

State-Federal Relations: Agendas for Change and Continuity

By John Kincaid

The current economic crisis and the new Democratic majority in the federal government will produce significant policy changes relevant to state-federal relations, but, overall, American federalism will continue its contemporary coercive course in an evolutionary manner because that course has involved expansions of federal power that were augmented by crises in the past and by change-minded presidents supported by partisan majorities in Congress.

The 2008 election of Barack Obama to the White House was as much, or more, a voter rejection of policies associated with President George W. Bush as it was a voter affirmation of Obama's policy positions and embrace of an historic opportunity to elect a black American to the presidency. Obama's victory also was driven by the severe economic crisis that began to develop in mid-2008—a crisis that will take a heavy toll on state and local government budgets and, thereby, on public services.

Obama's election—along with the strengthened Democratic majorities in both houses of Congress, increased Democratic control of state legislatures (both chambers in 27 states), and increased Democratic governorships (to 28)—have placed state-federal relations firmly in Democratic hands after more than three decades in which intergovernmental relations were either dominated by Republicans or contested by Democrats and Republicans.

This historic change in partisan control of the federal system signals major changes to come in state-federal relations, but will those changes be revolutionary or evolutionary? Most likely they will be both. There will be revolutionary changes in some policies that involve state-federal relations because many Democratic policy preferences differ significantly from those of Republicans, but over the long-term, the changes are likely to produce evolutionary enhancements of coercive federalism rather than a revolutionary New Federalism.¹

Evolutionary Federalism

Several factors point to evolution rather than revolution. First, federalism played virtually no role in the 2008 presidential and congressional elections. Unlike Presidents Richard M. Nixon and Ronald Reagan, for example, no viable, prospective, presidential candidate articulated a New Federalism. The only campaign issues that attracted some attention to federalism were gay marriage and federal crackdowns on medicinal marijuana. Both candidates treated same-

sex marriage as an issue to be decided by the states. They differed on drug enforcement. Obama pledged to stop federal raids on medicinal marijuana outlets; McCain vowed to enforce federal drug laws.

Second, most of the criticism of President Bush focused on the war in Iraq, the Guantánamo Bay detention camp, domestic facets of the war on terrorism, "tax cuts for the rich," global warming and other issues not central to state-federal relations. Otherwise, Bush's overall intergovernmental record was not criticized as much as his records in those other policy arenas. Consequently, the public pressure for change was not as white hot as it was in other policy areas.

In February 2007, for example, a national poll, conducted by the author and a colleague, asked: "Considering President George W. Bush's response to New York City after 9/11 in 2001, his response to New Orleans after Hurricane Katrina in 2005, and his support for the NCLB education law, overall, would you say that President Bush's policies for our state and local governments have been very helpful, somewhat helpful, not very helpful, or not at all helpful?" Despite Bush's low job-approval ratings of only 32 percent to 37 percent at that time, 16.3 percent of the respondents termed Bush's intergovernmental actions as "very helpful," while 35.4 percent said "somewhat helpful," 23.5 percent responded "not very helpful," and 24.8 percent declared "not at all helpful." In short, 51.7 percent fell on the positive side. Notable, though, is that 70.5 percent of Democrats fell on the negative side, while 81.2 percent of Republicans fell on the positive side of the question. In turn, 78.9 percent of black respondents fell on the negative side, while 63.3 percent of Hispanics and 55.8 percent of whites fell on the positive side.²

In terms of the three issues posed in the question, the Obama administration will certainly revise but probably not revolutionize domestic anti-terrorism policies, in part because it recognizes the political necessity of preventing another 9/11. President

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Obama needs to repair but not necessarily revolutionize the emergency-response system so as not to repeat President Bush's botched response to Katrina, and, even during the campaign, Obama signaled his support for some of the core principles of the No Child Left Behind Act of 2002.

Third, the constitutional, legal, fiscal and political institutional inertia of coercive federalism built up over the last 40-some years is a formidable barrier to revolutionary change.

