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# The Middle Tier in American Federalism: State Government Policy Activism During the Bush Presidency

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# **The Middle Tier in American Federalism: State Government Policy Activism During the Bush Presidency**

By: Dale Krane

Demarcations and assessments of particular periods of American federalism typically focus attention on national–state relationships, and ignore the independent activities of the 50 states. Labels applied to a period are often based on the federalism stance taken by a president. One can think of Lyndon Johnson's “creative federalism,” Richard Nixon's “new federalism,” and Ronald Reagan's “new, new federalism.” President George W. Bush, unlike some of his recent predecessors, has not proclaimed his own distinct vision of federal relationships, and consequently efforts to describe and assess the character of federalism during his administration must rely on a review of policy actions (or inactions). Because a sole focus on national–state relations ignores the ability of state governments, either singly or in combination, to adopt policies different from those of the federal government, it is also necessary to examine this independent policy activism as part of any assessment of an era in American federalism.

This article begins with a discussion of state government response to the centralizing thrust of Bush policy proposals and his reversal of his party's previous stance supportive of states' rights. To capture more fully the condition of federalism during the Bush presidency, the analysis then moves to an examination of independent policy action by state governments, or what Elazar (1972, 174) termed “federalism without Washington.” The essay concludes with an effort to explain how and why the “middle tier” in American federalism has been so assertive during the George W. Bush presidency.

## **State Governments Respond to Bush Initiatives**

Compared to the “Devolution Revolution” that proceeded with the support of recent presidents (Nathan 1996, 5–13; Schram and Weissert 1997), the Bush administration reversed course and pursued policies designed to enhance national government control over domestic policy. It is an understatement to say that state governments in various combinations vigorously opposed the centralizing course embodied in the many Bush policy initiatives. Beginning with the passage of the No Child Left Behind Act (NCLB) in 2001, bipartisan complaints grew year by year and turned rancorous at the 2006 annual National Governors Association conference at which the “... relationships between the governors and Washington [were described] as poisonous” (Broder 2006 August 9). The National Governors Association (NGA) and the National Conference of State Legislatures (NCSL) disagreed with the publicly popular elimination of taxes on dividends and on estates. The Medicare Modernization Act was opposed by NGA and NCSL as well as by the United States Conference of Mayors (USCM) and the National Association of County Officials (NACO). Joining NGA and NCSL in resisting passage of the REAL ID Act were the Council of State Governments (CSG) and the American Association of Motor Vehicle Administrators (AAMVA). The Food and Drug Administration's (FDA) ban on the importation of prescription drugs was defied by several states, including Illinois, Iowa, Kansas, Maine, Michigan, Minnesota, Missouri, Rhode Island, Vermont, and Wisconsin. In fact, it is hard to identify any significant Bush policy initiative that was welcomed with bipartisan enthusiasm from state and local officials. While space does not permit a detailed review of each Bush policy initiative, a brief examination of several important policies can highlight the sources of the strong opposition voiced by state officials.

## *No Child Left Behind*

The No Child Left Behind Act, the premier legislative triumph of Bush's first term in office, aroused an immediate and intense negative reaction from many state and local education officials that was soon joined by governors and state legislators. The new law “transformed federal education policy from one of a broad-based distributive but supplemental program of federal dollars to a policy based on performance standards and backed up by penalties for failure to achieve the standards” (Krane 2002, 10). As state and local officials worked to implement NCLB, they soon objected strenuously to the act's programmatic mandates, penalties, and timetables (McGuinn 2005, 58). Because NCLB's accountability regime raised the real possibility that large numbers of schools might fail to meet the Adequate Yearly Progress (AYP) benchmarks, which in turn could lead to the loss of federal funds, the act was seen as “... punitive and designed to identify problem schools without really dealing with the problems that are to be uncovered” (Greenblatt 2004, 40).

By 2004, debates on the Act became a common occurrence in many state legislatures, and state legislative resolutions demanding changes in or the repeal of NCLB quickly appeared. Some of the fiercest resistance emerged in strongly Republican states (Krane and Koenig 2005, 13). For example, Utah in April 2005 enacted legislation declaring the state's education law would have precedence over NCLB [the U.S. Constitution's supremacy clause notwithstanding]. Three dozen states proposed changes to relax the accountability standards and new lawsuits were filed by the nation's largest teachers union and by several school districts (Banchemo 2005). This barrage of complaints forced the U.S. Department of Education to loosen the rules for calculating AYP scores, and after his reelection Bush replaced Secretary Paige with Margaret Spellings who signaled she was willing to engage in dialogue with state officials. These changes did not stop states from lobbying national officials for further modifications in the law's implementation.

Each side continued to press the other. By 2006, the U.S. Department of Education announced that no state had met the deadline for teacher qualification and only 10 states were granted full approval of their systems for testing students. Secretary Spellings declared “I want the states to know that Congress and the president mean business on the law,” and she judged the testing systems in Maine and Nebraska to be inadequate. This rejection was immediately labeled by Douglas Christensen, Nebraska education commissioner, as a “... mean spirited, arbitrary, and heavy-handed way ...” of treating the state (Dillon 2006a). While the states were jousting with federal education officials over NCLB regulations, many state education boards and officials lowered scores for passing the mandatory tests and redefined the categories by which students were characterized; the effect of these alterations was to reduce the number of schools likely to be “in need of improvement” (Dillon 2003). This type of gamesmanship by the states brought criticism from corporate leaders and civil rights groups who pressured Secretary Spellings not to soften her stance toward state compliance (Dillon 2006a).

