants were not narrowly focused, like categorical grants; rather, they distributed a sum of money that state and local governments could use for a broad public purpose.

This change also spread federal money to more cities. The project grants of the Great Society had gone disproportionately to a small number of large Eastern and Midwestern cities that had invested considerable political and administrative energy into preparing grant applications and lobbying federal agencies. The new formula grants, by contrast, allocated funds according to specific criteria—unemployment, poverty, and old housing, for example—to all local governments above a certain population size, without requiring governments to apply for funds in any but the most perfunctory manner. This change increased federal financial support for local governments in the South and West, a result that assisted Nixon's effort to build his political base in these regions.

Nixon also pushed funding away from special districts and nongovernmental organizations, back toward cities, counties, and other general-purpose governmental entities. While their predecessor programs had largely gone to special districts or nonprofit agencies, CETA and CDBG funds went to city or county governments. In addition, the passage of "general revenue sharing" in 1972 increased general, noncategorical aid to state and local governments—a change that, as Figure 1 shows, pushed up spending in the 1970s on "general government" functions.

Thus, by the end of the 1970s, the federal grant system was well distributed across many purposes, reflecting cumulative efforts by presidents to impress their priorities on the federal system through fiscal incentives. As different presidents brought different goals, attitudes, and political alignments to bear on the American federal system, the national executive branch developed a variety of administrative methods in dealing with state and local governments, and dealt with an expanding range of governments, special districts, nonprofits, and other grant recipients. This accumulation of programs, administrative tools, and recipients gave presidents great flexibility in interacting with the federal system.

Intergovernmental Regulations

Executive powers over the states also grew during this postwar period of federal expansion with the expansion of federal intergovernmental regulations, which imposed new mandates on state and local governments. These regulations began to grow in the 1960s, but their growth accelerated in the 1970s. The regulations were usually cheap ways of imposing new demands on subnational governments, since the regulations were often not accompanied by significant federal funds. They also had the effect of creating new federal agencies with the authority to

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interpret and enforce the regulations. Rule making was thus added to the list of executive tools in federal relations with the states.

The shift toward regulation grew partly out of long-growing congressional disenchantment with positive and indirect incentives. During the 1950s and 1960s, for example, grants aimed at eliminating billboards on highways had had little impact, as did federal efforts to encourage states to address problems of environmental protection through research and demonstration grants. Yet fiscal uncertainties also encouraged federal reliance on regulations. Slower economic growth and higher inflation during the 1970s led to tighter federal budgets. These fiscal pressures increased tensions between congressional appropriations and authorizations committees as well as conflicts over budgetary issues between the White House and Congress. Annual appropriations for grants were less predictable, and one-shot enactments of new regulations became increasingly attractive as a means of producing lasting change in the federal system.

In a 1984 study, the Advisory Commission on Intergovernmental Regulation (ACIR) reported that, especially after 1969, the federal government had shifted away from reliance on positive fiscal incentives in the form of grants and toward regulatory requirements to influence state and local governments.[25] The earliest regulations were linked to federal grants. Title VI of the Civil Rights Act of 1964, for example, prohibited state and local governments from discriminating against persons on the grounds of race, color, or national origin in carrying out programs receiving federal assistance. Attaching conditions to federal grants was viewed by the courts as a constitutionally sound extension of the spending power of Congress, as long as the conditions were reasonably related to a legitimate national purpose, and the states had the option of forgoing federal dollars. However, these conditions were added after the states had created their programs, when constituencies and other political factors made it hard for states to end programs and reject federal conditions.

The ACIR labeled Title VI of the 1964 Civil Rights Act a "crosscutting requirement," one that applied to all or many federal grants, not just a single program. The method spread quickly during the 1970s. Title IX of the Education Amendments of 1972 prohibited discrimination against women in educational institutions receiving federal aid, and the National Environmental Policy Act of 1969 required states to prepare environmental impact statements before using many federal grants. The 1970s also saw the growth of crossover sanctions, regulations in which the federal government would terminate or reduce aid in a federal program unless the requirements of another program were satisfied. The Highway Beautification Act of 1965 threatened to withhold transportation funding from states if they did not stop the proliferation of billboards on federal highways; and the 1974 Federal-Aid Highway Amendments prohibited federal transportation construction projects in states that failed to establish and enforce speed limits of 55 miles per hour. The federal government also used crossover

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sanctions to influence states in health planning, environmental policy, and education for handicapped children.

A third form of intergovernmental regulation, partial preemptions, was not piggybacked onto existing federal grants. The federal government asserted its authority to set policy in a specific domain—perhaps by creating national goals or standards—and state governments were encouraged to implement the goals.[26] The Clean Air Act of 1970, for example, required states to submit plans adopting and enforcing national air quality standards. If a state refused, the federal government prepared the state's plan and enforced it, a loss of control most states wanted to avoid. If the state accepted responsibility for meeting the standards, the federal government paid some of the state's administrative costs. Federal officials used partial preemptions to enforce standards involving environmental protection, meat and poultry inspection, occupational safety and health, and others.

Finally, a fourth type of regulation, direct orders, mandated state or local actions under the threat of criminal or civil penalties. These orders were more constitutionally suspect than other regulations. The Fair Labor Standards Act Amendments of 1974, a direct order that extended minimum wage and overtime coverage to state and local governments, was found to be unconstitutional by the Supreme Court in *National League of Cities vs. Usery* in 1976. Yet most direct orders were found to be constitutional, such as the Public Utility Regulatory Policies Act of 1978, which required state utility officials to consider adopting various electrical energy and conservation measures.

Ironically, the Senate, once viewed as the national institution most protective of the states, initiated many of the regulations as senators responded to national news stories about widespread problems, such as mine safety and other occupational hazards, pollution scandals, and growing numbers of auto deaths.[27] Weak state parties and candidate-centered electoral politics meant that senators and governors often competed for public attention and campaign contributions from many of the same citizens and institutions, a situation that often led to a convergence in their issue agendas—which, from the states' perspective, meant an encroachment on traditional state functions.

