

There Will Always Be a New Federalism

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ABSTRACT

American federalism is strongly operative and very much alive! Above all, it is opportunistic. It changes over time depending on the relative power and goals of major interests in the society. Currently, federalism has been rediscovered by liberals. This article describes the latest “New Federalism” and discusses the values of U.S. federalism at the state and grass roots’ levels as well as the ways it has changed historically and has served as a force for public sector growth and the accretion of governmental functions and services.

There was a time when it was stylish among political scientists to write about the death of federalism. That it will whither away. I want to reassure readers—if for any reason you are worried about this—it won’t happen. There will always be a New Federalism.

As an architect of the “New Federalism” program of President Richard Nixon’s first term, I am struck by a paradox in domestic policy now that hinges on how our federal system works.

Nixon’s “New Federalism” had a decidedly progressive cast, although not many people know about or recall this. A key component was more fiscal aid on a more flexible basis to state and local governments in the form of revenue sharing and block grants (Nathan 1975, 12–34).

In more recent decades, federalism has been touted as a good thing by conservatives. Ronald Reagan as president stressed the Tenth Amendment to the U.S. Constitution (which “reserves” powers to the states), making the argument that various national proposals for new domestic programs should not be federal responsibilities but instead should be viewed as appropriate for the states. Some observers believed that the subliminal message was not that the states should carry out the programs involved, but that no government should do so. The George W. Bush administration has gone Reagan one better, forthrightly arguing that in domestic policy areas no government should do things that some liberal interests and organizations favor.

REDISCOVERY BY LIBERALS

The paradox is that federalism is being rediscovered by liberals. Representative Barney Frank (D-MA) recently was compared to states’ righter and former U.S. senator Strom

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Thurmond when Frank argued that the states (with Massachusetts out front) should be the arbiters of gay marriage (Foer 2005).¹ Barney Frank is not alone. Other liberals see the states, particularly states with liberal leaders, as the appropriate governments to deal with many program issues:

- *Protecting Medicaid*—The federal government has tried several strategies to slow the growth of the Medicaid program, which aids the elderly, the disabled, and poor families. But since the program has a broad constituency of recipient groups (not just the poor) and multiple provider interests, states have fought hard (and so far pretty much successfully) to shield Medicaid from Washington's retrenchment efforts.
- *Cleaning Up the Environment*—This is a policy area in which many states are ahead of the curve compared with the federal government, as shown by the nine-state Northeastern Accord to freeze power plant emissions and similar regional efforts underway in California, Washington, and Oregon (DePalma 2005).
- *Equalizing School Aid*—Hard-charging activists in many states are pulling every lever—judicial, executive, and legislative—to distribute school aid in ways that give more aid to poor core-city and rural communities and provide more aid overall.
- *Providing Public Infrastructure*—Although the Federal Highway Act is a big factor in the transportation field, activists at the state level generally see states as their best avenue for rehabilitating, maintaining, and constructing new roads, schools, parks, and other public facilities. Some of this is old-fashioned pork barreling, but that does not diminish its importance in providing facilities for services advocated by the supporters of public education, libraries, economic development, the arts, recreation, parks, and so forth.

The same point applies for regulatory issues:

- *Minimum Wage*—This is a good example of an area where some states are out front nationally. According to a *USA Today* article (Cauchan, 2005) seventeen states covering 45 percent of the national population have set minimum wages above the federal rate of \$5.15 an hour.
- *Stem Cell Research*—Following California's lead with its \$3 billion bond issue to support stem cell research, other states have joined the parade, notably Illinois, Connecticut, and New Jersey.
- *Sex Education*—This, too, is not a good area for liberals to pursue nationally, the expectation being that any action would cater to the rigidity and the intense concerns of religious fundamentalists.
- *End-of-Life Decisions*—One could argue that the 2005 debates on the Terri Schiavo case in Florida was an example of states' favoring more liberal positions than those of President George W. Bush and Florida governor Jeb Bush.
- *Teaching about Evolution*—While not a likely area for federal policymaking, still it is another example of a sensitive subject that from a liberal point of view is best left to the states.

¹ This article contains a useful scan of liberal views on state activism.

