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## The State of American Federalism, 2005: Federalism Resurfaces in the Political Debate

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# The State of American Federalism, 2005: Federalism Resurfaces in the Political Debate

By: John Dinan and Dale Krane

## Abstract

After several years during which federalism was rarely a prominent or explicit issue in political debates, it was in several ways thrust into the public consciousness in 2005. It was not that the president or Congress ceased sacrificing state and local interests to substantive policy goals, as shown by the costly REAL ID Act, stringent new federal requirements in the Temporary Aid to Needy Families reauthorization, and congressional intervention in the Terri Schiavo case. However, Hurricane Katrina, and particularly the delayed and ineffective intergovernmental response, generated substantial debate about the appropriate federal role in disaster relief. In addition, state and local governmental opposition to the No Child Left Behind Act intensified and generated significant attention during the year, particularly as a result of a Utah statute asserting the precedence of state over federal law and a Connecticut lawsuit against the act. Meanwhile, state governments continued to address a number of policy problems that federal officials were unable or unwilling to confront, especially regarding environmental, health-care, and labor issues. Finally, although the Supreme Court in 2005 continued its recent (2003–2004) trend of pulling back somewhat from its late-1990s Congress-curbing decisions, federalism issues figured quite prominently in the senate confirmation hearings for Chief Justice John Roberts and Justice Samuel Alito.

During President George W. Bush's first term, federalism was rarely a prominent or explicit issue in political debates. Certainly, there was no indication that federalism was an important concern for President Bush, who in his speeches and initiatives showed little respect for state prerogatives, especially when they conflicted with his policy goals. Nor did members of Congress—including many critics of the president's policies—show much of an interest in forcing a sustained debate about the consequences of these policies for state and local governments. To be sure, intergovernmental lobbying organizations tried to call Congress's attention to the burdens associated with the continuing stream of federal mandates and preemptions, but with little success. To the extent that public attention was focused on the issue of federalism during this time, it came in response to several highly controversial U.S. Supreme Court rulings interpreting the Eleventh and Fourteenth Amendments as limiting federal power.

It is significant, therefore, that in 2005 the issue of federalism resurfaced in several ways. It was not that the president or Congress became any more committed to reducing the costs of federal policies to states and localities—quite the contrary, as shown by passage of the REAL ID Act and the Temporary Aid to Needy Families (TANF) reauthorization, each of which imposes a significant burden on state governments, and as demonstrated by federal intervention in the Terri Schiavo case, and particularly a congressional statute requiring that this state case be removed to a federal court. However, the issue of federalism was in several important ways thrust into the public consciousness in 2005, whether due to unexpected developments or due to the determined efforts of state governments. Most important,

Hurricane Katrina, and particularly the delayed and poorly coordinated intergovernmental response, generated substantial debate in Congress and among the general public as to the appropriate federal role in responding to emergencies. Meanwhile, state and local governmental opposition to the No Child Left Behind (NCLB) Act intensified throughout the year, so that prior efforts to pass resolutions of nonsupport grew into outright resistance, as in the case of a Utah statute and Connecticut lawsuit, both of which attracted a good measure of public attention. In addition, although the Supreme Court continued its recent (2003–2004) trend of pulling back somewhat from its late-1990s Congress-curbing decisions, federalism figured quite prominently in the senate confirmation hearings for Chief Justice John Roberts and Justice Samuel Alito, and such hearings come as close as possible in the current era to offering a public seminar on the constitutional balance of power between the federal and state governments. In these and other ways, then, although 2005 did not witness a significant change of course in federal policymaking regarding states and localities, the issue of federalism was thrust into the public consciousness and political debate to a greater extent than in recent years.

### **Hurricane Katrina**

Early on the morning of Monday, August 29, 2005, the sixth most powerful Atlantic hurricane ever recorded struck the central Gulf Coast near Buras-Triumph, Louisiana, southeast of New Orleans, and caused massive destruction in an arc from western Louisiana to the Florida panhandle. The federal disaster area extended 220 miles inland and covered more than 90,000 miles. Cities along the Mississippi Gulf Coast sustained severe damage from the direct hit and the storm's wave surge breached the levees protecting New Orleans with the result that by the next day 80 percent of the city was under water to depths as great as twenty feet (Thomas 2005a; Alford 2005). The death toll exceeded 1,400 and the estimated number of persons missing was 1,300 (*USA Today* 2005), making Katrina the deadliest hurricane since 1928. Nearly 1.5 million persons were evacuated from the areas of worst damage, and the forced movement of residents from New Orleans exceeded that of any city since the evacuation of Richmond, Virginia, during the Civil War (Thomas 2005a). There was little doubt that Katrina caused the worst domestic natural disaster in the nation's history.

Efforts to provide relief were surprisingly chaotic and delayed. Instead of a coordinated and rapid response, confusion and paralysis characterized the initial campaign to rescue those trapped in the flooded areas of New Orleans. Since the establishment of the Office of Civil Defense in the 1950s, the nation had developed a high level of capacity to respond to natural disasters that had proved itself many times, most recently in August and September 2004 when four different hurricanes crisscrossed Florida. But a year later the rescue and relief efforts after Katrina were, in the words of U.S. Representative John Lewis (D-GA), “a national disgrace” (Thomas 2005a, 52). Walter Maestri, emergency management director for the New Orleans suburbs in Jefferson Parish, Louisiana, requested aid from state and national governments on August 28, but “then we sat here for five days waiting. Nothing” (Glasser and Grunwald 2005). In those five days, many of the 100,000 or so persons who had not left New Orleans tried to survive in the upper levels of their homes or fled to emergency shelter in the Superdome and the city's convention center. After the storm passed, calls for help or for protection from looters overwhelmed the local police, many of whom had lost their homes and some of whom simply quit. Robert and Mary Kweit's article in this issue offers a more detailed description and some explanations of the shortcomings in initial rescue and relief activities. They compare the post-Katrina events to those in response to the 1995 flood and destruction of Grand Forks, North Dakota, the last major U.S. city to be evacuated as a result of a natural disaster.

President Bush, who flew over the flooded areas on his way back to Washington, DC, from his vacation in Texas, declared on September 2, “the results [of the government's rescue efforts] were not acceptable”

(Glasser and Grunwald 2005). But this judgment paled in comparison to assessments in newspapers usually allied with the president. For example, the *Omaha World-Herald* editorialized, “The initial response of government to the disaster in New Orleans was so pathetically inadequate as to severely call into question the competence of the federal government’s disaster recovery machinery—and the judgment of the Bush administration” (2005, 6B). The *Wall Street Journal* went further:

The scene was starkly different in Florida a year ago, after Hurricanes Charley and Frances roared in. Then, federal agencies pulled off a tour-de-force rescue, quickly pouring in billions of dollars to help distressed residents, and more still after two more storms, Ivan and Jeanne, followed. President Bush visited the scene within 48 hours. Gov. Jeb Bush, the president’s brother, took personal responsibility for managing much of the relief effort. (quoted in *Omaha World-Herald* 2005, 6B)

Increasingly, around the country, the question was being asked, “What took so long?”