Conservative Reaction and Its Limits

After Republican gains in the 1978 congressional elections, and especially after President Reagan's election in 1980, the expanding size and roles of the federal government became an issue in itself. As Reagan said in his 1981 inaugural speech, "government is not the solution to our problem; government is the problem"; and, "It is my intention to curb the size and influence of the Federal establishment and to demand recognition of the distinction between the powers granted to the Federal government and those reserved to the States or to the people."

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In short-run fiscal terms, Reagan saw some success. The nearly uninterrupted postwar expansion of grant programs came to an end. As Figure 1 shows, the real value of federal assistance declined precipitously from 1979 to 1983. Reagan's efforts produced the 1981 Omnibus Budget Reconciliation Act (OBRA), which eliminated many Great Society grants, cut benefits and eligibility under Aid to Families with Dependent Children (AFDC), and consolidated 77 categorical programs into 9 block grants. As a result of these and other initiatives, the number of categorical grants declined from 534 in 1981 to 392 in 1984, while the number of block grants rose from 5 to 12 over the same three years.[28] During Reagan's administration, spending was cut for grants supporting education and training, employment, and social services; community and regional development; general government (including revenue sharing); and natural resources and the environment. Medicaid and other "entitlement" programs still grew, though more slowly due to cuts in eligibility or benefits. By the end of the 1980s, as Figure 1 shows, federal assistance showed a much less diverse pattern of spending than found in the late 1970s.

But the political attractions of using regulations to produce policy change in the American federal system remained strong, and the most intrusive and constitutionally suspect method of regulation, direct orders, became the most common regulatory instrument in the 1980s.[29] Most of the new regulations expanded existing programs, such as environmental requirements.[30] But some of the laws broke new policy ground, such as the Drug-Free Workplace Act of 1988, which required certification by all federal grantees and contractors that their workplaces were drug-free and that they offered anti-drug programs for employees.

In sum, Reagan and the Congresses of the 1980s did not oppose federal power as much as they opposed federal spending. But the locus of national power did shift, away from the legislative process and toward the executive branch. With respect to grants, executive power moved upward, from agency administrators to the Office of Management and Budget. Block granting enhanced the influence of central clearance processes and federal budget policies in relations between the federal executive and the states. With respect to intergovernmental regulations, the Reagan presidency was distinctive in its reliance on administrative rather than legislative means to achieve its goals.[31] Rather than asking Congress to pass new laws or amend old ones, the administration altered federal regulatory policies through administrative rule making, selective cuts in federal staffing, aggressive reviews by the Office of Management and Budget of the costs and benefits of agency actions, and appointments of ideological allies to top agency posts.[32] Sometimes these management powers were used to reduce regulatory burdens, and sometimes to tighten controls. What was clear, however, was that the choices regarding the severity and character of federal control over the states were increasingly in the hands of top political executives and the presidency.

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Devolution and the New Accountability

A final period of federal expansion occurred under the George H. W. Bush administration and continued through the Clinton and George W. Bush administrations. Intergovernmental regulations were extended, including the Clean Air Act of 1990, the Religious Freedom Reformation Act of 1993 (replaced in 2000 with the Religious Land Use and Institutionalized Persons Act), and tighter blood-alcohol standards in determining drunk driving as a condition for federal highway aid. Federal spending on grants resumed rapid growth, though most of the growth came from only a few grants. Medicaid alone accounted for 63 percent of the growth in total federal grant spending between 1989 and 2003. This lopsided pattern of spending altered the distribution of federal grants. In 1989, health care spending constituted only 30 percent of total federal grants to state and local governments. By 2003, health care programs made up about half of all federal grant expenditures.

This uneven growth in federal grants produced a major divide in the financial role of the federal government in state and local functions. As Table 1 demonstrates, federal grants as a percentage of state and local expenditures fell in the 1980s and rebounded slightly in the 1990s. But these overall changes were the result of two very different trends. Federal funding of health and human service programs grew, especially between 1990 and 2000, largely as a result of Medicaid. By contrast, federal funding of all other state and local expenditures—including education, transportation, criminal justice, and environmental protection—declined from 18 percent in 1980 to 11 percent in 1990 and 2000. Thus, the federal government may use federal funding as leverage in efforts to control the states in health and human service programs, but federal fiscal bargaining power has weakened in most other policy areas.[33]

The 1990s also saw important changes in the characteristics of grants. Some have called this a period of devolution, when states were given greater discretion in how they implemented federal programs. Medicaid, for example, was used as a source of funding for an ever-expanding variety of health services and institutions. Coverage of mental health and special education services grew during these years under federal "waivers" (discussed below), as did support for health institutions, such as general-purpose grants to hospitals serving low-income people.

In addition, several block grants were created that offered state and local governments flexibility in their use of federal dollars. In 1991, President George H. W. Bush signed the Intermodal Surface Transportation Efficiency Act (ISTEA), which gave state and local governments greater control over the nation's transportation system.[34] ISTEA established a block grant, allowing state and local governments to transfer funds from one program to another—such as highways and mass transit systems—in order to implement comprehensive trans-

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TABLE 1
Federal Grants-in-Aid as a Percentage of State and Local Spending, by Function, 1980, 1990, 2000.

Year	Total spending	Spending on public welfare (including health)	Spending on non-public-welfare
1980	23%	55%	18%
1990	17%	56%	11%
2000	19%	64%	11%

SOURCE: U.S. Census Bureau, Annual Survey of Government Finances.

portation strategies. These characteristics were generally retained by ISTEA's successor program, TEA-21, enacted in 1998 under the Clinton administration. Two other block grants were also enacted in the late 1990s: the Workforce Investment Act (1998), which consolidated several employment and training programs, and the Children's Health Insurance Program (1997), which allowed states to create programs covering low-income children who lacked health insurance.