One sign that the state-national struggle over the best strategy for school improvement will not soon end was seen in Governor Jeb Bush's (R-FL) defense of his state's A-Plus program which grades schools A to F instead of NCLB's Pass or Fail: “I mean perfection is not going to happen ... We're all imperfect under God's watchful eye, and it's impossible to achieve it. With all due respect to the federal system, our accountability system is really the better way to go” (quoted in Dillon 2006b). Governor Bush made his remarks in response to Secretary Spellings' stance that NCLB was “... 99.9 percent pure” and needed no changes. Governor Bush disagreed with Secretary Spellings by saying “Punitive actions don't work nearly as well ... [and] accountability works better when it's viewed as a reward” (Dillon 2006b).

The current campaign to improve public schools began in the 1970s as states established minimum competency testing and grew into a national movement to create standards and accountability systems.

Change occurred incrementally as states engaged in the not so easy task of altering school curricula and practices. The national government encouraged this voluntary effort through actions such as Goals 2000 and the Improving America's Schools Act. From the states' perspective, NCLB's radical shift in education policy design from dialogue to dictation abandoned the incremental pace of change and imposed large-scale changes in school operations that would be difficult to achieve in the short time frame set by national law. This shift from voluntary to mandated action accounts for the high level of state resistance and guarantees the intergovernmental conflict over NCLB will continue into the foreseeable future.

### *REAL ID Act*

Another source of state government resistance to the centralizing thrust of current federal policy is the 2005 REAL ID Act, which is part of the Emergency Supplemental Appropriations for Defense, the Global War on Terror, and Tsunami Relief Act (P.L. 109–13). Because all but one of the individuals who conducted the 9/11 attacks had obtained a driver's license, officials in the Department of Homeland Security and members of Congress concluded that state variation in the issuance of driver's licenses posed a serious security threat. Initially part of the debate over the language of the Intelligence Reform and Terrorism Prevention Act of 2004 (P.L. 108–458), the REAL ID Act created stricter standards for driver's licenses issued by states (Dinan and Krane 2006, 340–341), but little attention was paid during its passage to the impact of the new requirements (Marek 2006).

State government issuance of driver's licenses is an element of the highly decentralized organization of American law enforcement. The REAL ID Act not only abrogates traditional state control but also imposes an extremely large administrative burden on the states. Because the act appears to force the states to renew the license of every single one of the nation's 245 million drivers and end license renewal by mail, states will have to hire more personnel for their motor vehicle bureaus (n.b.: some estimate a doubling of their staff), purchase new equipment (computers, photocopiers, and digital recognition), link to national databases, and increase security at local bureaus. A September 2006 report released jointly by NGA, NSCL, and the American Association of Motor Vehicle Administrators (AAMVA) estimates REAL ID's cost to the states at more than \$11 billion over five years (AAMVA 2006). Part of the report's analysis expects states to raise and even double the price of renewing driver's licenses. The report asks among other requests that the federal government extend the compliance deadline, provide the funds and electronic verification systems necessary for states to comply, implement a 10-year re-enrollment schedule, and allow the Homeland Security Secretary discretion to recognize state government innovations (AAMVA 2006).

Fierce opposition by those who believe the new driver's license will become a national identity card will complicate state government implementation of REAL ID. Groups as politically diverse as the American Civil Liberties Union (ACLU), the conservative CATO Institute, and the Libertarian Party oppose the new federal standards. ACLU has set up an internet website (REALnightmare.org) that itemizes “What's Wrong with REAL ID?”—it is REAL Invasive, REAL Red Tape, REAL Expensive, and REAL Pointless. A particular fear of civil libertarians is a centralized database of federalized IDs some see as a move toward a “police state.”(Eyre 2006).

The widespread opposition pits state governments against the national government's strategy to improve homeland security. Although governors and state legislators “share the concern for increasing the security and integrity of the driver's license and state identification processes,” (NGA 2005a), their initial concerns over the usual questions about the feasibility of administration and the sufficiency of the Act's funding has been reinforced by the privacy issue. State legislators, under pressure from different sides of the political spectrum, are drafting resolutions to bar their state from participating in the nationally uniform

identity system. Maine in January 2007 passed a resolution objecting to the REAL ID Act, and in a few short weeks various bills opposing the Act were filed in at least 22 state legislatures (Miller 2007). While a few states (OR, IN, and MD) are moving to comply with REAL ID, most state motor vehicle departments have not begun to make the necessary changes. NCSL at its August 2006 annual meeting urged repeal of the REAL ID Act if Congress does not provide full funding by December 31, 2007. The grassroots resistance to REAL ID has prompted a bipartisan effort in the U.S. Senate to repeal the Act. On March 1, 2007 Homeland Security Secretary Michael Chertoff, under siege from state and local officials, agreed to give states an extra a year and half in which to comply with REAL ID (Mark 2007). Chertoff's action passed the intergovernmental implementation challenges of REAL ID to the next presidential administration.