Among the many problems that contributed to the confused and slow response was a debate over who should be in control of the overall rescue and relief operations—the national government or the governments of the affected states. At issue was whether to “federalize” the National Guard and shift the command of guard units from the state governors to the president. The White House proposed a plan to put the National Guard under control of Lieutenant General Russel L. Honore, who was in command of active-duty military forces sent to New Orleans to restore order. However, the governor of Louisiana refused to go along with Bush’s proposal because she did not want to lose control over the rescue operations (Thomas 2005b, 40). Bush could have invoked the Insurrections Act (Title 10 USC, Sections 331–335), which permits the president, upon request by a state legislature or governor, to employ U.S. armed forces personnel to suppress riots or enforce federal laws in the face of rebellion. But Bush and his advisors were reluctant to do so out of fear that eighteen- and nineteen-year-old troops untrained in crowd control would inadvertently kill citizens (Thomas 2005b, 37). Further, the White House worried about negative political fallout if the president preempted a female governor of another party who was in command of her state’s personnel (Lipton, Schmitt, and Shanker 2005). At the same time this standoff over “federalization” of the National Guard was occurring, Louisiana governor Blanco was frustrated by the lack of action on the part of the Federal Emergency Management Agency (FEMA). “We wanted soldiers, helicopters, food and water, said Denise Bottcher, press secretary for Gov. Kathleen Babineaux Blanco. They [FEMA] wanted to negotiate an organizational chart” (Shane 2005). Meanwhile, the situation in New Orleans was desperate; by Saturday, September 3, Mayor C. Ray Nagin lamented, “We’re still fighting over authority. A bunch of people are the boss. The state and federal government are doing a two-step dance” (Shane 2005).

Eleven days after Katrina struck, Department of Homeland Security (DHS) secretary Michael Chertoff, under considerable pressure from Democrats and Republicans dissatisfied with the conduct of the relief efforts, removed Michael D. Brown from his position as FEMA’s director (Bumiller 2005). Brown argued that “we’re [FEMA] not a first responder agency. We’re there to coordinate and help people prepare and coordinate in times of disaster. And so if the country wants us to be more, then we should have a great public policy debate whether that’s true or not” (Stevenson 2005). Anyone experienced with disaster relief knows that mistakes do occur in responding to such a large-scale incident as Katrina. But as mistake after mistake became a constant stream of news reports from throughout the ravaged areas, the president’s approval ratings plummeted. Bush soon took personal responsibility for federal failures after Katrina, and in a nighttime speech from a deserted Jackson Square he promised “to rebuild this devastated city and the rest of the Gulf Coast with one of the largest reconstruction efforts the world has ever seen” (VandeHei and Baker 2005). The president secured US\$62 billion from Congress to back up his pledge and

promised, “We will do whatever it takes,” despite estimates that it would require at least US\$200 billion to rebuild (Fineman 2005, 27).

The initial federal funds were expended at a rate of US\$2 billion per day, much going to FEMA. In addition to federal funds, Katrina prompted the largest outpouring of state-to-state aid in the nation's history. States and cities throughout the nation provided housing, food, and employment assistance for thousands of evacuees. Especially noteworthy, Houston, Texas, sheltered 300,000 evacuees. Police officers, firefighters, emergency medical personnel, and specialists as well as all manner of equipment from other states flowed into the Gulf Coast. Facilitating this movement of state-level resources was the nine-year-old Emergency Management Assistance Compact, a state-to-state version of the “good neighbor” cooperative agreements common among local governments (Hunter 2005).

State officials from both political parties strongly opposed Bush proposals to transfer the leadership in response to catastrophic natural disasters to the Pentagon. On October 13, 2005, the National Governors Association (NGA) issued a statement opposing federal preemption of state authority over emergency response and management:

Governors are responsible for the safety and welfare of their citizens and are in the best position to coordinate all resources to prepare for, respond to and recover from disasters. Federal aid and assistance are sometimes necessary to accomplish these goals, and governors are open to discussing how best to team with federal emergency officials. (NGA 2005)

Governor Jeb Bush (R-FL) was quoted as believing that if the “state and local response is a complete failure, there might be a way for the federal government to step in. But a takeover is not appropriate.” Governor Mitt Romney (R-MA) suggested that the president's proposal was worth considering since “a fair question to ask is, ‘If the federal government is paying the bill, should not it also be in command?’” However, Governor Brian Schweitzer (D-MT) rejected that view by declaring, “People in Washington, D.C. can yap all they want, but they're not going to undermine the constitution of the state of Montana” (Nichols and Benedetto 2005).

Federal recovery operations did make progress, even though they were hampered in late September by Hurricane Rita, which caused further damage to Texas and Louisiana. FEMA and the leadership of the DHS, within which FEMA was located, had completed in January 2005 a 426-page “all hazards” National Response Plan to guide the agency's and the nation's response to large-scale incidents, and “Katrina was its first test” (Walters and Kettl 2005, 24). But public and congressional opinion judged FEMA's performance to be excruciatingly slow, burdened with mismanagement, and plagued by wrangling over how best to rebuild New Orleans and the other damaged areas. Provision of temporary housing, relocation of persons to temporary quarters, and approval of monies for repair and rebuilding of homes overwhelmed FEMA and the Small Business Administration. Ronald D. Utt of the Heritage Foundation noted, three months after Katrina, the effort to house individuals “just doesn't seem to be well organized. Things in some respects have gotten more confused than they were a couple of weeks after the storm” (Hsu 2006). Cleanup became characterized by high costs and by no-bid contracts (Lipton 2005). As blunders mounted, the GOP delegation in the House launched an investigation into conduct of the recovery efforts, and as FEMA's reputation sank, even allies of the president such as Governor Mike Huckabee (R-AR) claimed the agency's acronym stood for “Forget Expecting Meaningful Answers” (Page 2006).

Katrina and the flooding that followed was not an unexpected natural catastrophe—FEMA, Louisiana, and New Orleans officials had participated a year earlier in an exercise entitled Hurricane Pamela that simulated the conditions of a powerful storm hitting and flooding New Orleans (Martin, Simpson, and

James 2005). The unsatisfactory conduct of the rescue and relief work resulted from more than poor administration by a single agency; decisions and actions by officials at all levels of government created many of the difficulties that bedeviled the whole undertaking and contributed to the inability of federal, state, and local governments to work together. At the local level, city officials wasted more than a day and half after being warned of Katrina's path before ordering an evacuation (Jordan 2006). The city also had not developed a plan for the transport of an estimated 100,000 persons who would need assistance (Walters and Kettl 2005, 24). Similarly, the governor of Louisiana could have ordered the city's evacuation but delayed her decision, and the lack of preparation on the state's part given everything that was known (e.g., vulnerability of the levees) is "inexplicable," according to William Waugh, an expert in disaster management at Georgia State University (*Omaha World-Herald* 2005). DHS secretary Chertoff waited until a full day after the levees broke to declare Katrina "an incident of national significance," which authorizes federal agencies to mobilize to respond to a disaster. Further, Chertoff could have convened the Interagency Incident Management Group before Katrina struck, and he also could have urged the president to declare a federal emergency sooner (U.S. Congress. House 2006, 2). In light of these problems, it is possible, as Richard L. Cole and John Kincaid note in their article in this issue, that the across-the-board decline in public trust in federal, state, and local governments registered between 2004 and 2006 was in part a "negative reaction to the poor response of all governments to Hurricane Katrina."

The dilemma of American federalism also shaped the pattern of actions (and inactions) in response to Katrina. Effective intergovernmental performance is a challenge within a fragmented institutional arrangement. Speaking to the American Municipal Congress in 1961, Senator Edmund Muskie (D-ME) asked, "How do we make sure that the powers of government [will] continue to be diffused while at the same time the chores of government are effectively performed? This is the great dilemma which faces us with increasing urgency" (quoted in Leach 1970, 48). Richard Leach explains that American federalism is characterized by several dynamics, including (1) "Action in the American federal state is not automatic," (2) "Federalism lacks any single point of responsibility for triggering the process into action," (3) "Action in American federalism is for the most part confined to parts of a problem rather than to a problem as a whole," and (4) "Exertions of power in the federal system do not always produce a positive result" (1970, 60–63). It is relatively easy to review the events surrounding Katrina and to find examples that confirm Leach's observations about American federalism. If, as Walters and Kettl suggest, "what is more critical, and has significant implications for the future of emergency management in the United States, is the need to explicitly and thoroughly define government responsibilities so that officials in other jurisdictions don't suffer the same sort of meltdown in the next natural or man-made disaster" (2005, 20), then also critical to the establishment of a framework for intergovernmental collaboration is a better understanding of the dynamics of American federalism.