State flexibility, however, was just one facet of a new model for grants. Some grants imposed a new form of accountability on states by attaching financial penalties or rewards to performance standards, that is, outcomes for people, communities, or institutions related to a program's goals.[35] One example was the 1996 block grant, Temporary Assistance for Needy Families (TANF), which replaced Aid to Families with Dependent Children (AFDC). TANF was designed to reduce long-term welfare dependency by getting low-income parents to work, discouraging out-of-wedlock births, and promoting marriage. These goals were to be achieved in part by restricting assistance to low-income families. Benefits were time-limited, adults had to work, and teen parents were to stay in school and live with their parents.

But there was also a strong experimental element in TANF. TANF delegated many policy choices to states, such as how earnings and assets were treated in calculating eligibility and benefits; whether to withhold benefits from unmarried teen mothers; and whether benefits would be in-kind supports, services, or cash. States were also given flexibility in procedures for dealing with clients and in the agencies used to deliver benefits and services. States were allowed to contract with nonprofit and for-profit organizations—including faith-based institutions, such as churches—to administer their TANF programs, in sharp contrast to AFDC, which required states to use public agencies with merit systems.

In exchange for this flexibility, states were to meet performance requirements and were encouraged to achieve other measurable outcomes. States had to increase the proportion of adults on assistance engaged in "work-related activities," such as job search and actual employment. If states failed to achieve these work requirements, their block grants were cut. A high-performance bonus

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rewarded top-performing states on selected outcomes, such as job retention rates among former welfare recipients—outcomes determined by federal agency officials working with state trade associations. Financial rewards were also given to states that reduced their out-of-wedlock birth rates.

Finally, another block grant, the No Child Left Behind Act (NCLB)—proposed by President George W. Bush and enacted in 2002—also stressed national accountability through performance measurement and fiscal sanctions. According to the administration's 2002 *Economic Report of the President,* NCLB expressed the basic idea that American federalism should

> create an institutional framework that will encourage the development of measurable standards to which all providers of public services—Federal and local, public and private—can be held accountable, and then to allow these providers themselves to find the best way to meet those standards.[36]

NCLB was the reauthorized version of a centerpiece of the Great Society, the Elementary and Secondary Education Act (ESEA) of 1965, which provided federal dollars to local schools serving minority and low-income students. NCLB gave states flexibility in spending federal dollars to produce educational improvements. But the flexibility came with unprecedented accountability requirements. States had to install annual reading and mathematics tests and demonstrate annual progress toward proficiency in these subjects among all students *and* among disadvantaged groups. Indeed, states were expected to achieve universal proficiency by 2014. If schools and districts did not meet these targets, they faced sanctions, including giving parents the options to leave "failing" schools, closing schools altogether, and losing federal funds.

One effect of performance requirements was a decoupling of federal funding levels from the true costs of the programs. In traditional grants, the federal government shared the costs of a grant program as long as it satisfied federal administrative and policy guidelines. Under performance-based grants, however, Congress imposed ambitious goals on states with little certainty about how much money was needed to achieve the mandated outcomes. For example, many observers believed NCLB funding was inadequate to its tasks.[37] One estimate of the costs to Texas of achieving the goals mandated by NCLB concluded that the state needed three times the actual increase in federal funding provided to Texas.[38] Some supporters of NCLB disagreed; they argued that increased accountability should suffice to improve performance.[39] But the analytical disagreement underlines the federalism problem: when performance measures are attached to grants, typically little is known about how much it costs to achieve them. By disconnecting mandated state activities and federal funding, grants like NCLB place uncertain fiscal burdens on states, create incentives for evading performance requirements, or do both.

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Devolution also enhanced the powers of federal executive officials. They acquired new intergovernmental tools, such as negotiations of performance indicators, annual reviews of outcomes, and determinations of sanctions. Some programs also gave federal officials larger research budgets, which they could use to evaluate new programs and thus direct attention to particular innovations. Also, by permitting states to vary their policies and administrative approaches, devolution created a more mutable and potentially malleable system of policy making. Federal executives may, as discussed below, use various methods to influence the growing range of state choices, encouraging some policy and administrative developments and discouraging others—and do all this with little input from Congress.

Growing State Capacity and Democratization

While the federal government came to rely on states to pursue many of its domestic policies through grants and regulations, it also became more dependent on state governmental resources and their administrative, fiscal, and policy-making capacities. Strong states were, in brief, a by-product of federal activism. The increasing capabilities and political openness of the states, in turn, shifted power within the federal government, as vigorous state governments challenged congressional controls and opened opportunities for the federal executive branch to manage the increasingly complicated interactions between the national and state governments.

Federal administrative dependence on state and local governments may be seen in part by tracing the growth of their bureaucracies. In terms of employment, state and local governments are more dominant now than they were seventy years ago, before the New Deal went into effect. Table 2 reveals that the number of federal government employees grew rapidly in the 1930s and 1940s but little thereafter (see the chapter by Patricia Ingraham in this volume). The number of state and local government employees, by contrast, increased substantially every ten-year period except between 1983 and 1993. By 2003, only 15 percent of all civilian public employees in the United States worked for the federal government.

States enhanced their institutional capacities in many other ways during the twentieth century. Early in the century, improvements were driven by citizen demands for remedies to social problems that local governments were unable or unwilling to address.[40] The "good roads" movement, for example, grew out of discontent with the terrible conditions of major roads and highways and led to a great expansion of state involvement in the building of roads, highways, and parks to meet the demands of the swelling number of automobile and truck drivers. Many other reforms in state governmental institutions occurred as the federal government imposed greater demands on their operations.[41]

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TABLE 2
Civilian Government Employees in Federal and in State and Local Governments, 1933–2003.