Fourth, the development of coercive federalism since the 1960s has been supported by both parties because the scope of federal policymaking is so comprehensive and so intergovernmental that incumbents of both parties in Congress and the White House need to bring state and local governments into alignment with their policy preferences in order to achieve their national policy objectives. President Obama and congressional Democrats will be no different, as reflected, for example, in the provision of the American Recovery and Reinvestment Act of 2009 that authorizes a state legislature, via a "concurrent resolution," to accept federal stimulus money for its state if the governor declines to accept it. This provision—inserted into the Recovery Act because several governors, led by Republican Gov. Mark Sanford of South Carolina, threatened not to accept stimulus funds—overrides constitutional rules, legislative procedures, and established norms in many states.

Fifth, President Obama's intergovernmentally relevant responses to the severe economic crisis affecting the nation and the world have thus far been consistent with long-term patterns in state-federal relations. For example, most of the \$506.5 billion in funds to be spent under the Recovery Act will go to state and local governments, with most of it going to the states; most of the money will reach state and local governments through existing intergovernmental program structures; and most of the money will finance social welfare such as Medicaid and unemployment compensation.

Impacts on Dimensions of Coercive Federalism

The various facets of coercive federalism could be affected by the partisan change in state-federal relations in the following ways.

Grants-in-Aid

There will be a substantial increase in federal aid to state and local governments in the short term, an increase already evident in the Recovery Act. Under Bush, federal grants-in-aid increased by 63.2 percent

in nominal dollars (to \$466.6 billion in 2008) and by 31.2 percent in constant (2008) dollars (compared to 60.5 percent and 30.7 percent respectively under Clinton). Aside from the economic crisis, Obama had pledged during his campaign to increase federal funding for various programs, such as K-12 education. Congressional Democrats have supported higher spending as well; consequently, there is likely to be a long-term increase in federal aid, although at levels below the temporary bump provided by the Recovery Act. At the same time, an important question for the states is whether they will be locked into higher long-term spending as a result of program expansions produced by the momentary influx of the Recovery Act funds.

One characteristic of federal aid in the era of coercive federalism is that aid has shifted substantially from places to people; 64.4 percent of federal aid is now dedicated for payments to individuals (i.e., social welfare).³ Among the long-term consequences of this shift are that (1) place-oriented aid for infrastructure, economic development, education and the like has declined sharply; (2) increased aid for social welfare has locked state budgets into programs ripe for escalating federal regulation and matching state costs; and (3) local governments have experienced a steep decline in federal aid. Medicaid, which accounts for almost 45 percent of all federal aid, is the leading example.

This trend will experience a brief interruption due to Recovery Act money dedicated to infrastructure, school construction and other place-based programs, but, if the national economy recovers, these funds will contract in less than a decade under pressures of federal deficit reduction and growing social welfare spending. Indeed, even in the Recovery Act, the single largest category of spending is for Medicaid (\$90 billion), followed by unemployment compensation and other social welfare programs.

The effects of the shift of aid from places have been felt strongly, for instance, in the declining revenues for surface transportation. The Obama administration has said it is unwilling to increase the federal motor fuels tax and to consider a new financing scheme based on charging drivers by the mile. Consequently, in order to maintain surface-transportation infrastructure, states will be compelled to increase revenues through higher taxes, more tolls, and privatization.

Another characteristic of federal aid is coercive conditions of aid intended to accomplish through spending power federal objectives that cannot be achieved through Congress's constitutionally delegated powers. A leading example of such condi-

tioned aid is No Child Left Behind, commonly called NCLB, which mandates all U.S. elementary- and secondary-school students reach proficiency in reading and mathematics by 2014. In 2005, the National Conference of State Legislatures blasted NCLB as flawed, under-funded, stifling of state innovation and unconstitutional.