### **The Intergovernmental Policy Mix**

Although federal policymakers dealt in 2005 with perennial issues that have important implications for federalism—education, health and welfare, immigration and homeland security, and social issues—Congress also debated several other initiatives that were placed on the policy agenda by the president or members of the slightly larger Republican majorities in the House (232-202-1) and Senate (55-44-1) and are deserving of brief mention.

The first half of the year was dominated by discussions of Social Security reform. President Bush spent a good portion of his first post-reelection State of the Union address touting the need to shore up the Social Security system, and he barnstormed the country trying to generate support for his preferred reform plan, which had as its centerpiece the creation of voluntary personal retirement accounts. However, the public

was not persuaded of the need to address a problem whose full effects would not become evident for decades to come; nor was the public persuaded of the benefits of the president's reform package, especially in the face of heavy advertising against retirement accounts sponsored by AARP. Moreover, members of the Republican congressional majority were reluctant to proceed on an issue that had proven politically perilous for Republicans in midterm elections in recent decades. Even if the president's proposal had commanded majority support in both houses, the legislation would surely have been blocked by the willingness of Democrats in the senate to use the filibuster, a tool that has become increasingly important to a party that has failed to control the presidency or either house of congress since the 2000 elections, save for a year-and-a-half period in 2001 and 2002 when the party switch of Jim Jeffords (I-VT) gave them a majority in the senate.

Although the president's Social Security initiative made little headway in 2005, several other bills with varying implications for federalism were enacted. Thus, a class-action reform bill had been debated for the previous six years and had frequently stalled in the senate; however, Republican gains in senate elections in November 2004 allowed the Class Action Fairness Act to emerge from Congress and to be signed into law in February 2005, thereby requiring interstate class-action lawsuits in excess of US\$5 million to be litigated in federal court. Meanwhile, Republican gains in the senate also made possible enactment of the Bankruptcy Abuse Protection and Consumer Protection Act, making it more difficult for individuals to avoid responsibility for existing debts by declaring bankruptcy. August brought the signing of a comprehensive energy bill that offered tax incentives to stimulate energy production and, among other things, added another month of daylight savings time to the calendar but failed to authorize drilling in the Arctic National Wildlife Refuge or grant liability exemption to manufacturers of the gasoline additive MTBE (methyl tertiary butyl ether), which were two sticking points in previous years. August also saw the belated passage of a US\$286 billion surface transportation act—the Safe, Accountable, Flexible and Efficient Transportation Equity Act: A Legacy for Users—which guaranteed that by 2008 each state will get back at least ninety-two cents for each dollar contributed to the Highway Trust Fund, thereby partly addressing long-standing complaints from states that paid much more into the fund than they received back in spending. The slightly larger Republican Senate majority also led to the passage in October of a statute protecting gun manufacturers and dealers from civil liability lawsuits, several of which had been filed in recent years by local governments and individual plaintiffs (Congressional Quarterly 2006).

At the end of the day, though, the policy areas that were of most importance to federalism in 2005 were the standard issues from recent years: education (especially implementation of NCLB), health and welfare (especially TANF reauthorization, changes in Medicaid, and implementation of the new Medicare Part D prescription drug benefit), immigration and homeland security (especially passage of the REAL ID Act), and social issues (congressional intervention in the Terri Schiavo case).

### *Education*

Since its passage in 2002, NCLB has been the subject of extensive criticism from state and local government officials (Krane and Koenig 2005; McGuinn 2005). Intended to provide a national report card on schools' progress and force districts to improve the performance of all students, but particularly minorities, NCLB has been assailed on numerous grounds (National Conference of State Legislatures 2005a). The requirement that schools administer math and reading tests in the third through eighth grades and demonstrate “adequate yearly progress” toward proficiency for all students by 2014 is viewed by many as an inflexible measure of schools' effectiveness. The federal definition of a “highly qualified teacher”—according to NCLB, all academic subjects must be taught by such an individual—is also thought to be overly rigid. The consequences of a Title I school being labeled “in need of

improvement”—after two subpar years students must be permitted to attend another, higher-performing public school in the district, and in the third year they must be offered tutoring and other remedial assistance—are seen by state education officials as counterproductive. And the extra federal funds intended to compensate states for these federal directives are considered by many state officials to fall well short of meeting the full costs of preparing students to meet these requirements. This criticism intensified in 2005, as opponents expressed their concerns through state statutes (most notably in Utah), two federal lawsuits (one brought by the National Education Association and another filed by Connecticut attorney general Richard Blumenthal), and repeated requests for waivers (some of which were granted) from the new education secretary Margaret Spellings.

Although in prior years state legislatures had passed resolutions expressing disagreement with and urging revisions to NCLB, state and local resistance in 2005 took new and more aggressive forms. Of particular importance was Utah's passage in April of a law requiring that state education law take precedence over NCLB. Utah legislators had considered enacting such a law the prior year but had held off doing so, in part out of hope that the governor's negotiations with the federal Education Department would lead to waivers from several burdensome requirements. However, these negotiations were only partly successful, and in the face of a threat from Secretary Spellings to withhold US\$76 million in federal education funds, the Republican-dominated legislature approved, and Republican Governor Jon Huntsman Jr. signed, a statute directing state education officials to give priority to state education law rather than NCLB directives (Dillon 2005). Other states during 2005 considered enacting legislation that was critical of NCLB or that threatened noncompliance. In addition, Virginia, New Mexico, Hawaii, and Connecticut published studies of the additional costs imposed by the Act (Helderman and Glod 2005). Meanwhile, several school districts in 2005 considered withdrawing from NCLB (two Illinois districts and a Colorado district had done so in previous years), with voters in the Kit Carson, Colorado, school district approving a November 8, 2005, measure opting out of NCLB and raising property taxes to make up for the loss in federal funding (Hoff 2006). However, Utah's statute remains the most significant and aggressive challenge to date (Civil Society Institute 2005; National Education Association 2005).

State and local officials in 2005 also advanced their case against NCLB in two federal lawsuits, one of which was dismissed and the other of which is pending. The unsuccessful suit was filed in April 2005 by the National Education Association (NEA), along with NEA affiliates in ten states and several school districts in Michigan, Texas, and Vermont, and it charged that NCLB “is imposing unfunded federal mandates on the states.” However, in a November 23, 2005, ruling in the case of *Pontiac v. Spellings*, U.S. District Judge Bernard A. Friedman of the Eastern District of Michigan dismissed the suit on the ground that NCLB “cannot reasonably be interpreted to prohibit Congress itself from offering federal funds on the condition that States and school districts comply with the many statutory requirements, such as devising and administering tests, improving test scores, and training teachers” (2005 U.S. Dist. LEXIS 29253). The second lawsuit, which is pending in U.S. District Court in Connecticut, was filed by the Connecticut attorney general and advances the same arguments as the NEA suit. Connecticut charges that the additional federal funds are insufficient to compensate for the extra expenses incurred by the state in meeting NCLB requirements. And the state argues that this violates both the spending clause of the constitution and an NCLB provision expressly disallowing “an officer or employee of the Federal Government to...mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this chapter” (Salzman 2005).