Year	Number of federal government employees (in thousands)	Number of state and local government employees (in thousands)	Percent of all public employees in federal government
1933	591	2,601	18%
1943	3,274	3,174	51%
1953	2,532	4,340	37%
1963	2,498	6,868	27%
1973	2,886	11,097	21%
1983	2,875	13,159	18%
1993	2,999	13,443	18%
2003	2,717	15,760	15%

SOURCE: U.S. Census Bureau, Annual Survey of Government Employment and Payroll.

The 1960s and 1970s saw an acceleration of the reform movement, as state governments were forced to become more responsive to a wider range of political interests. Spurred by *Baker v. Carr* (1962) and related Supreme Court decisions, states reapportioned their legislatures to comply with the "one man, one vote" standard and opened their legislatures to growing suburban and urban populations. Reapportionment produced changes in legislative leadership, which led state legislatures to adopt other reforms, including annual sessions, committee consolidation, higher pay, and more staff.[42] States also began to reorganize their executive branches in the mid-1960s.[43] They consolidated executive agencies into larger line agencies under the direct control of the governor, reduced the number of elective cabinet officers, increased the number of political executives appointed by governors, and strengthened governors' budgetary powers.[44]

Gubernatorial terms lengthened throughout the postwar period, giving governors time to formulate and build on policy initiatives. While fifteen states still had two-year gubernatorial terms in 1964, only two states did not elect governors to four-year terms by 2000. Turnover among governors declined throughout the twentieth century, especially in the second half. Reflecting in part the growing policy importance of governorships, gubernatorial elections became vigorously contested. Total gubernatorial elections expenditures more than doubled in constant dollars between 1977–1980 and 1999–2002.[45]

State governors and administrative officials also became better organized. The National Governor's Association (NGA) and other intergovernmental lobbies grew in strength and activities, as did specialized associations of state and local officials involved in specific policy areas.[46] By the 1990s, the National Governors Association had become the dominant national voice on many

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human service programs, a role revealed in 2003 when the NGA effectively vetoed the Bush administration's first proposal to block-grant Medicaid. State policy-making autonomy was also enhanced by the growing availability of policy expertise from national policy communities, think tanks, foundations, interest groups, and other institutions involved in formulating and diffusing policy ideas.[47]

State fiscal capacities have grown markedly in recent decades. States greatly increased their reliance on sales and income taxes since the 1950s and decreased their dependence on property taxes, which had always been politically difficult to raise. The development of a broad-based and growing tax base meant that states could sustain their own spending priorities, even in the aftermath of severe federal budget cuts, as they did in the 1980s.[48] States could even compensate for chronic federal underfunding. Since the early 1990s, for example, federal environmental grants changed little in real terms, despite the growth of state responsibilities. States responded by increasing their own spending, to the point that they now pay about 80 percent of the costs of federal environmental programs.[49]

Their greater political, administrative, and fiscal capacities have led many states to fashion their own policy responses to major problems. In the 1980s, states were on the forefront of efforts to deal with worker dislocation and retraining, when federal officials paid little attention to such issues.[50] Interest in economic development has sometimes led states to take on novel functions, such as California's decision in 2004 to fund stem cell research in order to draw academic researchers and biotech businesses unhappy with the Bush administration's restrictions on federal research grants. States showed leadership in energy policies in the 1970s, 1980s, and early 2000s—the most recent years in response to electricity reliability problems, environmental concerns, and energy price spikes.[51] Some states have even addressed the problem of global warming, while the federal government has done little, despite all the theoretical reasons that one would expect states to ignore such an issue.[52] The openness and capacities of state political institutions, combined with the growth of federal involvement in so many domestic issues, produced by the late twentieth century an extremely dynamic, less constrained system of federalism—one in which it would be difficult to identify any major domestic policy issue in the United States that has not penetrated both federal and state political agendas. Federal and state governments may be more than ever "different agents and trustees of the people." But one would be hard put to identify their "different purposes."

Congress and the States

As state and federal policy agendas converge, and as state governments increase their institutional capacities and political assertiveness, it is reasonable to ask how conflicts between the federal and state governments are resolved, if in

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fact they ever are. How does the federal government exercise real influence over state governments, and through which institutions, in this amorphous federal system of widespread assertions of national authority and vigorous state governments?

Despite its assertions of federal authority over so many domestic policy areas through legislation, Congress appears to play a smaller role in resolving intergovernmental issues. Indeed, the factors that made it easier for Congress to extend its authority also limited its real influence. Heavy reliance on state and local implementation, a shrinking federal domestic bureaucracy, federal funding that is poorly correlated with the costs of achieving national goals, and the failure to resolve many divisive policy issues, often by devolving major questions to state and local governments, all facilitated legislative action while weakening legislative control.

For example, members of Congress may claim credit for dealing with national problems when they impose new goals on state governments. But the same devolution that makes the enactment of such programs feasible also denies members political credit for whatever successes the programs achieve. Few votes are likely to be reaped by sustaining an "institutional framework" for *states* to succeed or fail. TANF is a good example. It was widely lauded as reducing welfare caseloads, increasing the labor participation rates of unmarried women with children, and creating a politically popular rationale (i.e., supporting work) for programs serving low-income families. However, political credit for these developments has gone largely to the states, not to Congress, with the result that many members have cared little about the program's reauthorization, which has dragged along in a fairly desultory manner since 2002.

Indeed, in recent years, Congress has failed to reauthorize many intergovernmental programs—sometimes because of difficult conflicts, sometimes because of a lack of interest among many members, and sometimes (as in the case of TANF) a combination of both. Congress has sustained some of these programs through annual appropriations or short-run reauthorizations.[53] The Child Care and Development Block Grant, the Safe Drinking Water Act, and the Clean Air Act have been sustained only through the annual appropriations process. Short-run program extensions—usually a few weeks or months, with little or no changes in the law—have been used in recent years to maintain TEA-21 (surface transportation), the Workforce Investment Act, and child nutrition programs, as well as TANF.