Nevertheless, key elements of NCLB, especially its testing and performance-accountability requirements, are likely to endure, in part because the public has supported the idea of such requirements for decades, and the public's reception of NCLB was generally positive. Moreover, a number of leading black and Hispanic civil rights organizations generally support NCLB. Even the Rev. Al Sharpton co-authored an editorial "staunchly" supporting "NCLB's core concept that schools should be held accountable for boosting student performance."⁷⁴ The act also is supported by editorially liberal newspapers such as the *New York Times* and *Washington Post* and by many education reformers, Democratic and Republican. Furthermore, Obama has signaled his intention not only to retain but also to strengthen the key testing and accountability provisions of NCLB while also defusing some teacher concerns by revising certain rules and increasing funding for education. Consequently, NCLB is likely to mark a major change in federal-state-local relations in public education, a substantial augmentation of coercive federalism, and a lasting legacy of the Bush administration.

Earmarking, another characteristic of federal aid under coercive federalism, shows every sign of continuing under the Democrats' intergovernmental regime. Earmarking is popular, in part, because of the shift of federal aid from places to people. Faced with declining federal aid for place-based functions, members of Congress scramble to find money for public facilities and other tangible projects in their states and districts for which they can claim personal credit. In turn, state and local officials have been forced to lobby for earmarks as second-best sources of place-based funding, although members of Congress frequently ignore those officials and earmark money for projects that conflict with the needs and plans of state and local governments.

In summary, federal grants-in-aid will continue to shift toward people, the federal government will continue to attach intrusive policy conditions to federal aid, and earmarking will not come to an end. Otherwise, a revolutionary change in this field would be federal assumption of Medicaid's long-term care costs or enactment of a universal federal health care plan that would federalize or abolish Medicaid.

Mandates

Mandates—direct federal orders—also characterize coercive federalism. However, the 1995 Unfunded Mandates Reform Act reduced mandate enactments. Only seven intergovernmental mandates having costs above the act's threshold have been enacted since 1995. One was a complex Bush-supported tax mandate that will affect local governments in 2011.

President Bush, however, forged creative circumventions of the Unfunded Mandates Reform Act by developing *de facto* mandates, such as the REAL ID Act of 2005. Technically, REAL ID is not a mandate because states can opt out of it, but it is a *de facto* mandate in the sense that a state's withdrawal would have catastrophic consequences for its residents, namely, driver's licenses that could not be used for such activities as boarding an airplane, riding Amtrak trains, purchasing a firearm, opening a bank account, applying for federal benefits, and entering a federal building.

In January 2008, President Obama said he does not support the Real ID program "because it is an unfunded mandate, and not enough work has been done with the states to help them implement the program."⁷⁵ Otherwise, Obama has not commented on REAL ID. He voted for REAL ID but did not cast a vote on REAL ID funding in July 2007; consequently, his position is unclear, although his 2008 statement suggests a willingness to implement REAL ID under funding conditions more favorable to the states.

The new secretary of Homeland Security, former Arizona Gov. Janet Napolitano, signed a bill in June 2008 barring Arizona's participation in REAL ID. However, as Homeland Security secretary, she has said she will examine "realistic options" for REAL ID implementation, including state experimentation, such as Washington's version of the Western Hemisphere Travel Initiative under which it issues driver's licenses with enhanced security features. Her office also agreed to participate in a working group organized by the National Governors Association to review REAL ID's implementation.

Democratic dominance of the intergovernmental system might curb mandates in many areas; however, there are many policy fields, such as environmental protection and business regulation, in which Democratic federal officials will be eager to ensure state and local compliance. The Unfunded Mandates Reform Act, moreover, was not enacted by Congress when Democrats were in the majority. Instead, Republicans, who had made mandate relief a part of their 1994 "Contract with America," enacted the mandate reform act when they took over Congress in 1995.

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Hence, it is not clear whether, overall, the new Democratic intergovernmental regime will be friendly or unfriendly to mandates. It is likely that Democrats will support more funding for federal mandates.

Preemption

Federal preemptions of state laws under the U.S. Constitution's supremacy clause are another characteristic of coercive federalism. President Bush furthered this trend. Under the new Democratic regime, there is likely to be heightened debate and conflict over preemption, coupled with rollbacks of some preemptions and preemption practices of the Republican years. U.S. Rep. Henry Waxman, D-Calif., complained in June 2006, for example, that during the previous five years, Congress had voted at least 57 times to preempt state laws. Of those votes, 27 yielded preemption bills signed by Bush.