#### *Temporary Assistance for Needy Families (TANF)*

While the sustained state–national conflict over the design and implementation of NCLB captured headlines, efforts to reauthorize the TANF block grant muddled along through 13 short-term extensions after the original authorization expired in September 2002. After his reelection, Bush made TANF a priority and the Republican majority in Congress approved the reauthorization measure as part of the Deficit Reduction Omnibus Reconciliation Act of 2005 (DRA). The new provisions authored by the Bush administration were enacted over the bipartisan objections of governors and public assistance officials. State officials were not thrilled over the transfer of \$10 billion of program costs to the states nor were they pleased with the 2005 Act's new provisions that significantly constrained state government discretion over work rules. Predictably, state officials expressed anger because, in the words of Kansas State Representative Melvin Neufeld: The new law abrogates the spirit and letter of the historic 1996 agreement ... I would argue that the underlying philosophy of the original law has been altered. Gone is the deference to state innovation and creativity. Back are the federal decision-making handcuffs that characterized the old AFDC law (quoted in Tubbesing 2006, 21). According to Michael Bird of the National Conference of State Legislatures, the new work participation requirements “virtually guarantee that every state will incur penalties and fail to meet the federally mandated work participation rates, until they reconfigure their programs”(quoted in Vestal 2006a).

To understand the intensity of state officials' negative reactions to the new version of TANF, it is important to recall that the original law was “the most visible—and probably the most significant—example of devolution ...” produced by the Republican House majority as it sought to fulfill its 1994 campaign promises known as the *Contract with America* (Schram and Weissert 1997, 4). The 1996 Personal Responsibility and Work Opportunity Reconciliation Act replaced the 61-year-old Aid to Families with Dependent Children (AFDC) entitlement with the TANF block grant, which markedly increased state government discretion over the use of federal welfare funds in exchange for insuring employable welfare recipients meet certain work requirements and for imposing a lifetime limit of five years of eligibility for welfare assistance.

TANF also enhanced state discretion to exempt those who are not employable from the work requirements, and it limited federal regulatory authority in a very defined fashion (Walker 2000, 163–165). TANF incorporated a number of innovative actions taken by state governments during the early 1990s as they experimented with new ways to improve state welfare-to-work programs (Gais et al. 2001). Republican governors in particular viewed TANF as a product of their work that was ratified by a historic compromise with Democratic president William Clinton to “end welfare as we know it.” The transfer of discretion and money to the states would not have been acceded to by Congress had it not been for the pressure applied by Republican governors (Weissert and Schram 1996, 15).

State officials used TANF's expanded flexibility to modify the old AFDC program primarily by strengthening work requirements and sharply reducing cash assistance (Meyers, Gornick, and Peck 2002), while also taking actions to reward work. Gais and Weaver (2002, 4) found that “Instead of a ‘race to the bottom’—a continuing expansion of restrictive policies and little or no expansion in access-enhancing policies—many states adopted both types of policies,” and after several years under TANF “there remains substantial heterogeneity in packages of state choices.”

The drastic reduction in state discretion contained in the reauthorization and the Department of Health and Human Services' new regulations governing its implementation eliminated many features that made TANF a block grant (Center on Budget and Policy Priorities 2007). States have made progress in moving unemployed persons to the workforce, but “most states’ work participation rates are currently below 35 percent,” and under DRA, “states must reach 50 percent for the year that starts in October 2006 or face substantial financial penalties—both the loss of grant funds and mandated increases in state TANF spending” (Tweedle 2006). The reauthorization reduces the ability of states to be innovative in addressing the needs of the remaining pool of unemployed who exhibit more serious barriers to employment which are more costly to remedy. DRA also restricts state latitude to reprogram TANF funds to other forms of social assistance such as those funded by the Social Services Block Grant—the effect of which is to make it more difficult to address an individual's employment barriers in a holistic and personal fashion.

The Bush administration used Georgia's revamped welfare system as a model other states could follow (Vestal 2006b), much as the “Texas model” of school testing was used as the template for NCLB. But while Bush lobbied successfully for increased federal funding for NCLB, he has held the line against increased funding for TANF, thus forcing states to bear any additional costs. Just as much of state government resistance to NCLB derives from implementation issues, the same can be said of states’ response to TANF. Research has consistently found that the states encounter considerable but predictable difficulties to institutionalize the purposes and rules of a major policy shift such as required by TANF (Gais et al. 2001, 60–61). New regulations, less funding, and short time-lines make it hard for states to change their administrative procedures and avoid the penalty of losing federal funds. It should be no surprise state officials are upset and agree with Elaine M. Ryan, deputy executive director of the American Public Human Services Association, when she said “You had fixed block grants in exchange for state flexibility. Now you have fixed block grants in exchange for federal micromanagement ... That was not the deal” (quoted in Goldstein 2006a).

### *Medicaid Reform*

Not all domestic policy domains exhibit the degree of state–national rancor characterizing the running battles over NCLB, REAL ID, and TANF. Because Medicaid is a joint national–state funded program, unlike Medicare which is federally funded, state governments are more directly involved in any reform effort, many of which begin with the states. Also, unlike welfare policy, Medicaid recipients are viewed as deserving assistance, and the program's scale has created a significant economic presence in localities throughout the country. The key issue faced by both levels of government is the necessity to slow the unrelenting rise in the program's costs which consume 20 per cent of state expenditures.

Nathan (2005, 1465) describes the evolution of Medicaid as being driven by “a state-push factor” which he explains is “... the product of state initiatives ... as states have taken measures in recent years to protect and expand their Medicaid programs in the face of Washington's efforts to damp down the growth of the program.” An excellent example of “state-push” is the NGA's 2005 report on Medicaid reform which took a sweeping five pronged approach to health care. The bipartisan proposals sought not only to control costs but also to broaden substantially the discretion available to state officials so that they could

redesign their state's program without having to "... still jump through significant hoops in order to make relatively minor changes to their Medicaid programs" (NGA 2005b, 6). The federal government spends nearly 8 per cent of its total budget on Medicaid, and it is easy to understand why the Bush administration was sympathetic to the states (Goldstein 2006b). Many of the NGA's proposals were adopted in the 2005 DRA, and as a result, the changes in Medicaid are seen as "truly state-friendly" (Tubbesing and Wilson 2006, 21).