In addition, states' dominance of the implementation process means that states can often evade or "game" federal requirements. The federal government has few sources of in-depth information on the implementation of programs apart from what states tell them. In such circumstances, it is not surprising that states can adapt these requirements to their own ends. Job training program administrators have long been accused of "cream skimming"—of achiev-

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ing high program performance scores, such as the percentage of persons served who find employment, by only serving people easy to employ.[54] Most accusations of state gaming, however, have concerned how federal dollars were used.[55] The General Accountability Office estimated that about 60 percent of federal highway grants were used, albeit indirectly, for other purposes.[56] States have been particularly creative in drawing down Medicaid funds. Some states have "taxed" hospitals serving many low-income clients, used the taxes as state matching money under Medicaid, received federal dollars as a result of the state match, and then returned the "tax" to the hospitals, while the state retained the extra federal dollars. Congress has, from time to time, clamped down on these "Medicaid maximization" strategies. But states have invented new ones.[57]

Nor are there always strong incentives among members of Congress to determine whether states satisfy requirements. Program advocates may reasonably believe that imposing penalties on noncompliant states would hurt program recipients, frustrate program goals, and further reduce states' political support for the program. Members may also have different feelings about imposing prospective costs on all states—as when they enact a new regulation—and seeing their particular states penalized for noncompliance. For example, even though Congress established strict penalties for states that made errors in determining eligibility and benefits under the Food Stamp Program, Congress has repeatedly reduced those penalties after they were levied.[58]

Finally, all of these barriers to legislative control are compounded by the declining importance of federal grant funds in most policy areas, and the discrepancies between federal funding and demanding federal mandates. In 2005, for example, Utah risked losing federal dollars offered under the No Child Left Behind Act by subordinating NCLB requirements to state policies, an action several other states were also considering as of in mid-2005. Rejection of NCLB's demands was no doubt made easier by the small role of federal funding in K-12 education systems.

Congress is not without recourse. It could give up efforts at real control and simply contain its fiscal liabilities by creating more block grants, which usually lose real value over time.[59] Or it could turn to the federal courts to enforce and adapt the laws. Congress has never funded more than a small percentage of special education services mandated under the Education for All Handicapped Children Act of 1975.[60] However, the act has had an enormous impact on state and local education budgets because Congress gave parents opportunities to challenge school decisions, and gave federal courts the authority to define which students were "disabled" and what protections they deserved. Private rights of action have been a critical enforcement mechanism against subnational governments for many other federal laws. However, the Rehnquist Court may be curtailing their use.[61]

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Executive Federalism

Although the federal executive branch is, like the Congress, also limited in its ability to control the states, it nonetheless has strengths in this regard that are not found in the national legislative process. The executive branch has acquired many administrative tools that federal executives may use to influence state and local governments, including rule making or other methods of interpreting the law; discretion over project grants, demonstrations, and other grants directly controlled by federal agencies; waivers or other exemptions from the laws; contracts or grants to evaluate program innovations; and selective enforcement of federal requirements. In addition, the executive branch can apply its powers to the states in ways that Congress cannot. It can adapt quickly to state policy developments, act on selected states, and build on state reactions to federal initiatives—thereby using state changes and variations to discourage developments it opposes and to facilitate those it supports. The executive can also act in a concerted manner across several programs or even policy areas—as in the case of President Bush's Faith-Based Initiative—by using key federal appointments to bring new goals to bear on many decisions affecting the states.

The strategic exercise of executive powers to promote major changes in state policies or administrative practices is what we call "executive federalism." Its growing use has given rise to new intergovernmental dynamics. Presidents and their appointees have been able to produce significant changes in program management, coverage, and standards without new legislation. Even large policy changes depend less on major shifts in control over Congress—such as those produced by the elections of 1932–1936, 1964, and 1980—and more on control of the presidency and governorships and the conditions facing the states.

Executive federalism comes in many forms. Some involve particularistic negotiations between the federal executive and selected states over prospective policy changes, as in the case of federal waivers and demonstration projects. Most involve efforts by presidents and executive appointees to alter the context of state policy making and administration in order to influence state choices. These contextual changes may be effected through rule making and other policy interpretations, or through comprehensive managerial strategies, in which appointments, procedures, contracts, and other methods are used in combination to create new priorities in intergovernmental programs.

One common characteristic of these different forms is the fact that they do not require legions of federal staff. Waivers require a few policy and legal experts, as well as some research methodologists to review evaluation plans. Rule-making and policy memoranda demand legal and policy analysts. And management strategies, such as the Bush administration's Faith-Based Initiative, may require new staff for a few top positions. But all of these functions are consistent with the current, relatively small federal bureaucracy.

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Waivers

The most common administrative device that presidents and federal executives have used to change the operation of grant programs has been the waiver. A waiver is a grant of authority by Congress to a federal agency to permit selective enforcement of a law. Acts establishing domestic grant programs often allow federal agencies to suspend normal program requirements under certain circumstances: to experiment with and evaluate demonstration programs; improve program administration; or provide services or cover groups other than those authorized in the legislation. Federal agencies have developed policies and procedures under which waivers are granted, and presidents and their appointees have manipulated these rules to pursue particular program changes.

One of the most influential series of waivers were those granted in the 1980s and 1990s permitting states to change their policies under Aid to Families with Dependent Children (AFDC).[62] Although federal authority to grant AFDC waivers had existed since 1962, they were rare until the Reagan administration established a Low Income Opportunity Advisory Board (LIOAB) in the White House to ease federal review of waiver requests. The Reagan administration did not use waivers to push particular policy preferences but focused on program evaluation and budget neutrality (waivers could not cost the federal government more than continuing the AFDC program).[63] The first Bush administration revived the practice of issuing extensive AFDC waivers in 1992, when it used them to respond to then-Governor Clinton's campaign to "end welfare as we know it."