Secretary Spellings has mounted a vigorous defense of NCLB in the face of this criticism, but she has also acceded to a number of requests for waivers from particular requirements. For instance, she has given states an additional year to meet the highly qualified teacher requirement. And as for the consequences of



being labeled a school in need of improvement, Virginia received approval for a pilot program that would allow students at such schools to receive tutoring assistance *before* being permitted to transfer to another public school in the district. As for the means of measuring adequate yearly progress toward proficiency, Spellings announced the 2 percent rule, which permits states to develop alternative ways of assessing the progress of children with severe cognitive disabilities (up to 2 percent of students). Spellings also announced that as many as ten states will be permitted to participate in a pilot program that will measure student proficiency according to a growth model that takes account of individual students' progress from year to year. Admittedly, these waivers represent only a small portion of state requests during the year, and many state officials argued that Spellings should have been more flexible with other requirements. Nevertheless, there was no denying the somewhat greater willingness of Education Department officials to grant waiver requests in 2005 than in previous years (Olson 2005; Anderson 2005; Samuels 2005).

### *Health and Welfare*

The most important development in federal health and welfare policy in 2005 was congressional reauthorization of the TANF program. Congress had been debating a long-term TANF reauthorization since the initial five-year authorization in the 1996 welfare reform law expired in 2002 but had been forced to settle for a dozen short-term extensions. In the closing weeks of the 109th Congress's first session, however, a five-year TANF reauthorization was added to a US\$39.7 billion budget reconciliation measure, the first use of the reconciliation process to cut entitlement spending since 1997. The Deficit Reduction Omnibus Reconciliation Act of 2005 was approved by the House on December 19, 2005, on a 212-206 vote and then passed the Senate in December 21, 2005, by a 51-50 vote (on Vice President Cheney's tiebreaking vote), but because the Senate made several minor changes to the conference report, the measure had to be reapproved by the House, by a 216-214 margin, on February 1, 2006, and was then signed by the president on February 8, 2006 (Simon and Havemann 2006).

States are subject to several new rules as a result of the TANF reauthorization, though not nearly as many requirements as were considered earlier in the 2005 legislative process. Originally, there had been discussion about increasing the number of hours per week that welfare recipients are required to be working or engaged in work activity. However, these tougher work hours requirements did not survive in the eventual legislation; instead, the secretary of health and human services was directed to issue regulations clarifying which activities qualify as work activities. The principal changes that were adopted deal with the percentage of each state's welfare recipients who must meet these work requirements. By October 1, 2006, states have to show that these work requirements are met by at least 50 percent of all families receiving welfare assistance and 90 percent of all two-parent families receiving assistance. Moreover, states now have to include in these calculations not only families receiving TANF assistance, as in the past, but also families receiving assistance through separate state welfare programs. Finally, these work participation requirements will be adjusted downward in each state by 1 percentage point for each percentage-point reduction in the families receiving assistance, starting with 2005 as a baseline (rather than using the previous baseline of 1995, which was more advantageous for states). These latter two changes—requiring that states include in their calculations families in separate state welfare programs and that any reduction in the target percentage be measured from the 2005 baseline—are seen as making it particularly difficult for many states to meet the federal work participation requirements. And the consequences of failure are significant, in that states can lose between 1 and 5 percent of TANF funds in the first year and be penalized up to an additional 2 percent in each subsequent year for noncompliance (Greenberg and Parrott 2006; Greenberg 2006).

The budget reconciliation measure signed on February 8, 2006, also made several changes to the Medicaid program, which now provides health-care coverage for one in six Americans and whose

spiraling costs exceed US\$300 billion per year. The push for Medicaid reform began in February 2005 with the president's budget proposal, which called for US\$60 billion in Medicaid savings over ten years (Adams 2005). House Republicans were generally supportive of the president's proposals. But the budget resolution incorporating these changes encountered difficulty in the Senate in March, when Gordon Smith (R-OR) prevailed on his colleagues to reduce the amount of Medicaid savings to US\$10 billion over five years and to establish a commission to study the issue further, thereby stalling major reform efforts (Schuler 2005a). House Republicans continued to push the issue of Medicaid reform, however, and they were assisted by the NGA, whose members came together in a bipartisan fashion in June to urge a fundamental restructuring of the program to give states more flexibility (Balz 2005). As outgoing NGA chair Mark Warner (D-VA) explained at the time, as he joined with incoming NGA chair Mike Huckabee (R-AR) in presenting the proposals of an NGA task force on Medicaid reform, "We may be the only bipartisan game in town" (quoted in Harkness 2005). Moreover, as NGA executive director Ray Scheppach noted in November 2005, after the House adopted a number of the governors' proposals: "The House has worked very closely with us. From our standpoint, Republicans and Democrats saw this very similarly at the state level" (quoted in Weisman 2005c). Although the House and Senate versions of Medicaid reform differed significantly, when the budget bill went to conference in December 2005, the House version largely prevailed, and the resulting package took effect when the president signed the budget reconciliation bill on February 8, 2006 (Pear 2005d; Schuler 2005b).

The reconciliation bill is estimated to bring US\$4.7 billion net savings in Medicaid spending over five years and, of particular importance to state officials, will give states added flexibility in certain areas. States will be permitted to adopt cost-sharing measures, impose higher premiums, and reduce benefits for certain Medicaid recipients and services. In addition, current and future Medicaid recipients are required to provide proof of U.S. citizenship. Changes have also been made in the rules governing asset transfers and home equity for nursing home benefits, and added penalties are imposed for violating these rules. Individuals were previously prevented from transferring assets at below market value for three years before qualifying for such benefits; this period was lengthened to five years. Also, individuals cannot qualify for these benefits if their home equity exceeds US\$500,000, with the proviso that states can increase this to US\$750,000 (Schuler 2005b; Pear 2006b; CBO 2006).

Although the budget reconciliation bill brought several changes to Medicaid policy, other important Medicaid developments in 2005 came through state initiatives made possible by Section 1115 waivers granted by the federal Centers for Medicare and Medicaid Services (CMS). In the first four years of the Bush administration, comprehensive Section 1115 waivers were granted to seventeen states for a variety of initiatives, many of which sought to reduce burgeoning costs and coverage (Kaiser Commission on Medicaid and the Uninsured 2005a). One particularly significant waiver in 2005 was granted to Florida Governor Jeb Bush for a five-year pilot project to shift most Medicaid recipients in Broward and Duval counties from a "defined benefit" program to a "defined contribution" program. Medicaid recipients in these counties will be assigned a premium based on their medical history, and will then be permitted to enroll in a managed care plan or to opt out of Medicaid and use the premium to contribute toward a private plan of their choosing. Managed care plans would have significant discretion in determining benefit packages and would not be responsible for costs that exceed a state-specified limit (Kaiser Commission on Medicaid and the Uninsured 2005c). Officials in other states are following closely the implementation of Florida's plan, and several are considering similar programs (Pear 2005b).

The year 2005 also brought continued preparation for the implementation of the Medicare Prescription Drug, Improvement, and Modernization Act, whose prescription drug program took effect on January 1, 2006 (Weissert and Miller 2005). Most of the 43 million Americans eligible for Medicare prescription

drug coverage had until May 15, 2006, to enroll in a private prescription drug plan (PDP), and therefore had additional time to navigate the complex range of private sector plans. However, for more than 6 million “dual-eligible” seniors and disabled individuals who qualify for Medicare and Medicaid coverage, January 1, 2006, was a crucial date because their Medicaid coverage ended and they were automatically transferred to a PDP. State and federal officials had planned extensively for this transition, but as could be expected, and as state Medicaid officials had feared, a number of dual-eligibles encountered problems in securing prescriptions throughout the month of January (Kaiser Commission on Medicaid and the Uninsured 2005d). As the Kaiser Commission on Medicaid and the Uninsured reported,

In the early phases of implementation, there have been widespread reports of dual eligibles being overcharged, and, in some cases, leaving the pharmacy without getting their prescriptions filled. There have also been cases of plans not following the transitional protocols they were required to develop to ensure beneficiary access to needed medications—typically the provision of a 30-day supply of medication regardless of whether or not the drug in question is on the formulary. (Kaiser Commission on Medicaid and the Uninsured 2006)

In light of the many reports of difficulties faced by dual-eligibles in the first few weeks of January 2006, a number of states stepped in to cover the costs of prescriptions that should have been covered by private plans. Although states covered these costs in the expectation that the federal government would later reimburse them, CMS administrator Mark McClellan initially said that he lacked the authority under federal law to make such reimbursements (Connolly 2006). Only later, on January 24, 2006, did McClellan announce that legal authority for reimbursements had been established and would last through February 15, 2006, by which time the administration expected transition problems to be worked out. State officials were less confident that this time frame was a realistic one (Pear 2006a).