State-national skirmishes over Medicaid occurred before and after the adoption of the 2005 reforms. During legislative maneuvering to create the new Medicare Part D prescription drug benefit, governors of both parties fought hard against the "phased-down state contribution," or "clawback provision," which requires states to return to the federal government a percentage of monies the states would have spent on medicines for those who were "dual-eligibles" in the Medicaid and Medicare programs (Dinan and Krane 2006, 340). Most recently, state officials find themselves at odds with the White House over the level of funding for the State Children's Health Insurance Program (SCHIP) because 17 states face federal aid shortfalls that would result in children being denied health care (Broaddus and Park 2006). At the winter 2007 NGA meeting, governors of both parties appealed to Congress and the president to release additional funds (Pear 2007). Governors also expressed opposition to the \$25 billion reduction over five years in Medicaid monies proposed in the president's FY2008 budget. Battles over federal aid are nothing new; what is important in Medicaid policy is the greater latitude given to states to make changes and to test alternative ideas for improving the quality of care as well as the program's efficiency. The new state discretion in Medicaid contrasts starkly with the mandates imposed by NCLB, REAL ID, and TANF.

### *Big Government Conservatism*

Strong negative responses by many state officials to the centralizing direction of Bush initiatives in education, welfare, and homeland security also characterize other policy areas such as disaster response and emergency management, energy conservation, and taxation. Prior to the Bush presidency scholars routinely noted the era of cooperative federalism had declined substantially during the 1970s and 1980s, and by the 1990s an era of coercive federalism was well entrenched (Kincaid 1990). While cooperation between the states and Washington can be found in some policy areas, the current pervasiveness of conflict poses the question of why have national-state relations become so acerbic under Bush?

It is instructive to recall the influence Republican governors exercised during the heady days of the 1994 "Republican Revolution" in Congress. Two-thirds of the states, including eight of the ten most populous states, had Republican governors, and they used the NGA as a vehicle for applying pressure on their congressional co-partisans to transfer power to the states as well as enacting their policy preferences in federal law. Speaker Gingrich, the architect of the *Contract with America*, declared "We regard you [the Republican governors] as full partners in the process of creating a better 21<sup>st</sup> century America for our children" (Weissert and Schram 1996, 16). In 1998 when Clinton tried to replace his 1993 executive order on federalism and Reagan's 1987 executive order, state and local officials forced Clinton to suspend his 1998 order and replace it a year later with one more acceptable to state governments (Schram and Weissert 1999, 19-20).

George W. Bush, handpicked by the Republican governors as their presidential candidate in 2000, was expected to be attentive to state concerns, and he certainly sounded this theme on the campaign trail (Kincaid 2001, 47-50). However, once in office, Bush's decision to govern as a "big government conservative" and to intervene in state and local matters as well as to preempt state authority ignited opposition from state and local officials of both parties. The legislation put forward by President Bush represents more than the next step in expanding federal power, his initiatives reflect a belief that state and

local governments are not essential to his policy goals. Instead, Bush relies on an expansion of federal authority to achieve his “compassionate” policy goals.

Unlike his recent predecessors, Bush has not established a specific unit for intergovernmental relations within the White House. While Bush did issue a memorandum creating an Interagency Working Group on Federalism, the group has not produced any discernable product nor has Bush issued an executive order related to federalism. Similarly, congressional Republicans have not shown much solicitude for state governments. U.S. Senator Lamar Alexander (R-TN) lamented “I’ve been disappointed to find so few voices in the United States Senate who respect the prerogatives of governors and mayors to make their own decisions. The conservatives are just as bad as liberals at passing new programs and expecting someone else to pay for it” (quoted in Greenblatt 2005, 26). Both the president and congressional Republicans can be seen as succumbing to the same temptation to use centralized power as did the Nixon and Reagan administrations (Conlan 1998, 313–314).

### **State Government Policy Activism**

Zimmerman (1996, 33) reminds us that “Horizontal intergovernmental relations are of great importance in the U.S. federal system although they typically are overshadowed in the media by vertical intergovernmental relations.” This “neglected dimension of federalism,” as Zimmerman labels it, is a political arena in which significant policy decisions occur “. . . that can act as a counterbalance to federal activity” (Elazar 1972, 174). State policy activism has always been a feature of American federalism (Teaford 2002, 5), and it appears to be increasing at an accelerating pace, so much so some observers argue state policy activism no longer serves to “counterbalance” federal power but trumps it (Greve 2004). Among various motivations to pursue policy independent of the national government, states may do so to (i) fill a policy void left by federal inaction or refusal to act, (ii) adopt policy positions that correct or modify state perceived defects in federal policy, (iii) communicate or signal issues or problems to the federal government, or (iv) follow (or oppose) a policy adopted by another state(s). A review of some important examples illustrates state government exercise of policy independence during the George W. Bush presidency.

#### *Filling a Policy Void: Environmental Protection and Global Warming*

In the 1950s and 1960s state government reluctance to address rising levels of air and water pollution led to a national movement that forced the federal government to establish national standards. But during the Bush years this relationship has become transposed. Of the 16 issues listed on the White House's homepage, environmental protection is conspicuously absent and can only be found by searching under energy issues. This indifference to environmental matters is also supported by Congress and has been expressed by its opposition to the Kyoto treaty on global warming as well as by its preference for solving the nation's energy shortage by enacting more incentives for increased production and eschewing incentives for conservation (Krane 2004, 24).