When the Clinton administration took office, it encouraged waivers containing more radical departures from existing policies. Governors responded enthusiastically. Tommy Thompson of Wisconsin and John Engler of Michigan saw opportunities to create national reputations for policy leadership, hardly a hopeless gesture when three out of the last four presidents had been governors (now, four out of the last five).[64] Governors also saw waivers as opportunities to claim credit for getting special recognition from Washington—and as timely intergovernmental devices in dealing with state problems. Despite complaints about delays in federal approvals, waivers allowed governors to respond quickly and specifically to the circumstances they faced in the early 1990s—rising welfare caseloads in many states, and budget crises in some.

Waivers, when implemented, broke down the ideological stalemate in the national legislative process by demonstrating the political, administrative, and economic feasibility of new welfare policies, such as time limits on benefits and work requirements with severe sanctions.[65] By 1996, when President Clinton estimated that 75 percent of AFDC recipients were involved in waivers, he not unreasonably claimed that he and the states had already reformed welfare while the legislative process in Washington had bogged down. Many factors were

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important in explaining the enactment of federal welfare reforms in 1996.[66] But the waivers were essential, and they showed the potential for selective demonstrations and diffusion processes—encouraged and facilitated by a highly interactive form of executive federalism—to reshape a divisive national debate.

Waivers have been no less important in shaping the Medicaid program since the early 1990s. Indeed, they have constituted the primary device by which federal-state health policy changes were made. Perhaps the largest change in the operation and financing of Medicaid in the last fifteen years has been the shifting of clients, particularly low-income women and children, from the program's original fee-for-service form into managed care. Under managed care, a health maintenance organization or similar entity receives a fixed payment to serve an individual for a certain period of time. Since 1991, the percentage of Medicaid clients enrolled in managed care grew from less than 10 percent to nearly 60 percent in 2003.[67]

This enormous change was almost entirely the result of Medicaid waivers. Legislative provisions allowing managed care waivers had existed for many years, but the Health Care Financing Administration (HCFA; now the Center for Medicare and Medicaid Services, CMS) had approved only small projects in which enrollment in managed care was voluntary.[68] As governors struggled to slow the rapid growth in Medicaid spending in the early 1990s, President Clinton encouraged states to submit, and the HCFA to approve, waivers permitting large managed care programs in which enrollment by Medicaid clients was mandatory.

Beginning in the late 1980s, Medicaid waivers also allowed states to move many elderly and mentally disabled recipients out of nursing homes and state institutions and into home and community-based services. Such services were thought to be more effective and cheaper than long-term institutional care. These waivers grew dramatically during the Clinton administration, from 155 in 1991 to 263 in 2001, and the number of clients receiving home and community-based services tripled.[69]

The George W. Bush administration continued this practice of using waivers, rather than legislation, as a means of changing Medicaid policy. One of the administration's first domestic policy initiatives, announced in August 2001, was the Health Insurance Flexibility and Accountability (HIFA) waiver. These waivers allowed states to expand health insurance coverage by shifting funds from other parts of Medicaid or the Children's Health Insurance Program (CHIP), or by reducing coverage of other groups.[70] For example, the administration has granted state waiver requests to use unspent funds from the CHIP program, which was enacted to expand coverage for children, in order to expand coverage for adults.[71]

The Bush administration has also welcomed state efforts to limit coverage and benefits for Medicaid recipients through the waiver process. CMS has

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approved waiver requests that cap Medicaid enrollment for some groups, cut benefits, and increase the premiums and copayments charged to Medicaid patients. The agency has, for example, approved a controversial proposal from Mississippi to eliminate Medicaid coverage for some low-income elderly and disabled residents.[72] The Bush administration has also encouraged waivers to provide prescription drugs for low-income elderly while requiring states to limit spending for *all* elderly recipients.

Waivers are found in many other federal programs. For many years, legislation authorizing programs administered by the U. S. Department of Education contained no waiver provisions. In 1994, however, new legislation included waiver provisions, and the department began to grant waivers at a rapid clip, issuing more than 500 between 1995 and 1999.[73] The No Child Left Behind Act extended broad authority to the secretary of education to grant waivers to limited numbers of state and local education agencies to consolidate and redirect funds and suspend a wide range of program requirements. Waivers were also used under the Food Stamp Program to suspend time limits and work requirements for adult recipients.[74] Beginning in 1994, the U.S. Department of Labor (DOL) used workforce development waivers and demonstration grants to encourage states to establish one-stop service centers, before Congress mandated such institutions under the Workforce Investment Act of 1998—which also gave extensive waiver authority to the DOL.[75]

Some federal agencies offer instruments similar to waivers, even if they are not called such. The Environmental Protection Agency (EPA) under Clinton permitted its regional officials and state administrators to negotiate agreements and grants under the National Environmental Performance Partnership System. Performance partnership grants (PPGs) allowed states to combine funds from up to 13 different environmental protection grants to address each state's needs and to promote innovation. In 1998, forty-three states had negotiated PPGs. Performance partnership agreements covered negotiated decisions about specific goals, strategies, performance measures, and responsibilities of federal and state administrators. EPA officials have also used "differential oversight" and "accountable devolution" to give greater autonomy to states with strong enforcement histories.[76]

The popularity of waivers and other forms of selective enforcement is easy to understand. States are unequal in their administrative ability and political and financial circumstances, and waivers allow states that can operate innovative programs to move ahead without imposing burdens on states that cannot. Waivers also allow presidents to pursue controversial policy goals without seeking approval from a slow and divisive legislative process. By permitting a few, often small-scale, demonstrations to be implemented, uncertainty is reduced about the effects and feasibility of even major policy innovations, and politicians in other states and in the federal government may be led to accept the initiatives. Waivers

may also allow presidents to help political friends among the nation's governors and punish enemies by withholding or delaying approval or insisting on onerous conditions attached to waivers. Finally, waivers provide governors with opportunities for political credit-claiming that are not available when they simply exercise flexibility expressly offered to all states under federal legislation.