The pace of preemption under Bush was consistent with that of presidents since Lyndon B. Johnson, but the objects of preemption differed from the policy preferences of most Democrats because most of Bush's preemptions displaced state business-regulation and consumer-protection laws in response to business preferences to be regulated (or de-regulated) by the federal government rather than by the states. Consequently, congressional Democrats will likely repeal some Bush statutory preemptions.

Bush also used executive rule-making to advance preemption when Congress dragged its feet. For the first time in its 33-year history, for example, the Consumer Product Safety Commission issued a rule in 2006 on mattress flammability that preempted state laws that set higher standards and included language in the preamble to protect mattress manufacturers from state court lawsuits when their mattresses conform to the new federal standard. President Obama, therefore, will likely reverse some of Bush's administrative preemptions and reduce the use of administrative preemption.

Obama, however, is not averse to preemption. For example, he voted for the Class Action Fairness Act of 2005, which was strongly supported by Bush. This law moved from state to federal courts most class action lawsuits involving at least 100 plaintiffs, two-thirds of whom live in different states, seeking \$5 million or more in damages. Federal judges will apply state consumer protection laws in such cases, but federal procedural law will govern the cases. This act, lamented Sen. Harry Reid, D-Nev., "turns federalism upside down by preventing state courts from hearing state law claims."⁶

Furthermore, the need to reinvigorate the national

economy and to remedy regulatory deficiencies that contributed to the home mortgage debacle and massive financial institution failures will put strong pressure on Congress and the president to engage in broad-ranging preemption. In addition, governors, more often than state legislators, have supported federal preemptions intended to clear state-law barriers from national markets.

At the same time, though, trial lawyers represented by the American Justice Association, as well as many consumer and civil rights groups, are pushing hard to roll back preemptions enacted not only during the Bush years but also in prior years extending back to President Reagan. These interests are likely to find many allies among congressional Democrats.

Battles over preemption will be intensified by the U.S. Supreme Court's March 2009 decision in *Wyeth v. Levine* (No. 06-1249) in which the justices, by a 6-3 vote, upheld a Vermont jury's award of \$6.7 million to musician Diana Levine, whose arm had to be amputated after an anti-nausea drug was injected into her artery. Wyeth, the drug's manufacturer, had argued that it was immunized from state lawsuits because the federal Food and Drug Administration had approved Wyeth's warning labels on the drug, which included a warning against intra-arterial injection. The Bush administration supported Wyeth's argument.

This case involved implied preemption, namely, preemption based not on a federal statute but on a conflict between a federal regulation and a state law. The court held that, absent explicit congressional preemption, it would not find an implied preemption. As Justice John Paul Stevens wrote in the majority opinion:

"State tort suits uncover unknown drug hazards and provide incentives for drug manufacturers to disclose safety risks promptly. They also serve a distinct compensatory function that may motivate injured persons to come forward with information. ...

Wyeth has not persuaded us that failure-to-warn claims like Levine's obstruct the federal regulation of drug labeling. Congress has repeatedly declined to pre-empt state law, and the FDA's recently adopted position that state tort suits interfere with its statutory mandate is entitled to no weight. Although we recognize that some state-law claims might well frustrate the achievement of congressional objectives, this is not such a case.

We conclude that it is not impossible for Wyeth to comply with its state and federal law obligations and that Levine's common-law claims do not stand as an obstacle to the accomplishment of Congress' purposes in the FDCA."

This case will intensify conflict between business groups that will now want explicit federal statutory preemption of state laws governing such matters as product labeling and consumer groups that want to retain state authority to regulate such matters in addition to, and in a stricter manner than, federal regulation. The *Wyeth* ruling also will motivate pharmaceutical companies to lobby state legislatures and governors to emulate the states that have already granted deference to the FDA when determining the validity of drug-label warnings, especially when the drug's manufacturer is not guilty of wrongdoing.