“In the absence of federal leadership to address climate change,” a report from the Pew Center on Global Climate Change (2006, 1) notes, “many states and regions have begun taking action on their own. States are setting targets for reducing their greenhouse gas emissions, adopting policies to promote renewable energy and energy efficiency, and developing statewide climate action plans.” The number of recently established state environmental policies has been extensive. Six multi-state efforts now foster regional collaboration: the Northeast Regional Greenhouse Gas Initiative (RGGI), the Western Governors’ Association's Clean and Diversified Energy Initiative, the Southwest Climate Change Initiative (Arizona & New Mexico), the West Coast Governors’ Global Warming Initiative, the Powering the Plains



Initiative, and the New England Governors and Eastern Canadian Premiers (NEG-CP) Climate Action Plan.

Other environmental policies taken by state governments include the promotion of low-carbon electricity generation, mandates for the use of renewable energy, the creation of “public benefit funds” earmarked for supporting energy efficiency projects, allowing utilities to offer “green pricing,” and imposing limits on power plant emissions. States have also altered their transportation policies to benefit the environment by adopting more stringent standards for cars and light trucks. After California in 2004 imposed tougher rules on automobile tailpipe emissions, eleven other states adopted the California standards. More than half of the states support alternative fuel production, and several states require a significant percentage of state-owned vehicles to use alternative fuels or natural gas. Oregon, California, Arizona, and New Mexico have established state targets for lower levels of greenhouse gas emissions by 2020, and on the other side of the country, so have Maine, Vermont, New Hampshire, Massachusetts, Rhode Island, Connecticut, New Jersey (by 2005), and New York (Pew Center 2006, 2–7; Goodman 2006, 60–62). During the signing ceremony for a global warming reduction agreement between California and the United Kingdom of Great Britain and Northern Ireland, Governor Schwarzenegger (R-CA) declared “We cannot wait for the United States government to get its act together on the environment. We have to create our own leadership” (quoted in Farney 2006, 28).

Why are states able to work together on environmental policies when in the past they had refused to do so? The Pew Center for Global Climate Change (2006, 1) suggests three reasons (i) “state leaders and their constituents are concerned about the projected toll of climate change on their states,” (ii) “many states view policies that address climate change not as a burden on commerce but as an economic opportunity,” and (iii) “states are also seeking to improve air quality, lessen traffic congestion, and develop reliable energy supplies.” In addition to economic and quality of life benefits, leadership on global climate change pays political dividends because environmental protection policies appeal across partisan lines, allowing candidates to build centrist coalitions. The Pew Center (1) notes that “even when governorships have changed hands, state policies on climate change and clean energy have remained in place.” One can also surmise California's dissatisfaction with decisions by the Federal Energy Regulatory Commission during the power crisis of 2000 and 2001 has led state officials not just to be wary of federal energy deregulations, but has forced them to resist and pursue their own course (Timney 2004).

#### *Correcting Defects in Federal Policy: Minimum Wage Legislation*

Since its enactment in 1938 the federal minimum wage has been adjusted for inflation every few years. However, the last increase was in 1997 and Bush has strongly resisted any increase, leading to the longest period in which the wage rate has not been adjusted. State officials, in contrast, have moved aggressively to correct this situation. Since the State of Washington in 2001 linked its minimum wage to automatic inflation adjustments, each following year the number of states adopting a higher than federal minimum wage has increased. By the middle of 2006, 23 states had mandated that their lowest paid workers make more than the federal minimum wage, with the result that half of the U.S. population now lives in states where the state minimum wage exceeds the federal minimum (Hunter 2006).

What accounts for the rapid and widespread adoption of increases in state minimum wage laws? Good politics and democratic responsiveness by state officials have combined to forge bipartisan approval for wage increases. Public opinion has strongly supported minimum wage hikes—the Pew Research Center in April 2006 reported 88 per cent of the general public including 72 per cent of Republicans favored wage increases (Vestal 2006c). While the usual business interests such as the National Restaurant Association opposed wage increases, Republican governors and state legislators found themselves

pressured by a coalition composed of labor unions, advocacy groups for the poor, religious organizations, the Association for Community Organizations for Reform Now, and 9 to 5: the National Association for Working Women (Kenworthy 2006). Third, raising the minimum wage came to be justified as part of the effort to reduce welfare rolls. Since 1996 the national strategy has been to move the long-term unemployed to the workforce, and while the changes enacted as part of TANF have had considerable effect, a higher minimum wage is also seen as necessary to insure those who left welfare for jobs did not return to welfare (Ehrenhalt 2005, 9). Fourth, availability of the initiative process allowed grassroots groups to push through higher wages in several states, most recently illustrated by ballot measures approved in six states during the November 2006 elections (Vock 2006). The confluence of these factors has led state officials in both political parties to conclude that this issue is an electoral “winner,” while the Administration sees it as anti-business and anti-growth.

Democrats in the November 2006 elections gained a 32 vote majority in the House of Representatives; however, in the Senate, the party division wound up with 49 Democrats, one Independent Democrat, one Independent, and 49 Republicans. Democrats, having their efforts to raise the federal minimum wage stopped by Republicans since 1995, moved quickly to pass a bill raising the minimum wage to \$7.25 an hour over two years. Senate Republicans, responding to Bush's demand that costs to businesses caused by an increase in the federal minimum wage be offset by tax cuts, stalled passage of an increase. The tax breaks proposed by the Senate Republicans were supported by the National Federation of Independent Businesses, representing small firms, but the U.S. Chamber of Commerce, representing large companies, opposed the tax breaks (Hennessey-Fiske 2007). Compared to the states, the congressional standoff over the federal minimum wage offers another instance of polarized politics in the nation's capital.