The waiver process also neutralizes congressional scrutiny by enlisting the delegations of individual states as supporters of their states' waiver requests.[77] State delegations are expected to support waiver requests from their state and to lobby federal agencies to approve the waiver. Steven Teles observed that "members of Congress generally function as their state's advocate in Washington, protecting and advocating their state's interest much as they would in the case of a defense contract or toxic waste clean-up grant."[78]

Waivers have thus enhanced presidential control of domestic policy and have diminished congressional influence. Presidents have used the waiver process to enact significant changes in program policies and operations in many programs without legislative changes, and congressional oversight of these changes is weakened by the need for individual delegations to support requests from their own states.

Rule Making

Executive federalism is also exercised through the rule-making powers of the federal executive, as well as less formal methods of interpreting statutes to the states. Administrative rules may be overturned by Congress—though they typically are not—yet they sometimes produce major changes in intergovernmental programs.

One example was the promulgation in 1999 of rules interpreting the 1996 federal program, Temporary Assistance for Needy Families. As it was enacted by the 104th Congress and signed into law by President Clinton in 1996, TANF discouraged "dependence" on public benefits among low-income families with children. Adult recipients could receive assistance no longer than 60 months in their lifetimes. By 2002, half of each state's caseload had to be participating more than 30 hours per week in a limited number of work-related activities (which allowed few educational activities). Adults could receive assistance no longer than two years without working, and families on assistance assigned child support rights to the state. States also had to collect extensive data from people on assistance and report the information to the federal government.

If these and related requirements applied to all activities funded by TANF, states would have had little flexibility to use the block grant to supplement earnings, support education, provide job services widely, or offer child care and other work supports to families who left cash assistance rolls. But the Clinton administration promulgated a rule in 1999 interpreting the TANF legislation that made these approaches possible. A central feature was the rule's definition of "assis-

tance" and "nonassistance." By narrowly defining assistance as benefits meeting a family's "ongoing basic needs"—such as food, clothing, shelter, and utilities—the rule allowed states to use TANF funds for many kinds of "nonassistance" without applying the time limits, narrow work requirements, or administratively costly reporting requirements for TANF "assistance." Many states could thus fashion less restrictive programs than many congressional proponents of TANF had anticipated.

For example, "assistance" did not encompass earned income tax credit programs for working families, and about one-third of the states established such programs to supplement the earnings of working families.[79] Many states expanded their child care and transportation benefits to families that left cash assistance rolls, sometimes offering years of support to former recipients. Some states also developed a variety of lump-sum "diversion" benefits that might equal three or four months of cash benefits, yet these did not count against a family's time limits. One result was an enormous shift in the types of expenditures under TANF between 1998 and 2000. In 1998, the typical or median state put 59 percent of its total TANF expenditures into basic assistance, mostly ongoing cash payments to poor families, while it put only 7 percent of its spending into child care. Just two years later, in 2000, the median state devoted only 43 percent of its TANF spending to basic assistance and 24 percent to child care. Although other factors contributed to these changes, rule making by the Clinton administration made the restrictions on assistance much less important than anticipated by the program's congressional proponents.[80]

The effects of this rule making in transforming TANF into a more flexible work support program—at least among states inclined to do so—were augmented by other actions by the Clinton administration. The administration permitted many states to continue their AFDC waiver programs after TANF was enacted. Under the waivers, a wider range of activities were counted as "work" than the TANF rules permitted, including participation in educational and training activities. The administration also allowed states to avoid having to meet the demanding work participation requirements for two-parent families by permitting them to move two-parent families to programs supported exclusively with state dollars, a shift that made the federal work participation rates inapplicable—despite language in TANF that seemed to prohibit such evasions.

Clinton's administration also mitigated the antidependency thrust found in the 1996 federal welfare reforms by using policy statements to make federal entitlements more accessible. Spurred by drops in Food Stamp and Medicaid enrollments, federal officials in the Department of Agriculture and HCFA took several administrative actions to increase access to both programs.[81] For example, HCFA officials sent a steady stream of messages to state Medicaid officials, reminding them that efforts to reduce welfare caseloads should not affect application or case closure processes for Medicaid; instructing them on legal ways of maximizing

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Medicaid access; and promising lenient treatment in the federal quality-control process for state mistakes in determining eligibility. Not all states responded to federal efforts to expand participation in Medicaid and Food Stamps, but many did, and enrollments in both programs rose quickly.

Management Strategies

Another intriguing use of executive power to influence the federal system was a cluster of administrative activities that President George W. Bush labeled his "Faith-Based Initiative" (see also Chapter 1 by Scott James in this volume). President Bush was deeply interested in promoting partnerships between government and congregations or social service providers with overt religious aims and approaches. The White House supported legislation in Congress in 2001–2002 to reduce legal barriers to the direct involvement of faith-based organizations in providing social services with public (i.e., federal) funds. But the legislation languished in the Senate, which was then controlled by Democrats.

The Bush White House, however, never waited for legislation to advance the Faith-Based Initiative.[82] Nine days after his inauguration, President Bush issued two executive orders creating the White House Office of Faith-Based and Community Initiatives (WHOFBCI) and additional centers for FBCI in five federal agencies, the departments of Education, Health and Human Services, Housing and Urban Development, Justice, and Labor. Later executive orders added FBCI offices at the Agency for International Development; the Departments of Agriculture, Commerce, and Veterans Affairs; and the Small Business Administration. The combination of the White House Office and closely connected offices in ten government agencies, each with a carefully selected director and staff, was aimed at penetrating all agency operations affecting the goal of getting public financial support to faith-based groups as social service providers.

The White House and agency offices tried to get more grants to faith-based organizations (FBOs) by eliminating perceived agency barriers to their involvement and by increasing the capacity of FBOs to compete for grants at all levels of government. Administrative rules overturned two longstanding restrictions on religious institutions that received public funds: against using government money to build and renovate places of worship, and against using religious belief as a criterion in recruiting and retaining staff. The White House published reports on the "unlevel playing field" that FBOs faced in securing public dollars, and the president talked about the initiative and its aims at public occasions.