This is a sampling of issues that spurs liberals to look to the states at a time when the conservative cost-cutting mood in Washington is not propitious for them. Every day, in similar ways, issues move around in American federalism. There is the case, for example, of a bill to combat the use of methamphetamine in cold medicines. The congressional sponsors of a national law sided with states, in this case Oregon, that “wanted to be tougher than the federal law” (Barnett 2005). In a more recent Oregon case before the U.S. Supreme Court, the question at issue is whether the U.S. attorney general (John Ashcroft in 2001) could abrogate a state law that permitted the administration of drugs to assist suicides. The *Wall Street Journal* sided with the state, referring specifically to the way in which liberals are discovering federalism in an editorial aptly entitled, “The New New Federalism” (*Wall Street Journal* 2005; see also Greenhouse 2005).

There has been similar back-and-forth debate involving the Supreme Court and the states about prescribing marijuana for patients who suffer from cancer and other serious illnesses. Other federalism issues arise in the field of bioethics and genetic engineering (McGee 2003) and on matters involving federal efforts to water down and weaken state constitutional restrictions against using state funds to support religion (Farris, Nathan, and Wright 2004).

While it is not decidedly a liberal versus conservative issue, the way state governments are digging in their heels to oppose federal rules and ratings under the No Child Left Behind national education reform law of 2002 is further evidence of state governments’ being outspoken about their prerogatives at a time when the national administration, uncharacteristically for Republicans, is relatively uninterested in federalism principles.

With future rules fights possible in the U.S. Senate to undercut the power of moderate and liberal senators, we would do well to take a careful look at the ideological balancing role of American federalism. It provides platforms throughout the country for voices and actions that reflect the multiple and varied values of citizens.

A LITANY OF VOICES

Without going into detail, the following are comments on the newest new federalism—the liberal version of new federalism that is rediscovering the states.

Franklin Foer (2005), in the *New York Times Book Review*, first called my attention to the Barney Frank example cited above. In an article called “The Joy of Federalism,” Foer said the liberal new federalism is more than a reaction to “the conservative grip on Washington”:

These developments may look like a desperate reaction on the part of some liberals to the conservatives’ grip on Washington. But in fact the well-known liberal liking for programs at the national level has long coexisted alongside a quieter tradition of principled federalism—skeptical of distant bureaucracies and celebratory of local policy experimentation.

Likewise, Andrew Sullivan (2004, 6) said in *The New Republic*, “The whole point of federalism is that different states can have different policies on matter of burning controversies—and that this is O.K.” Actually, he said, it is better than O.K.:

The U.S. Constitution was devised not as a means to avoid social and cultural polarization, but as a way to manage it without splitting the country apart. And it says a huge amount about our contemporary amnesia with regard to the benefits of federalism that this should now be seen as some sort of revelation.

In a similar vein, Paul Glasris (2004, 21) in the *Washington Monthly* asks, “Why shouldn’t the Democrats become the party of federalism?” Federalism journalist Neal Peirce (2005) called this rediscovery of federalism by liberals “a big turnaround—liberals trying to innovate through states’ rights, conservatives pushing their agenda through federal power.” Peirce favors the preservation of states’ rights:

For all of the states’ shortcomings, they’ve historically produced important programs and directions for the entire nation—most recently with welfare reform in the 90’s. The whole country has a stake in preserving the states’ fiscal and political viability, no matter what party or ideology is in power nationally.

Michael Lipsky and Dianne Stewart (2005, A23) in *The American Prospect* praised activist policies by governors, especially their strong role in resisting Medicaid cuts as “signs of turnaround.” They credited the work of the State Fiscal Analysis Initiative (which Lipsky had the critical role in founding) as watchdogs at the state level to support public services and uphold liberal values and views. David Barron (2005, 67) in *Dissent* took a similar tack in addressing the question, “What would a progressive federalism look like?”:

It might well be a mirror image of Rehnquist Federalism. It would give states and local governments much greater room to regulate the private market. This would check national and multinational business influence as Louis Brandeis and earlier progressives once imagined. It would also give the national government much more power to regulate nonmarket social relations.

Barron said the revival of states’ rights “may be the most substantial accomplishment of the Rehnquist Court’s conservative majority” (Barron 2005, 64).