#### *Signaling the Federal Government: Immigration*

Although policies related to citizenship traditionally have been the sole domain of the federal government, state governments increasingly are enacting laws that directly affect immigrants. This past year state legislators in 43 states submitted more than 450 bills related to immigration (Preston 2006) even though in 1986 federal immigration law preempted most state immigration policies then in existence and forbade states from imposing tougher criminal or civil penalties than the federal ones (Peterson 2006a). This explosion of state legislative bills, referenda, and initiatives can be understood as a means of signaling Washington that state officials and many of their constituents are growing increasingly frustrated with the national government's inability to craft a new direction in immigration policy.

Federal law requires states to provide various social services to undocumented aliens, in particular public education and emergency medical care. States and localities have responded to demands by immigrant advocacy groups as well as by employers to provide access to other state services and benefits, including driver's licenses, workers' rights, and in-state college tuition rates. As the influx of immigrants has continued, these noncitizens have dispersed beyond the border states to areas of the country where the current wave of immigrants is a new phenomenon. These new arrivals provoked debates over whether they should be granted access to publicly funded social programs, civil and criminal rights, and identification documents.

What used to be a regional issue has become a national one. John Keeley of the Center for Immigration Studies points out that “state and local politicians and the grass-roots in those states are up in arms over Washington's conspicuous lack of leadership ... immigration ... is a driving factor for the three biggest budget items states face: education, health care and criminal justice” (quoted in Jones 2006). The result of federal confusion and inaction on immigration policy has been the introduction in state legislatures of a spate of punitive measures that would reduce noncitizen access to social programs, tighten restrictions on

employers of undocumented workers, and make it more difficult for noncitizens to obtain driver's licenses or housing. In most cases these bills have not become law, and in states where punitive laws have been legislated, an anti-immigrant stance offers candidates and officials electoral advantages. Also on the increase are initiatives and referenda intended to impose more restrictions on noncitizens. For example, in 2006 citizens in Arizona approved four ballot measures that limited noncitizen access to public services, denied bail in felony cases, prohibited noncitizens from receiving punitive damages in civil cases, and made English the state's official language. Colorado voters approved proposals to prohibit employers from deducting wages paid to illegal immigrants as a business expense and ordered the attorney general to sue the federal government to enforce immigration laws (Vock 2006).

Much of the debate at the national and state level pits those who want strict enforcement of current immigration laws and tighter border security against those who want to offer noncitizen residents a path to citizenship as well as improve control of the flow of immigrants (Goodman 2004). Each side sees immigration policy differently—one side views it as a zero-sum situation where legal citizens wind up with the tax bills to pay for services provided to individuals who should not be in the country, while the other side views it as a variable-sum situation where noncitizens bring their labor and skills to the economy as well as offer the nation new opportunities and perspectives, as have past immigrant groups. Advocates for each side of the debate can be found in both parties and in all parts of the country. The cross-pressures inherent in immigration policy make it difficult to develop broad support across several states for a coherent approach, so unlike joint state action in environmental policy or parallel actions on minimum wages, states find themselves only signaling Washington to devise a solution.

#### *Following a Model State Policy: Identity Theft*

The rapid diffusion of California's model legislation on identity theft disclosure offers another example of independent policy action by state governments. California with a history of leadership in consumer protection passed the nation's first legislation to address the problem of computer security breaches. The 2001 law that went into effect January 2003 required customer notification when a company lost data on the consumer and allowed consumers to “freeze” their credit records by restricting access only to authorized entities (Swope 2003; Patton 2005). As cases of identity theft became public at an increasing rate, other states quickly followed California and adopted various measures to make identity theft illegal, mandate customer notification, and permit security freezes on credit reports. By mid-2006, 48 states had made identity theft a crime (Hunter 2006), and 34 had passed security breach notification laws (U.S. PIRG 2006). It should be noted, however, that ten of the states with security breach laws did not apply them to government agencies, thus leaving citizens vulnerable to those who might hack state agencies or local governments.

At first reluctant to act in the face of business opposition to federal standards on database security and credit reports, Bush issued an executive order to strengthen federal efforts by establishing a multi-agency task force to make recommendations on how to minimize identity theft. Meanwhile, Congress considered several different bills which if passed would preempt state laws that allow anyone to freeze their own credit report and only permit victims of identity theft to do so. The bills would also preempt the security breach notification laws already enacted by the states (Peterson 2006b). Consumer advocacy groups and state officials, particularly state attorneys general, oppose federal legislation because it weakens existing state disclosure laws. Because technology changes so rapidly, state governments argue that they “... have no choice but to act quickly and comprehensively if they want to prevent and control additional identity crimes that all agree are coming” (Patton 2005, 42). With identity theft accounting for 39 percent of all fraud complaints (Hunter 2006), states are unwilling to wait for Congress and the Administration.