In the agencies, FBCI offices estimated the number of federal grants going to FBOs and secular organizations in order to document the "problem." They looked for federal grants—mostly project grants under the direct control of federal agencies—that could be used to expand FBO involvement. They identified barriers against religious participation and used rule making and persuasion to

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eliminate them. And the administration established a new program, the Compassion Capital Fund, which supported "intermediary" organizations that made "subgrants to faith-based and community organizations; train[ed] small faith-based and community groups in grant writing, staff development, and management; and help[ed] them network and collaborate."[83]

The Faith-Based Initiative did not directly change state and local laws. But the use of strategic appointments to change policies, procedures, and contracts—all to demonstrate the potential roles of FBOs, to build their skills and experiences in getting and using public funds, and to keep the issue before the public—was clearly intended to influence state and local governments, which controlled most social service contracts. The White House exploited an impressive array of administrative tools not only to demonstrate a new direction for grant making but also to mobilize and train a national constituency to compete for public funds in states and localities. Although it is too early to tell, this orchestration of administrative and presidential activities may have altered perceptions about the potential roles of FBOs at all levels of government.[84]

Conclusions

Divided sovereignty was not conceptually problematic in the early years of the republic, when constitutional, political, economic, and societal factors limited the role of the national government and its functional overlap with the states. But after many of these constraints eroded and were eventually broken by the New Deal and later waves of national legislation, the policy agendas of federal and state governments converged, as the federal government used grants and regulations to enter new domestic policy arenas.

This expansion of federal authority, however, produced an asymmetry between the federal government's authority and its fiscal and administrative powers. That is, the flip side of federal reliance on states to facilitate national action has been the dependence of the federal government on state implementation, administration, and funding. In addition to their administrative dominance, states have also increased their political capacities—their claims to political representativeness and their connections with constituencies—through, among other things, reapportionment and the increasing public salience and powers of governors.

The combination of extensive federal authority over a wide range of domestic policies, federal dependence on state implementation, and democratized and politically assertive states has contributed to a shift in national power over the federal system from the legislative process to the executive branch. Legislative processes have lost strength in controlling state bureaucracies and policy makers. Intergovernmental influence increasingly demands an adaptive, selective application of diverse tools—tools that federal administrators may marshal on priority

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issues but that legislative actions are less adept at manipulating. Presidents and top administrators may, if they wish, exploit a wide array of administrative mechanisms to achieve their policy aims on selected issues—through the concerted use of waivers, rule making, direct grants to selected organizations, demonstration projects, direct contracting, appointments, and other means.

This shift in the locus of national action from the legislative process to the executive branch on federalism issues also represents a culmination of changing roles performed by the federal executive with respect to the states. In the New Deal years and thereafter, the federal bureaucracy nurtured support for federal grant programs, urged states to professionalize and centralize their administration of such programs, and built bureaucratic allies within state bureaucracies to influence state policies. The Great Society years brought increasing discretion to the federal government in distributing grants—through project grants and grant provisions allowing federal agencies to give funds directly to nonprofits—and more detailed control over program planning and implementation. Then, beginning with the 1970s, intergovernmental regulations and grants with major regulatory provisions increased opportunities for federal agencies to interpret laws through administrative rules and to determine whether particular states had standards and enforcement powers sufficient to delegate regulatory powers. After waivers and other opportunities for particularized negotiations between state and federal governments began to be used widely in the 1980s and early 1990s, federal administrators and presidents had acquired a large repertoire of methods they could use to change the contexts for state decisions and to encourage the development and diffusion of major policy initiatives without congressional involvement.

This growing autonomy of federal executive powers and actions alters the dynamics of federalism. Major nationwide changes in policies no longer depend on electoral shifts in the control of the Congress, including increases or decreases in policy agreement and partisan ties between Congress and the president. Instead, control over the presidency and a few governorships can be a sufficient base to launch important policy innovations. The administrative mechanisms may often produce only small changes at each step. But federal executives may build on incremental changes—whether through rule changes, demonstration grants, waivers, evaluations, or other mechanisms—to develop new policies in sympathetic states, to focus media attention on innovative ideas, to show political opponents that the initiatives do not produce worst-case scenarios, and to demonstrate to political allies and constituencies the potential political benefits of the policies. Indeed, the ideas may originally come from the states themselves—along with critical information on how to implement them—and federal executives may selectively nurture policies they find agreeable. American federalism may thus display a more continuous process of innovation, demonstration, and diffusion.

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But this mutability and flexibility may come at a price. While legislative federalism frequently produced larger coalitions than might have formed in a more centralized system, executive federalism exploits state differences in order to construct smaller policy coalitions between federal political executives and a few governors sympathetic to a national administration's goals. And while legislative federalism often created common and fairly stable frameworks within which states could exercise controlled choice and carry out long-term planning and implementation of complex policies, executive federalism may alter these frameworks with every new presidential administration—even new Cabinet and sub-Cabinet appointments—and eventually break the frameworks down altogether. By loosening the American federal system from legislative control, executive federalism may create a more uncertain, more varied, and less transparent context for state policy making. Some states may fare well under such a system, and some may not. But it is likely that differences in what they do and how effectively they do it will increase across states and over time.

Notes

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33. One caveat should be noted. Although direct federal assistance does not support a large part of state and local expenditures outside health and human services, the federal gov-

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ernment may support these functions outside the grant system. Recipients of Medicare, an exclusively federal program, often use state and local public hospitals, and Medicare coverage reduces payments that would otherwise be required under Medicaid. Higher education is another example. A significant, though minority, share of federal support for post-secondary institutions is provided through student loans and tuition grants to students, not grants to institutions. These indirect forms of federal support help support state and local governments—and extend the reach of federal regulations. But they still leave most of the fiscal burdens to state and local governments.

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