FOUR CHARACTERISTICS

Federalism, to be sure, is *opportunistic*. Where you stand depends on where you have power. While it may be easier and more efficient for a political faction to advance its goals centrally, when out of power centrally, it is equally logical to advance them from the periphery. There are three other important real-world characteristics of our federal form. It is *dynamic*. As already stated, it changes over time as values and goals shift in the society. It is *cyclical* in that changes in American federalism coincide with shifts in the mood of the country. It is *progovernment* (and in this I agree with Michael Greve [2005]) in the sense that its shifting character ratchets up public-sector activism and spending over time.

Few political developments demonstrate this formulation better than the rise and role of Eliot Spitzer, New York’s activist attorney general, since 1999. Spitzer is utterly candid. He says he discovered federalism and became in his own words a “fervent federalist” when he realized that the Republicans under Reagan had won in Washington. He became a crusading state official going after the leaders of some of the nation’s largest and most powerful corporations.

One might make a riddle out of this. Why, you might ask, is the Bush II administration cooling off on the Reagan administration’s aggressive devolutionary and deregulatory brand of new federalism, which was carried forward in the mid-1990s under House Speaker Newt Gingrich’s “devolution revolution”? (Nathan 1996). The answer is: “Spitzer.”

Here is Eliot Spitzer (2003) in his own words:

Well, let me make a confession that will not surprise you. On January 1, 1999, when I got this office, I suddenly became an enormous fan of the new federalism. I suddenly said, “States’ rights are a beautiful thing. States’ rights are the future, and we want to do everything we can to promote them. Because if they in Washington out of some foolish theory or dedication to a theory are silly enough to be giving away power, I’m not silly enough to reject the kind offer. And I will embrace this notion that states should be the repository of law enforcement and legal creativity and enforcing these statutes that have been passed. And I will dive into that as aggressively as I possibly can.”

And we did. And we did it in the areas of civil rights and we did it in the area of antitrust and the environment and most recently Wall Street, which got some attention, I suppose. And we did it in terms of women’s rights as well, of course, getting the injunctions that we got up in the western district and the northern district when there were protesters outside clinics. We enforced those statutes. And we said, “We are not going to decline the opportunity to define a creative, aggressive law enforcement agenda for the states.”

Peter Harkness, editor and publisher of *Governing* magazine and an expert on federalism and intergovernmental relations, makes the point that the Republican leadership in Washington has changed its colors and its course dramatically since Reagan’s inauguration. “Pragmatism,” he says, “is winning out over ideology” as Republicans fortify their control in Washington (Harkness 2005, 286):

As a result, Congress is re-asserting itself on turf it had abdicated so long ago. And despite the fact that 10 former governors are in Congress and more than half of the House members used to serve in state legislatures, Washington lawmakers are not reluctant to exercise their clout over their counterparts in state and local government. “Where you stand,” the adage goes, “depends on where you sit.”

Another demonstration of the opportunism of American federalism is seen in the “Contract with America” program spearheaded by Speaker Newt Gingrich in the 104th Congress. Gingrich’s program highlighted block grants, notably for Medicaid and welfare, to turn power back to the states, one aim being to make it easier under both programs to stem their spending growth. Yet, in other functional areas, notably involving business interests on environmental and other regulatory issues, the “Newt Federalism” was centrist, enacting laws to set national standards.

OTHER NEW FEDERALISMS

In my own checkered past, I have had a hand in these kinds of dialogues. Going back to Nixon’s “New Federalism,” several of us wrote what it meant in supposedly anonymous articles, which were later printed in the federalism journal, *Publius*. We did not all agree (the other authors were Bill Safire, Tom Huston, and Wendel Hulcher). Here is what I said under the name of Johannes Althusius (1995), a seventeenth-century German political philosopher, who was an early proponent of democratic government in the federal form:

The New Federalists are *not* ready to see the federal idea die hard. Our essential argument is that the American governmental balance must be readjusted and refined over time to preserve and enhance the essential political values of federalism, which are:

- permits diversity among regions;
- allows flexibility in problem-solving;
- provides opportunities for experimentation and innovation; and
- expands opportunity for participation in political processes.²

The Founding Fathers stressed the balancing role of the federal form. Alexander Hamilton in *Federalist No. 28* said, “Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of state governments, and these will have the same dispositions toward the general government.” Both the national and state governments, he said, are in this way “instruments of redress.” In a similar vein, James Madison in *Federalist No. 51* said the general and state government “will control each other.” A century later, Woodrow Wilson reinforced the point. He observed that “the question of the relation of the states to the federal government is the cardinal question of our constitutional systems.”