Although problems surrounding enrollment of dual-eligibles dominated discussion of the new Medicare Part D drug benefit, state officials and federalism scholars also had occasion to note another, highly unusual, aspect of the program: the “clawback” mechanism by which states will finance part of the federal Medicare program. As of February 2006, states are required each month to send the federal government a percentage of the funds they would have spent to pay for drugs for dual-eligibles through the jointly financed state-federal Medicaid program. The idea is that because dual-eligibles will now be covered by Medicare, states will no longer have to contribute their designated portion of the funds for Medicaid coverage for these individuals, and thus states will now be in a position to apply these savings to help fund federal Medicare coverage for these individuals. In what has been termed “the largest single source of state funds flowing from states to the federal government from FY 2006 onward,” states are initially required to send to the federal government monthly payments amounting to 90 percent of these savings; within a decade, this percentage will change to 75 percent (Kaiser Commission on Medicaid and the Uninsured 2005b).

### *Immigration and Homeland Security*

Although in past years debates about immigration and homeland security policy generally proceeded on separate tracks, these issues have become increasingly intertwined in the post-9/11 era, and this was particularly true in 2005, with the passage of the REAL ID Act requiring state driver's licenses to be brought into compliance with national standards within three years.

The act had its origin in congressional debates over the Intelligence Reform and Terrorism Prevention (IRTP) Act, which was enacted in December 2004 but did not include a provision supported by Representative James Sensenbrenner (R-WI) and other House Republicans that would have required state driver's licenses to meet national standards. Sensenbrenner had noted the 9/11 Commission's finding

regarding problems with existing driver's license standards, and he urged the 108th Congress to require states to adopt stricter driver's license standards. However, in order to break a House-Senate logjam over the wide-ranging intelligence reform act in late 2004, Congress instead approved a weaker provision directing the Department of Transportation to convene a rule-making panel to set national standards for state driver's licenses. At the same time, Sensenbrenner received assurances that the stronger House measure would be considered early in the 109th Congress (Skiba 2004). In February 2005, the House reapproved the REAL ID Act, and in March the measure was attached to an emergency supplemental spending bill for military operations in Iraq and Afghanistan (Dinan 2005). Although a number of senators again objected to the REAL ID provision, its inclusion in the military spending bill made it difficult to defeat, and it became law in May 2005.

The main provision of the REAL ID Act, which takes effect in May 2008, is a prohibition on state driver's licenses or other state ID cards being accepted for federal identification purposes unless the state is in compliance with national standards. Among other requirements, states must ensure that driver's licenses contain a person's full legal name, address of principal residence, and a digital photograph that can be read by facial-recognition technology. Moreover, prior to issuing driver's licenses, states must require applicants to present a birth certificate as well as documents showing that the person is legally in the United States, and such information must then be verified either through various databases or with the issuing agency. Finally, states must make available through a national database all of the information on their driver's licenses, along with information about each driver's history of motor vehicle offenses. States failing to comply with these requirements within three years will have no guarantee that their driver's licenses will be accepted by federal agencies. One caveat: states are still permitted to issue *state* driver's licenses or ID cards to individuals who are unable to produce proof of legal U.S. residence, but such state ID cards are not acceptable for federal identification purposes.

It would be difficult to overstate the extent of state governmental opposition to the REAL ID Act. In March 2005, prior to Senate passage of the act, Ray Scheppach of the NGA, William Pound of the National Conference of State Legislatures (NCSL), Dan Sprague of the Council of State Governments, and Linda Lewis of the American Association of Motor Vehicle Administrators (AAMVA) wrote to Senate Majority Leader Bill Frist and Minority Leader Harry Reid urging them to reject what they termed a "massive unfunded federal mandate" and to rely instead on the rule-making process established in the IRTP Act (NCSL 2005b). However, a February 2005 Congressional Budget Office (CBO) cost estimate determined that the REAL ID bill did not run afoul of the Unfunded Mandates Reform Act (UMRA), because the additional costs to state and local governments would amount to only US\$120 million over five years (in comparison with a US\$100 million five-year estimate for the driver's license changes in the existing IRTP Act) and therefore would not exceed UMRA's inflation-adjusted *annual* threshold of US\$62 million (CBO 2005a). Although state officials were unable to prevent the measure from becoming law, governors continued to express their concerns about the burdens and costs of implementation, whether by encouraging Congress to revise the law or pleading their case with Homeland Security Secretary Chertoff, whose department is charged with issuing regulations regarding national driver's license standards (Janofsky 2005). Meanwhile, the AAMVA conducted an August 2005 survey of state motor vehicle administrators and concluded that the law would require state motor vehicle departments to make dramatic changes and that the resulting costs around the country would far exceed the CBO cost estimate. In fact, Virginia estimated that implementation costs in that one state alone would far exceed this figure (AAMVA 2005; Associated Press 2006b).

In another congressional statute that addressed one of the 9/11 Commission's concerns, Congress in October 2005 passed a US\$31.9 billion Department of Homeland Security appropriations bill that permits

a portion of the US\$550 million in State Homeland Security Program grants and US\$400 million in Law Enforcement Terrorism Prevention Program grants to be allocated according to the risk of a terrorist attack. In the years immediately following the 9/11 terrorist attacks, federal first-responder funds had been allocated according to a formula that gave each state an equal amount of 40 percent of these funds and distributed the remaining 60 percent of the funds by state population. As a result, a state such as Wyoming received more funds per capita than New York. Pressed by the 9/11 Commission to eliminate such consequences—which are in one sense perverse but in another sense entirely predictable from the vantage point of scholars of congressional behavior—Congress retained the requirement that the first 40 percent of funds be allocated equally among the states (resulting in an FY2006 grant of US\$7.13 million per state) but permitted the remaining 60 percent of funds to be distributed by the Homeland Security Department based on factors other than population, such as the risk of terrorist attack (Doyle 2005; DHS 2005).

Along the same lines, in a separate move, Secretary Chertoff announced in January 2006 that the US\$765 million in homeland security grants available for cities through the Urban Areas Security Initiative (UASI) would also be distributed on the basis of risk assessment and be more narrowly targeted than in recent years. Although at the program's inception in 2003 only seven cities had been eligible for UASI funds, the number of cities receiving funds had climbed to fifty by 2005 (Lipton 2006). Chertoff indicated in January 2006 that only thirty-five high-risk urban areas would be eligible to apply for funds, and even these at-risk areas would have to justify their need for continued funds in future years (Marks 2006).

### *Social Issues*

Although Congress gave relatively little serious attention to legislation dealing with controversial social issues in 2005—the same-sex marriage constitutional amendment debate from 2004 was dormant—a March 2005 statute entitled “An Act for the relief of the parents of Theresa Marie Schiavo” attracted significant attention and had important implications for federalism. This statute originated in a dispute in Florida concerning Terri Schiavo, a forty-one-year-old brain-damaged woman whose life had been sustained for nearly a decade and a half by a feeding tube. Terri's husband Michael Schiavo sought the removal of the feeding tube on the ground that this was in keeping with his wife's wishes. However, Terri's parents, Robert and Mary Schindler, objected to the removal of the tube on the grounds that their daughter's wishes on this point had not been clear and, moreover, that Michael Schiavo was conflicted on this question because he was in a long-term relationship with and had two children by another woman (whom he would later wed). After seven years in which the issue was adjudicated in Florida courts, Pinellas County circuit judge George Greer sided with Michael Schiavo, and Terri's feeding tube was removed on March 18, 2005.