Taxation

Another characteristic of coercive federalism has been federal constraints on state taxation and borrowing, beginning especially with limits imposed on tax-exempt private activity bonds in 1984. Judicial and statutory prohibitions of state taxation of Internet services and mail-order sales are prominent constraints. In October 2007, President Bush signed a seven-year extension of the moratorium on state-local taxation of Internet access.

During the transition, Obama was asked to decide whether to support a temporary sales tax holiday for which the states would be compensated with federal money. According to Joe Klein, Obama's economic advisers loved the idea. But Obama rejected it. "He thought it would provide a temporary benefit, that it had no substantial or lasting policy impact."⁷ Tellingly, Obama rejected the idea for policy reasons, not federalism reasons.

Key questions are whether Obama will support repeal or at least expiration of the Internet-access tax moratorium and also support congressional approval of an interstate compact upholding the Streamlined Sales and Use Tax Agreement. Support for these state tax policies might be construed as violations of Obama's promise not to increase taxes for 95 percent of Americans. Another question is whether he will support an elimination or reduction of federal income tax deductions for state and local taxes and for mortgage interest and medical expenses. State and local officials have generally opposed elimination or reduction of these deductions. This issue has a partisan electoral dimension because the average state and local tax payment in blue (Democratic) states was \$7,487 in 2005 compared to \$4,834 in red (Republican) states. State and local tax deductions as a percentage of average income was 5.9 percent in the blue states and 3.7 percent in the red states.⁸ Obama's pledge to increase taxes on incomes of \$250,000 or more will likely reduce the value of those deduc-

tions while retaining their value for those taxpayers who have lower incomes and who itemize their deductions.

Although Democratic federal officials will be sensitive to the tax needs of their fellow Democrats in the states, they are not likely to allow those needs to stand in the way of fiscally and politically important federal objectives.

Federalization of Criminal Law

Another feature of coercive federalism is the federalization of criminal law. The number of federal criminal laws increased from about 4,000 in 2000 to about 4,450 by 2007.⁹ More than half these laws have been enacted since the mid-1960s. These laws cover a wide range of behavior. Another aspect of this federalization has been U.S. Department of Justice efforts to enforce federal death-penalty statutes, even in states lacking capital punishment.

The federalization of criminal law is likely to continue because members of both political parties in Washington, D.C., like to look tough on crime and because the current financial debacle is likely to generate new federal criminal statutes. Given Democratic proclivities, however, there is likely to be less emphasis on enforcing the death penalty under federal law.

Demise of Intergovernmental Institutions

Coercive federalism has been marked, too, by the demise of executive and congressional intergovernmental institutions established during the era of cooperative federalism. Most notable was the death of the U.S. Advisory Commission on Intergovernmental Relations in 1996 after 37 years of operation. Committees dedicated to intergovernmental relations disappeared from Congress.

It is unlikely that the new Democratic regime will revive the bipartisan advisory commission or intergovernmental committees in Congress. A key question, however, is whether the White House Office for Intergovernmental Affairs and Public Liaison will play a more elevated political and policy role than it did under President Bush. This office's location in the White House is a sign of enhanced importance, and it is headed by Obama's close confidant, Valerie B. Jarrett. However, she is senior adviser to the president as well as assistant to the president for both intergovernmental affairs and public liaison. Consequently, her intergovernmental affairs responsibilities could easily be reduced by the political pressures of her other responsibilities.

Another question is whether Obama will revive Reagan's federalism executive order (EO 12612),

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which President Bill Clinton revoked in 1998 (EO 13085) but then revived in weaker form in 1999 (EO 13132) after state officials objected to his 1998 order. This order lay fallow under Bush; however, the new administration has not signaled an intention to revive the order. State officials seem to have lost faith in the efficacy of such an order, but the American Association for Justice—formerly the Association of Trial Lawyers of America—is pressing the administration to resurrect the order, especially to reduce federal-agency preemptions of state tort laws.