My first instinct in working with the theme of this article was that I could devise a classification system for characterizing new federalisms over time. But I could not find a way to do so because the determining conditions are so changeable. Madison in his lifetime shifted ground from being a closet nationalist in 1787 to a states’ righter in 1798. In his authorship of the Virginia Resolution, written to oppose the Alien and Seditions Acts, Madison said the states “in case of a deliberate, palpable, and dangerous exercise of other powers . . . have the right, and are in duty bound, to interpose for arresting the progress of evil.”

A century later, Herbert Croly (1910) in *The Promise of American Life* argued for national leadership of the Progressive movement on a basis that was championed by Presidents Theodore Roosevelt, Franklin Roosevelt, and Lyndon Johnson.

On the other hand, Richard Nixon, as noted earlier, advanced devolutionary policies in his domestic program, which he explicitly called “the New Federalism,” on the premise that the goals of Johnson’s Great Society were worthy but could not be carried out effectively by heavy-handed, muscle-bound federal bureaucracies.

Ronald Reagan’s brand of new federalism was a far cry from Nixon’s. He advocated more power for the states as a way to curb government spending. Bill Clinton also ended up as something of a decentralist, signing and boasting about a welfare reform law that created block grants to the states and relied on them to “end welfare as we know it.” Although George W. Bush does not have what would be called a federalism agenda, his domestic program, which observers would have to characterize as centralist, has sought to curb social programs through federal laws and administrative action.

In fact, it has been suggested that the domestic and social policy of the Bush administration, rather than reflecting the usual federalism motif of Republicans, is primarily and in actuality his “faith-based initiative.” In speeches that reflect strong conviction and in an activist White House–led effort to infiltrate the bureaucracy to advance this program, the Bush presidency has been hard-charging in its views on domestic issues (Farris, Nathan, and Wright 2004). Critics see this as a covert effort to cast doubts about domestic public programs (Burke, Fossett, and Gais 2004). Supporters, on the other hand,

2 For the original essays see Althusius 1972a, 1972b, 1972c, and 1972d.

contend that one cannot impugn motives and that the effort to involve faith-based organizations in federally aided activities is sincere and praiseworthy.

More prominently, the directive and centrist policies of the Bush administration, for K–12 education (under No Child Left Behind) and also for homeland security and anti-terrorism activities, have reflected a willingness to run roughshod over state governments that is out of character with previous Republican administrations.

FEDERALISM CYCLES

A major question for this analysis is whether American federalism over time has been a force for impeding or expanding the role of government. One way to answer this question is that competition among the states has held down government activism and government spending. Another way to answer the question is in the affirmative. This, I argue, is the correct answer: *The dominant effect of U.S. federalism is to expand the scope and spending of the domestic public social sector.*³

Going back to the nineteenth century and the first part of the twentieth century, the states—not all the states, but some states—have been the sources of expansion of the public sector in conservative periods. When conservative coalitions controlled national offices, programs that were incubated, tested, and debugged in liberal states became the basis for later national action. In such periods, client and provider groups also played a strong role in protecting existing programs, making retrenchment harder to achieve than otherwise would have been the case.

A surge of liberal state initiatives in domestic affairs characterized the conservative Republican period in the 1880s. Allan Nevins and Henry Steele Commager (1981, 346) have written, “the first great battles of the reform movement were fought out in the states.” Compulsory school attendance, vaccination laws, and the creation of state boards of education, reforms of political processes, a growing role for state boards of charity, child labor laws, and state regulatory policies in licensing and zoning are examples of state initiatives in areas of domestic policy at the turn of the century that were later expanded and nationalized in the Progressive movement (Nathan 1990, 241–42).

Likewise in the 1920s, when the country was “Keeping Cool with Coolidge,” states were the source of progressive initiatives like unemployment insurance, public assistance, and worker’s compensation. James T. Patterson (1969, 4) has said that the states “preceded the federal government in regulating large corporations, establishing minimum labor standards, and stimulating economic development.” He adds that “the most remarkable development in state government in the 1920s was the increase in spending” (Patterson 1969, 7). State initiatives planted the seeds of Franklin D. Roosevelt’s New Deal.