Dissatisfied with the Florida court ruling, and determined to give Terri's parents yet another chance to present their case, Republicans in the U.S. House and Senate responded with a variety of legislative proposals, some of which would have ordered the immediate reinsertion of the feeding tube. Eventually, though, in what House Majority Leader Tom DeLay (R-TX) described as the “Palm Sunday compromise,” the House (by a 203-58 vote that included 156 Republicans and 47 Democrats in the majority) agreed to a Senate bill that did not order the reinsertion of Terri's feeding tube but rather called for a de novo review of the case in federal court (Babington and Allen 2005). In particular, Congress declared that the U.S. District Court for the Middle District of Florida would have jurisdiction to hear a claim by Terri's parents concerning the violation of any right “under the Constitution or laws of the United States relating to the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain her life” (P.L. 109-3) The bill was signed by the president in the early hours of March 21, 2005, and the Schindlers promptly filed suit in the designated federal court, only to be rebuffed the next day by

U.S. district judge James D. Whittemore and then by the Eleventh Circuit Court of Appeals. Terri Schiavo died on March 31, 2006 (Goodnough 2005).

Congress's intervention in the Schiavo case—and particularly its passage of a statute directing a federal court to review a case already adjudicated in state court—generated significant criticism from individuals who charged that the act was inconsistent with federalist principles and, moreover, contrary to the traditional Republican philosophy of deference to state law (Nather and Stern 2005). Initially, congressional Republicans defended the statute. But after polls showed that more than 70 percent of Americans objected to Congress's intervention, a number of members of Congress muted their support for the law. When an autopsy revealed several months later that Terri Schiavo's brain damage had been irreversible, several other congressional Republicans (though not all) moved to distance themselves from the statute. Senator Mel Martinez (R-FL), a one-time ardent supporter of congressional action, acknowledged in June 2005, “I really probably come to the view that this has to be more resolved at the state level, seems like the kind of issue the state courts deal with” (quoted in Kornblut 2005).

### **The Federal Budget: Is Anyone Guarding the Treasury?**

The previous year's budget battle characterized by intra- and inter-chamber splits within Republican ranks continued into 2005 with a surprising twist that produced important shifts in the FY2006 budget. Members of Congress pushing for even more tax cuts clashed with members worried about the ballooning deficit, while others favored reductions in domestic programs, including entitlements, and still others pushed hard for earmarking favorite items. By August 2005 it appeared as if the long-standing Republican commitment to limited government had been completely abandoned. When presented with a US\$286 billion transportation bill containing 6,371 pet projects, or “pork,” President Bush ignored taxpayer groups urging him to veto the bill. His signature on the transportation appropriations stood in stark contrast to the public attack on pork he made when he submitted his FY2003 budget. Conservative groups pointedly recalled that Ronald Reagan vetoed the 1987 transportation bill because it contained 152 pork barrel items (Weisman and VandeHei 2005). By November, the pork in the transportation bill became a political embarrassment and the focus of a furious fight among House GOP factions, and this feud not only altered the final outline of the FY2006 budget but also reshaped factional control within the majority caucus.

The politics of the 2006 budget played out against a backdrop of trends that seemed to augur well for the near future. Although expenditures on entitlement programs were projected to march relentlessly upward, the CBO predicted the FY2005 deficit would be US\$81 billion less than for FY2004, primarily because of a 42 percent surge in corporate income tax payments (Pear 2005a). But by the end of August, Katrina's landfall resulted in a hurricane of demands for large and immediate financial aid for the affected areas. The storm's budgetary impact also prompted a revolt by House GOP fiscal hawks and their revolt led to a “sea change in the budget policies of House Republicans” (Weisman 2005b).

In the 1990s Republicans had regained majority control of Congress in part by sticking a “tax and spend” label on Democrats. But once in control of the budget process, Republicans proceeded to behave in an even more fiscally damaging fashion than the label they had pinned on the other party. In a flip-flop from party principles devoted to guarding the Treasury, the GOP pursued a budgetary strategy characterized by large doses of pork, expansive use of tax expenditures, and substantial amounts of borrowing (Meyer 2005). This “spend and borrow” fiscal approach was justified by the belief held by many in the GOP that because tax cuts are constraints on economic growth, their removal would stimulate the economy. Vice President Cheney articulated this view concisely when he declared, “Reagan proved deficits don't matter” (Dionne 2005). The Club for Growth, an influential conservative group, disagreed and blasted the

Republicans' lack of fiscal discipline by stating in its fund-raising literature, "Too many congressional Republicans have veered away from the limited government agenda that got them elected to the majority in Congress. They have approved pork-barrel highway bills worse than the Democrats used to give us" (Murray 2005).

The massive demand for rescue, relief, and recovery assistance after Katrina became too much for the Republican Study Committee (RSC), a House faction of fiscal conservatives led by Representative Mike Pence (R-IN). Chafing under profligate spending for programs such as NCLB, the Medicare prescription drug benefit, and the burgeoning use of pork, the RSC during 2005 campaigned on national media against what they branded as "Big Government Conservatism" (Weisman 2005b). The political troubles of Majority Leader Tom DeLay, as well as his insistence on party fidelity to Bush's pursuit of more tax cuts, created a window of opportunity for the RSC faction to mount a challenge to the House leadership. At the same time, House Republican moderates rejected Bush's demand to offset the cost of hurricane relief by reducing monies for social welfare and health-care programs (Weisman 2005a). Once DeLay had been forced to step down from his leadership post because of his indictment on illegal campaign activities in Texas, the majority caucus was able to cobble together a budget proposal that cut entitlement programs (e.g., Medicaid, food stamps, farm supports) by US\$50 billion (Weisman 2005b), but also included US\$70 billion in new tax cuts, down from an initial US\$95 billion (Meyerson 2005). However, this proposal immediately ran into resistance from several sides. House GOP moderates were upset that reductions in social programs were used to finance the companion revenue bill filled with new tax cuts. Democrats in both chambers were incensed by this trade-off and further infuriated by the GOP's refusal to support generous recovery programs for the hurricane-damaged areas (Hulse 2005). Many House Republicans from the Gulf Coast were disappointed by Bush's lack of enthusiasm for the establishment of a Louisiana Recovery Corporation.

Support for the various budget positions (for and against more tax cuts, for and against cuts in domestic programs, for and against a large package of aid for hurricane relief, for and against drilling in the Arctic, for and against pay-as-you-go) left the House leadership with insufficient votes to frame a budget that would attract a majority (Weisman and Murray 2005). Twenty-two Republicans joined Democrats to defeat reduced spending on health and education programs, including the elimination of US\$8 billion to prepare for a possible flu pandemic (Hulse 2005). House leaders secured votes from GOP moderates by reducing proposed cuts in food stamps by 2 percent, not increasing Medicaid copayments, and raising to US\$750,000 the home equity protected under Medicaid nursing home provisions. These concessions led to a 217-215 vote in November 2005 for the House budget reconciliation bill (Weisman and Murray 2005), which was then approved on December 19, 2005, on a 212-206 vote, after several changes were made to the bill in conference.