### *Polarized Politics Versus Pragmatic Politics*

To the four policy areas discussed, one could easily add many others such as anti-Iraq war resolutions, medical marijuana, state highway franchises, payday lending restrictions, human trafficking, junk food in schools, “windy-day” funds, and hospital report cards. This heightened level of state policy activity requires some explanation. Common to each of the state policy examples is bipartisan support in contrast to the highly factionalized political environment in Washington. The political divisions in the national capital are not solely the product of a classic “deadlock of democracy” associated with a government divided among the political parties (Burns 1963). Rather the policy gridlock has been caused by significant ideological differences among congressional Republicans that occur within each chamber as well as across the two institutions. While it is the case today that votes on the final version of legislation exhibit higher levels of party unity than in the past, nevertheless, powerful and successful opposition to many of Bush's initiatives came from different groups within his party's congressional delegation. It is, after all, in the mark-up sessions where most of the critical policy battles are waged. So, “although Republicans controlled all three branches of the federal government, this officially ‘unified’ government behaved as if it were a ‘divided’ government” (Krane 2004, 52).

The polarization in Washington does not replicate itself automatically at the state level because state governments operate under constitutional constraints such as balanced budget and debt limit requirements that do not apply to the federal government. Further, the “culture wars” among party elites that play out on the national stage do not offer as much political gain at the state level where politics hews closer to middle-of-the road positions (Wolfe 1998; Fiorina, Abrams, and Pope 2005). Evidence for this can be seen in the states where the governor belongs to the minority political party—a “red” (i.e., Republican) governor in a “blue” (i.e., Democratic) state or a “blue” governor in a “red” state (Egan 2005). Governor Schwarzenegger (R-CA) labels his pragmatic mix of policy stances as “post-partisan,” and one can identify other governors who transcend traditional party positions—for example, Governor Elliot Spitzer (D-NY) (Steinhauer 2007).

Pragmatism rather than polarization typifies state governments as compared to the current situation at the federal level. William Pound, executive director of the U.S. Conference of State Legislatures, asserts “In recent years as we have seen gridlock in Washington, you have seen the pressure building on the states to do something” (quoted in Steinhauer 2007). Too many observers of American federalism succumb to a “top-down” perspective which blinds one to its noncentralized institutional matrix that “... allows different political interests and organizations to pursue their policy objectives at different venues within the matrix created by the horizontal and vertical divisions of authority” (Dinan and Krane 2006, 365). When polarization at the national level limits the ability of groups to gain their policy preferences, they naturally will gravitate to state and local governments. State activism becomes more likely as Nathan and Derthick (1987) observed “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 at the state level.”

### **rThe Middle Tier in the Bush Era**

A common interpretation of long-term trends in American federalism emphasizes a growing national dominance (Zimmerman 1992; Kincaid 1990), while others emphasize the continuation of national–state cooperation (Agranoff 2001). This division of opinion also reflects contrasting views as to the contributions and importance of state governments within the larger union of American federalism. Walker (2000, 267) asserts “For at least 140 years, the states were far more than middlemen. They were paramount political and policy actors and innovators, ..., and they were effective restrainers of national

government activism.” Derthick (2001, 45–50) takes an opposite position when she says “Historically, then, the states did not actually do very much,” [and] “... accept a role as subordinate governments, in which they become agents of nationally defined purposes.”

These contrasting assessments of American state governments leave unanswered how and why the states have been so assertive during the George W. Bush presidency. Federalism as a core institution of American government has long been part of the Republican party's platform, but Bush's departure from his party's dogma is an attempt to reshape American federalism. His campaign to change public programs and institutions so they function in accord with his preference for market-based policy approaches and executive-centered governance makes the federal government an instrument by which to install these policy preferences not just in Washington but also in state governments. Representative Mike Pence (R-IN), a leader of the fiscally conservative Republican Study Committee in the U.S. House of Representatives, summarized his view of the president's stance on federalism by saying “The Republican majority, left to its own devices from 1995 to 2000, was a party committed to limited government and restoring the balances of federalism with the states. Clearly, President Bush has had a different vision, and that vision has resulted in education and welfare policies that have increased the size and scope of government” (quoted in VandeHei 2005, February 9). His unwillingness to use the veto to oppose enlarged federal policies provides further evidence that Bush is less interested in downsizing government and more interested in imprinting his market-based policies on national and state governments.

One would not expect the states to passively accept Bush's centralist strategy. John Kincaid in explaining that actions by the national government stimulate actions by the states recently noted There has been a tremendous amount of federal pre-emption of state law in the last couple of decades ... So the states are responding. I think we have moved from an era of cooperative federalism to an era of coercive federalism in which the federal government is really dictating to the states. That has produced a really activist response of states to cope with this (quoted in Belluck April 2006). This trend toward coercive federalism has been in play since the 1980s, but George Bush's expansive use of the federal government raises the degree of national dominance over the states, and Kincaid's observation is correct; the states are responding, and the response takes two forms (i) resistance to many of the Bush policy positions and (ii) heightened independent policy activity.

The bipartisan resistance of state government officials to Bush initiatives can be linked to his overstepping the “mores” of American intergovernmental relations. As explained by Derthick (2001, 158–159), these norms establish an expectation that the national government can give orders or exhortations to the states, but it is not necessarily the case that “... the states promptly act upon orders or admonitions from Washington, only that Washington is accustomed to giving them, without pausing to question the appropriateness of doing so.” At the same time, because states are “governments in their own right” (37) and because states “... help fill the federal government's performance gaps,” these intergovernmental “mores” permit the states “... to talk back” to Washington (40).