In the 1980s, when the pendulum of social policy nationally swung toward conservatism, there was a similar spurt in state activism in response to President Reagan’s domestic policies to cut domestic spending. States reshaped programs to reflect their priorities, increased the funding of programs in areas in which the federal government had become less active, and assumed more control over the activities of local governments and nonprofit organizations. In these ways and others, states expanded their influence vis-à-vis the federal government and in their relationships with local governments and

³ This point is highlighted in Nathan (2005). See also Greve (2005).

nonprofit organizations (Nathan and Doolittle 1984, 1987). In an op-ed article in the *New York Times*, Martha Derthick and I wrote in 1987 that there was a new alignment in American federalism, just like today:

In our view, the striking thing about the rising role of the states is the reverse spin it puts on the usual assumptions about federalism and political ideology. To understand the new liberalism of the states, it is important to remember that they are governments in their own right and that nonetheless they are often treated as if they were subordinates of the Federal Government.

Because the states remain the dominant government in providing fundamental domestic services such as education, public health, property law and family law, they are almost always the first governments to act on new and different policy issues.

By contrast, Congress is rarely an innovator. When a new social issue appears—what to do about acquired immune deficiency syndrome, the homeless, nursing homes, or how to regulate new reproductive practices or whether to ban smoking on commercial airline flights—states are likely to be pacesetters.

No matter how big the Federal Government gets, the states retain their historic role as laboratories for experimentation in public policy.

Moreover, when all or part of the national Government is controlled by conservatives, as it has been recently, people who seek to experiment in social policy are inclined to concentrate on the state level (Nathan and Derthick 1987).

PUSH-PULL DYNAMIC

There is both a pull (from the federal government) and a push (from states) that advance federal government initiatives and activism. I believe this pull-push dynamic (almost like an electric motor) has been expansionist over time despite the American political culture in which individualism and skepticism about government's role is strongly manifest.

The basis for this cyclical pattern is made stronger by virtue of improvements in the capacity of American state governments. A report by the U.S. Advisory Commission on Intergovernmental Relations (1985, 2) stated that “state governments have been transformed in almost every facet of their structure and operations.” The state role was also strengthened by the Supreme Court's decision in *Baker v. Carr* in 1962, which reduced the urban-rural imbalances of many state legislatures. In a similar vein, Martha Derthick (1987, 72) stresses the importance of what she calls “the end of Southern exceptionalism” as a reason for increased state government activism in domestic affairs. Integration in the South, she believes, created a situation in which “the case for the states can at last begin to be discussed on its merits.”

In an underappreciated book, *The Rise of the States: Evolution of American State Government*, Jon C. Teaford (2002, 5) argues that periodic predictions, going back to the nineteenth century, of the death of the states “have been exaggerated.” His book takes a close look at states' finances, their role in transportation and in other crucial policy areas, and the steady process of reforming their structure and operations. While Teaford does not express his thesis in cyclical terms, his book provides support for such an interpretation:

Rather than slumbering for the first seven decades of the twentieth century, then suddenly springing to life under the leadership of a new breed of bright and vigorous governors, the states have been vital actors from the 1890s onward. The image of foot-dragging hayseeds in

provincial capitals blocking change and thwarting omnipresent dynamos in Washington, D.C., needs to be discarded. Though state government did change notably in the 1970s and 1980s, it also changed markedly in the 1920s and 1930s. The vitality characteristic of the last quarter of the twentieth century was not a new phenomenon. Instead, the states continually adapted (Teaford 2002, 5).

WHY CYCLES?

Why and how do the kinds of cycles occur that are intrinsic to this thesis? An iconoclastic economist, Albert O. Hirschman, in a series of lectures at Princeton University in 1981, advanced a cyclical interpretation of liberal and conservative shifts in public attitudes toward the role of government. He said that such an interpretation of the behavior of economies and societies requires that there be a swing variable, which in his theory is disappointment. Hirschman (1982, 3) described “oscillations between periods of intense preoccupation with public issues and of almost total concentrations on individual improvement and private welfare goals.” “My basic point,” he maintained, “is easily stated: acts of consumption, as well as acts of participation in public affairs, which are undertaken because they are expected to yield satisfaction, also yield disappointment and dissatisfaction” (Hirschman 1982, 10).