Similar divisions plagued the Senate, but it was able in November 2005 to approve on a 52-47 vote a budget reconciliation bill with a US\$35 billion reduction in federal benefit programs (Pear 2005c). Also tacked on to the Senate's budget bill (until it was later removed and attached to a defense appropriation measure) was approval of drilling for oil and natural gas in Alaskan wilderness areas. The Senate Finance Committee could not muster support to extend deep cuts in taxes on capital gains and dividends but did manage to approve US\$60 billion in hurricane relief. The Senate finally adopted the budget bill that emerged from a conference committee on December 22, 2005, after the vice president cast the tiebreaking vote (Weisman 2006), and on the same day that Senator Ted Stevens (R-AK) relented on his insistence that the Arctic oil and gas drilling provision be included in the defense appropriations bill.

The fiscal effects of Katrina (and the war in Iraq) became clear when the CBO reported in mid-January 2006 that the budget deficit would climb once again above US\$400 billion. With US\$85 billion

appropriated for Katrina-related spending, the President's insistence on US\$90 billion in tax cuts over the next five years became untenable (Andrews 2006). Further damaging the Bush push for deficit reduction by targeting entitlement programs was a CBO report that under the President's proposed Deficit Reduction Act, 45,000 Medicaid enrollees would lose coverage in FY2010 and, by FY2015, 65,000 would lose coverage, of whom 60 percent would be children. The CBO also estimated millions of low-income persons would pay substantially more for health care because of higher copayments and premiums (Pear 2006b). On February 1, 2006, on a 216-214 vote the House reapproved the budget bill that had been originally passed in December 2005, and the Senate followed the next day with a 66-31 vote to enact US\$70 billion in tax cuts. The ideological splits over the budget remained firm and were reiterated by both sides. For example, Representative Adam Putnam (R-FL) termed the finished budget as “this first step toward long-term, fiscal discipline and fiscal health for our government,” and Senator George Voinovich (R-OH) declared “We cannot afford these tax cuts” (Weisman 2006).

The final budget package imposed a 1 percent across-the-board cut on all funding except for veterans or emergencies, and it trimmed nearly US\$40 billion over five years from social and health programs such as child support enforcement, foster care, Supplemental Security Income, and TANF. In addition to making various previously discussed changes in TANF and Medicaid, it is noteworthy that the new budget provides only US\$1 billion in child-care funding over the next five years, instead of the required US\$12 billion estimated by the CBO. This meager funding for child care along with the new rules on work activities will likely push more families off TANF and result in more children falling into deep poverty (Parrott 2005).

Final tax cuts are more than double the expenditure cuts and will lower the deficit by less than one-half of 1 percent. Two provisions in the tax code were eliminated: (1) the so-called Pease provision, which limited the value of itemized deductions for persons with high incomes, and (2) the “personal exemption phase-out,” which reduces the value of the personal exemption as one's income rises. Analysis by the Urban Institute–Brookings Institute Tax Policy Center finds that 97 percent of the benefits from the removal of these two provisions in the tax code will go to persons with incomes above US\$1 million, yielding an average net gain of US\$19,000 on top of an average tax cut of US\$103,000 in 2005 based on previous rounds of tax cuts on personal income (Greenstein, Friedman, and Aron-Dine 2005, 1–4).

The continuing reliance on tax cuts as the preferred instrument of national government action leaves federal revenues at historically low levels and accounts for a substantial part of the deficit. In fact, even with the recent increase in income tax revenues, “*revenues in 2005 will remain well below the levels at which they were projected to be after the 2001 tax cut was enacted* (after adjusting for the additional revenue losses from the 2003 tax cuts and other tax cuts)” (Kogan, Shapiro, and Aron-Dine 2006, 2; italics in original). Many supporters of the tax reduction strategy allege tax cuts produce stronger economic growth and that the Bush tax cuts are “working,” as evidenced by the recent economic upturn. However, an Internal Revenue Service study finds that although the 2003 Jobs and Growth Tax Relief Reconciliation Act lowered tax rates, the net result even after the increase in taxable income was a “6.1 percent decrease in total income tax [relative to the previous year]” (Parisi and Hollenbeck 2005; quoted in Kogan, Shapiro, and Aron-Dine 2006, 1). Furthermore, federal revenues “are projected to average 17.1 percent of the Gross Domestic Product over the next ten years, a lower level than the average for the 1950s, 1960s, 1970s, 1980s, and 1990s” (Kogan, Shapiro, and Aron-Dine 2006, 2). As the CBO confirms, “even given very generous assumptions about tax cuts' impact on economic growth, they recoup only a fraction of lost revenue” (CBO 2005b; quoted in Kogan, Shapiro, and Aron-Dine 2006, 3). These recent studies cast doubt on the validity of assertions that tax cuts increase government revenues.



As an epilogue to budgetary politics in 2005, it should be noted that the recommendations of the President's Advisory Panel on Federal Tax Reform, created on January 7, 2005, suffered much the same fate as did the Bush proposals on Social Security reform. The advisory panel prepared two somewhat different plans for changes in the tax code; the two plans were relatively similar in their treatment of personal income but differed in how businesses would be taxed. Among the biggest and most controversial of changes proposed were the establishment of a ceiling on the size of a mortgage that would qualify for the deduction on interest paid on mortgages, the end of deductions for interest paid on home equity loans, and the elimination of the mortgage interest deduction on second homes. Also provoking criticism were proposals to tax employer-paid health insurance premiums above US\$5,000 a year for an individual (\$11,500 for a family policy), allow deductions for charitable contributions only for amounts above 1 percent of income, and eliminate the deduction for state and local taxes. The panel also called for the repeal of the alternative minimum tax. One approach to new business taxes would end taxes on dividends and lower the capital gains tax rate to 8.25 percent, whereas the other plan would apply a 15 percent rate on dividends, interest, and capital gains. Both plans would lower the maximum corporate income tax to 32 percent (President's Advisory Panel on Federal Tax Reform 2005). The war over the FY2006 budget pushed the advisory panel's report to the sidelines and public opinion offered little support for its recommendations. The downward trend in the president's approval rating undercut any possibility that the president would be able to push through any of the panel's recommendations, at least in the foreseeable future.

The federal government spent US\$2.5 trillion in FY2005 and raised revenues of US\$2.2 trillion, with a deficit of US\$312 billion. Expenditures consumed approximately 20 percent of GDP and revenues absorbed approximately 17.5 percent of GDP (National Academy of Public Administration 2005, 14). If Congress does not extend the tax cuts scheduled to retire over the next several years, and if it makes no significant alterations in expenditures, then the revenue gap will continue. If current policies do not change, both the CBO and the Government Accountability Office (GAO) agree that spending for Social Security, Medicare, and Medicaid will grow from 8 percent of GDP (in FY2005) to approximately 28 percent of GDP in 2050 (p. 15). Without changes in current fiscal policies, the GAO predicts the deficit in 2040 "would be so large that balancing the budget in that year could require cuts in total federal spending of as much as 60 percent or raising taxes to almost two times today's levels" (p. 18). Because of the interconnectivity between national government fiscal actions and state and local government policy choices, the likelihood is that the federal fiscal crisis would cascade to the other levels of government and provoke a national-state fiscal war.

## **The States**

Trends in government and politics within the American states sometimes run counter to trends at the national level, as evidenced by the 2004 election results. Not only did Democrats win governorships in several states carried handily by President Bush, but they also gained control of one or more legislative chambers in some Republican states. These results were surprising given the widely held view that the United States has become increasingly polarized into "Red and Blue" states, as exemplified by the following observations:

Democrats see Republicans as a collection of pampered rich people who selfishly seek to cut their own taxes, allied with religious fundamentalists who want to use government power to impose a narrow brand of Christianity on everyone else.

Republicans see Democrats as godless, overeducated elitists who sip lattes as they look down their noses at the moral values of “real Americans” in “the heartland” and ally themselves with “special interest groups” that benefit from “big government” (Dionne 2006).