The bipartisan opposition of state officials to the actions of the Bush administration can be attributed to “orders” that substantially depart from the previously existing intergovernmental “mores.” If “orders” from Washington seek to impose national objectives at odds with important constituencies at the state level, eliminate substantial state government discretion, and require states to bear a significant portion (if not all) of the cost, one might expect state government officials to do more than merely “talk back.” The design and implementation of NCLB, TANF, and REAL ID (and several other Bush policies) exhibit these three traits, and thus cause the negative state responses. Each of these policy areas imposes mandates opposed by groups at the state level, raises a state's cost to comply, and reduces the extent of state control over program administration. As implementation research demonstrates, state officials will

engage in deliberate delay and active resistance when federal policies rely primarily on constraints and ignore communications from state and local officials (Goggin et al. 1990). So it should be no surprise that Bush's centralizing policies elicit negative state responses, even in states with Republican governors and legislatures.

The ability of state governments to cope with the Bush initiatives and the new wave of state policy activism is a function of the modernization of American state government that occurred in the mid-1960s to the mid-1980s (Reeves 1982; Conlan and Riggle 1999). The institutional reforms did more than raise the capacity of state government, some alterations also changed the ability of certain state officials to influence public policy. For example, state attorneys general broadened their policy role by becoming champions of consumers, protectors of the environment, and defenders of civil and political rights. In the 15 states with term limits, governors have gained political influence at the expense of state legislators (Greenblatt 2006, 26), which in turn makes policy proposals that appeal broadly to the state's electorate more likely to be enacted than do proposals that benefit narrower constituencies.

Institutional differences between state and federal governments also contribute to independent state policy activity. In contrast to the relationship of the U.S. Attorney-General to the U.S. President, the independence of state attorneys general from governors gives them wider latitude to initiate policy changes, typically by filing lawsuits. The aggressive regulatory enforcement of corporations by state attorneys general has forced the business community to demand federal (de)regulation, where once businesses opposed national regulations. The availability of direct democracy devices—initiative, referendum, recall—permit citizens and interest groups, singly or collectively, to launch and succeed at establishing new policy directions (Smith, Greenblatt and Buntin 2005, 120–123). Found in nearly half of the American states, ballot initiatives have become a powerful instrument of change, as exemplified by the widespread tax revolt begun by California's Proposition 13 in 1978. In the 2004 elections, there were 163 ballot propositions in 34 states on issues as different as bans on same-sex marriages, decriminalization of marijuana, approval of gambling, raising the minimum wage, tax changes, and approval of public transportation projects (Krane and Koenig 2005, 24–28).

It also should not be overlooked that the higher level of state policy activism has also been driven by higher levels of political mobilization and participation prompted by the civil rights and “new politics” movements that injected “social issues” into the political arena (Scammon and Wattenberg 1970; Miller and Levitin 1976). This policy activism not only manifested itself in states taking the lead in policy areas where the national government eventually followed, but it also produced policy initiatives independent of Washington, D.C., despite the opposition of national officials.

What makes the level of independent state activity during the current Bush era so impressive is that this policy activism has occurred at a time when a severe fiscal crisis befell the states. Beginning in the last half of 2001 state governments experienced deep shortfalls in revenues due primarily to a sharp decline in the stock market and the economy. At the same time, the sudden new costs of homeland security added an expensive item to state budgets. State government finances sunk to levels not seen since World War II. Although state officials struggled to solve their financial problems with a variety of expenditure and revenue actions, nevertheless, the fiscal situation did not begin to abate until 2005 (Krane 2003, 24–27; Krane and Koenig 2005, 28–31). State governors appealed for federal aid to cope with the crisis, but Bush refused; he eventually agreed to a modest \$20 billion as a concession to obtain the votes of Senate moderates for the 2003 tax cut bill (Krane 2003, 11). By 2006 state finances were back in the black, at least for the near-term. That state officials were able to gain control of the budgetary crisis and still produce new and innovative policies demonstrates the enhanced capacity of state governments compared to earlier eras.

This enhanced capacity for policy action by itself is not sufficient to account for state government activism. Equally important is the increasing similarity of economic and social problems faced by the states. Most of the policies and programs described in this article are responses to problems that cross state lines or have spread throughout the country. NCLB, represents the latest and most nationalized attempt to improve K-12 schooling. It has roots in the 1970s “new South” governors’ efforts to raise the region’s educational level so as to become more competitive economically. This regional concern spread throughout the nation and culminated in NCLB. A similar problem–response dynamic that becomes diffused across the states and to the national level also characterizes many of the other policy areas discussed here.

Another factor contributing to state policy activism, especially policies independent of Washington, is the difference between state political behavior in national versus state elections. The argument that the nation is highly polarized into “red versus blue” states paints a simplistic picture of state electoral behavior. While some states today are strongly conservative or liberal, many states are not, and within most states one finds a mix of “red” and “blue” districts, hence the term “purple” states (Sandweiss 2006, 42). The opinion and party affiliation diversity within states expresses itself differentially in national and state elections, in part because different leaders and groups operate within the different spheres (Krane and Shaffer 1992, 280–282). Robert Dion illustrates this differential electoral behavior using Indiana as an example: Indiana is reliably Republican in presidential contests going back to 1964, but it has had, at the same time, a habit of electing Democratic governors, senators, mayors, state legislators, and so on . . . So, is it a Republican state or a two-party state? (quoted in Sandweiss 2006, 42). The admixture of “red and blue” areas in state electoral arenas helps explain the centrist, pragmatic politics at the state level in contrast to the polarized politics at the national level. These several factors—state government capacity, state government institutional features different from national government features, similar problems confronting state officials, and the character of state versus national political arenas—interact to provide state government officials with the ability and the motivation to pursue public policies different from those found at the federal level.

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