Decline of Political Cooperation

There has been a decline, too, in federal-state cooperation in major intergovernmental programs such as Medicaid and surface transportation. Congress earmarks and alters programs more in response to national and regional interest groups than to elected state and local officials, who themselves are viewed as interest groups.

This facet of coercive federalism is likely to be alleviated to some degree by the dominance of Democrats in the state-federal intergovernmental arena. In particular, for example, even though the National Governors Association and the National Conference of State Legislatures are officially bipartisan, Democratic majorities in those organizations and in other organizations representing state officials will facilitate more intense contacts and smoother negotiations between state officials and Democratic federal officials. The state membership of the National Association of Attorneys General also consists of 31 Democrats, and that organization plays important intergovernmental roles on matters involving federal preemption, business and trade regulation, and criminal law. The prevalence of Democrats in both the federal and state arenas is likely also to reduce the number of dueling federal and state policies that became prominent during the Bush years.¹⁰

Conclusion

During a period of severe economic crisis, perhaps even depression, it might seem odd to suggest that the course of American federalism through this crisis and during a new presidential administration committed to change will likely be evolutionary rather than revolutionary and, thus, largely stick to a course that is some 40 years old. However, the fundamental underlying feature of coercive federalism is expansion of federal power, and major expansions occurred during the Great Depression under Franklin D. Roosevelt's New Deal and during the tumultuous decade of the 1960s under Lyndon B. Johnson's Great Society

and Creative Federalism. Both of those expansions laid the foundations for coercive federalism; consequently, during the current crisis, there is not likely to be a contraction of federal power.

Notes

¹For background, see John Kincaid, "State-Federal Relations: Federal Dollars Down, Federal Power Up," *The Book of the States* (Lexington, KY: Council of State Governments, 2006), 19-25; John Kincaid, "State-Federal Relations: Defense, Demography, Debt, and Deconstruction as Destiny," *The Book of the States* (Lexington, KY: The Council of State Governments, 2005), 25-30; John Kincaid, "Trends in Federalism: Continuity, Change and Polarization," *The Book of the States* (Lexington, KY: Council of State Governments, 2004), 21-27; John Kincaid, "State-Federal Relations: Continuing Regulatory Federalism," *The Book of the States* (Lexington, KY: Council of State Governments, 2002), 25-32; John Kincaid, "From Cooperation to Coercion in American Federalism: Housing, Fragmentation, and Preemption, 1780-1992," *Journal of Law and Politics* 9 (Winter 1993): 333-433.

²John Kincaid and Richard L. Cole, "Public Opinion on Issues of Federalism in 2007: A Bush Plus?" *Publius: The Journal of Federalism* 38 (Summer 2008): 469-487.

³For explication, see John Kincaid, "The State of U.S. Federalism, 2000-2001," *Publius: The Journal of Federalism* 31 (Summer 2001): 1-69.

⁴Joel I. Klein and Al Sharpton, "Charter Schools Can Close the Education Gap," *Wall Street Journal*, January 12, 2009, p. A24.

⁵Anne Broache and Declan McCullagh, "Technology Voters' Guide: Barack Obama," *CNET News*, January 2, 2008, http://news.cnet.com/Technology-Voters-Guide-Barack-Obama---page-2/2100-1028_3-6224109-2.html, accessed March 3, 2009.

⁶Stephen Labatan, "Senate Approves Measure to Curb Big Class Actions," *New York Times*, February 11, 2005, p. A20.

⁷Joe Klein, "Obama Promises New Destiny, Work Begins Today," *Time*, January 21, 2009, <http://www.time.com/time/politics/article/0,8599,1872924,00.html>, accessed March 4, 2009.

⁸John Maggs, "Limping Toward Tax Reform," *National Journal* 37 (October 22, 2005): 3280.

⁹John S. Baker, Jr., "Revisiting the Explosive Growth of Federal Crimes," *Legal Memorandum* 26, Washington, DC: Heritage Foundation, 16 June, p. 1.

¹⁰John Kincaid, "State-Federal Relations: Dueling Policies," *The Book of the States* (Lexington, KY: Council of State Governments, 2008), 19-24.

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