I would add another factor that has contributed to the conservative shift from the 1960s and 1970s to the 1980s in domestic policy in the United States—*success*. The Great Society and Nixon’s New Federalism initiatives produced a buildup of social benefits that sparked opposition and caused resentment toward social spending. Perceived shortfalls of these programs, along with backlashes to the civil rights revolution and the Vietnam War, generated disappointment about what governments can do. Still, the underlying buildup of cash, in-kind, and social services has to be viewed as success by those who favor social programs.

Today, a low-income single parent and his or her children, even in a conservative state, are likely to receive a sizable package of benefits. Cash assistance is only part of the package, which for the family head can include an earned income tax credit (if the family head is working), food stamps, Medicaid (which is large and still growing), child care assistance, and perhaps a rent supplement. These packages of benefits and services raise a fundamental question of horizontal equity. Improvements in social benefits in the 1960s and 1970s produced a cumulative value of income for poor families of several times the per-hour value of the minimum wage, causing resentment on the part of unaided low-income working families.

A major factor that explains how the diversity of federalism ratchets up social benefits is the way many federal grants-in-aid are structured so that they often give states wide discretion, much more so than would be likely under a unitary governmental form. If instead, as under a unitary system, policymakers in the United States had to establish one national standard (“one size fits all”) for social programs, the ultimate effect would be less expansive programs. This accommodation to diversity permits setting relatively higher standard benefits in larger, wealthier, and more liberal states, compared with poorer, more conservative, and typically less urban states.

While not wanting to cover the whole waterfront in this lecture, I need to mention additional points about how discretion works in U.S. federal-state relations. States can be constricted by national action. The federal government can and does preempt state action

by requiring them to do things under the commerce clause or general welfare clauses of the U.S. Constitution. There is an immense literature on this subject, which was summarized recently in a symposium on preemption in *PS: Political Science and Politics* published by the American Political Science Association, with the lead article by my colleague Joseph Zimmerman (2005). On the other hand, Martha Derthick (2005) in a recent paper discusses how increased reliance on state and local performance management systems and social science demonstrations has professionalized intergovernmental relations in ways that enhance the power and influence of state and local public agencies and officials.

Another reason for the hot and cold cycles of domestic public affairs from Washington is the fact that much of the time foreign affairs dominate the national policy process. Wars, military actions, and foreign policy tend to push domestic policy off the stage. This was the fate of Roosevelt's New Deal and also of Johnson's Great Society. It is true of Washington today with the war in Iraq and against terrorism.

MY CONCLUSION

As I see it, federalism is a fundamental checking and balancing attribute of American government. It is often viewed as an old-fashioned and a dull subject. But it is strongly operative and very much alive! Our federal system is a safety valve—an instrument for political calibration, accommodation, and innovation. That is the genius of American federalism.

The current arrangement of power in Washington—with a strong ideological coalition dominating all three branches of the national government—is not an aberration. It has happened before and can happen again, regardless of whether it is liberals or conservatives who have the upper hand. The situation today is compounded by the atrophy of political parties as instruments for grassroots action. The conclusion of this article both involves and transcends ideology. We need U.S. federalism, not just on the part of those who seek to counter a strong president with a strong ideological agenda and with support in the Congress and the federal courts, but as a way to make sure over the long haul that our political system is open to multiple values and views.

Moreover, the way federalism works is not a neutral or technical matter. This assessment of the American federal form points to lessons that have not been given enough attention. Yes, federalism can be a check against excesses—power that tends to corrupt. At the same time that it does this and promotes governmental diversity, U.S. federalism has been a force for building up governmental power and the public sector. In an ironic way, this has undercut conservative programs that deploy federalism arguments to deflect pressures for expanding the size and scope of the U.S. national government.

There are tradeoffs involved. For liberals (people who favor activist government), federalism is untidy, hard to manage, and uneven in its effects. Nevertheless, it is a fuel and force for building up governmental activities. For conservatives, the federal idea may seem to have appeal as a way to tame Leviathan. However, the temptation to use it for this purpose can backfire in the long run.

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