Some scholars suggest a “clash of cultures” is the primary cause of these partisan divisions, whereas others point to a long list of social and economic differences among states and their residents, including marriage and fertility rates, religious affiliations and church attendance, urban versus rural lifestyles, and even relative housing prices (Drehle 2005; Sailer 2005; Tierney 2004). The heightened level of polarization has particularly distorted national politics—so much so that Hacker and Pierson (2005) assert that Bush has deliberately followed a governing strategy of moving rightward and away from the normal “center” of American politics. Not only has Bush tacked rightward, but he has done so in the face of prevailing public opinion (Morin and Balz 2005) and a rising dismay about “a sea of partisanship but no results” in Washington (D. Broder 2006).

By contrast, state governors and state governments in general continue to operate in the “center.” This is in part because recent state elections have produced “purple” states, where governors belong to the party opposite that of the state's national voting pattern. For example, Republican governors preside over several blue Democratic states such as Massachusetts, California, and New York, and red Republican states such as Arizona, Kansas, Montana, Oklahoma, and Wyoming have governors who are Democrats (Egan 2005). Instead of the hardened partisanship found in the nation's capital, “at the state level,” Governor Romney (R-MA) notes, “when the election is over, there's a meeting of minds and a readiness to find solutions” (quoted in D. Broder 2006). Therefore, part of the explanation for the higher incidence of bipartisan policymaking at the state level is the simple fact of divided government in twenty-nine states (Krane and Koenig 2005, 24). Bipartisan action by governors and legislatures is also prompted by (1) court rulings that force the enactment of legislation, (2) constitutional requirements for a balanced budget, (3) economic development competition among the states, and (4) public opinion. Governor Kathleen Sebelius (D-KS) claims that the bipartisan resolution of her state's education funding crisis “came not just from the court ruling but also via public opinion, demanding that ‘we have to work together, and it can't be just Republican or Democratic’” (quoted in D. Broder 2006). The November 2005 defeat of Governor Arnold Schwarzenegger's (R-CA) package of changes in California state government demonstrates the electorate's power to defend the political “center” (J. Broder 2006b). Although the national level of American government may be sharply divided and unable to resolve pressing fiscal and policy issues, many state governments are characterized by “savvy politicians who are willing to cut the necessary deals to put the [mix of red and blue] ideas into practice” (*The Economist* 2006), and, as a consequence, state officials produce a stream of pragmatic policies.

### *State Policy Actions*

A commonly cited reason for national policymaking is the lack of action on a problem by state governments. However, the reverse may also be true; that is, states often act to address problems because Washington has failed to do so (Elazar 1972; Reeves 1990). Whereas the president and Congress are gridlocked over global warming, states on both coasts adopted proposals to reduce greenhouse gases such as carbon dioxide emitted from motor vehicles and electric power generators. Under the leadership of Governor George E. Pataki (R-NY) seven states in the northeast (Connecticut, Delaware, Maine, New Hampshire, New Jersey, New York, and Vermont) entered into a cooperative agreement to hold power plant emissions at the current level and to reduce the level by 10 percent by 2020. Labeled the Regional Greenhouse Gas Initiative, the plan creates a market-based system of pollution “allowances” and “offsets” that can be auctioned off or purchased by polluters and will encourage technological innovation and lead to lower levels of emitted pollutants. The plan is similar to the one adopted in the early 1990s to address

acid rain (DePalma 2005). On the West Coast, Oregon and Washington adopted California's tough standards on automobile tailpipe emissions (Cain 2005). Late in the year, New York, Connecticut, Rhode Island, Vermont, Maine, Massachusetts, and New Jersey also adopted the California rule, which takes effect in 2009 and requires a 30 percent reduction in carbon dioxide emitted from cars by 2016. Once again in the environmental policy arena, California, not the national government, is at the forefront, as Oregon's air-quality administrator Andrew Ginsburg observes: "For greenhouse gases, the federal government hasn't taken any action at all, and California has. It's clear the federal government won't do it unless California paves the way and enough other states opt in" (Freeman 2006). The U.S. Conference of Mayors in June 2005 adopted a resolution that national and state governments move to abide by the Kyoto treaty (Greenblatt 2005, 63).

While the federal government's attention in health policy was concentrated on untangling the administrative fiascoes caused by the poor design of the Medicare prescription drug benefit, nineteen states considered proposals to expand health-care coverage, compared with twelve states in 2003 (Appleby 2005). The Kaiser Family Foundation (2005) reported that forty-six states and the District of Columbia increased Medicaid provider payments, nineteen states plus the District of Columbia expanded Medicaid eligibility, eleven states expanded long-term care coverage, and nine states improved Medicaid benefits. Nevertheless, because of Medicaid's rapidly rising costs, forty-nine states and the District of Columbia made changes in provider payment rates, forty-seven states plus the District of Columbia imposed new controls on pharmacies, twenty-seven states and the District of Columbia took new fraud and abuse containment actions, twenty-five states and the District of Columbia adopted new disease and case management procedures, fourteen states expanded managed care arrangements, eight states made cuts in eligibility, eight states added copayments, and seven states reduced benefits. Twenty states increased children's access to health-care coverage and nine states reversed the cuts in children's health care made as part of the efforts to cope with the 2001–2003 fiscal crisis (J. Broder 2005c). Illinois, in a bold move, approved low-cost health insurance for all of the state's children to begin July 2006 (Appleby 2005). Another bold move was made by the California attorney general in August 2005 when he sued thirty-nine drug companies for defrauding the state's Medicaid system (Medi-Cal) by charging as much as ten times the price offered to other purchasers (J. Broder 2005a).

State governments also took the lead in labor issues, with seven states raising their minimum wages above the federal minimum wage of US\$5.15 per hour (Center for Policy Alternatives 2005, 2). Since 1997, when the national government last boosted the federal minimum wage, seventeen states and the District of Columbia have increased their wage, and it is likely that several more states will do so in 2006. These wage increases have not been enacted only by states with Democratic governors or legislatures; to the contrary, most of the recent rises in state minimum wages have been in states with Republican governors and/or Republican legislatures (Ehrenhalt 2005, 7). It is worth noting that about half of the U.S. workforce lives in states where the minimum wage is above the federal minimum (J. Broder 2006a). Eleven states also passed improvements in unemployment insurance coverage.

The National Association of State Public Interest Research Groups reported data-breach laws were introduced in thirty-five state legislatures during the first half of 2005, and at least fifteen states passed some form of identity theft protection (Patton 2005, 40). Six states acted to prohibit racial profiling, five states added new laws on nondiscrimination, three states approved criminal penalties for human trafficking, and three more states expanded their hate crimes law (Center for Policy Alternatives 2005, 2–6).

Of course, some state policy activity occurs as a reaction to policy emanating from the national capital. For instance, states have made strong appeals for more federal dollars to pay for administration of the new

Medicare prescription drug benefit (Wolf 2005). Another example of states going in a direction opposite to or opposing actions taken by the federal government is the estate tax. Although the federal estate tax is scheduled to disappear in 2010, legislators in twenty states worked on plans to uncouple their state's levy from the federal tax, and at least seventeen states plus the District of Columbia have started the process of creating their own estate tax (FT.com 2005).

State officials also formulate policy independent of federal policy activity, typically in response to conditions or issues unique to the state, such as California's new law restricting the activity of photographers who chase or stalk celebrities (Associated Press 2006a). Reminiscent of the mid- to late 1800s, local communities in Kansas and Nebraska offer free land to persons willing to settle in small towns (Woodward 2005). Kansas continues to be an important battleground in the "culture wars" over evolution. In November 2005 the state Board of Education voted six-four to redefine science and to mandate science curricula that recommend teaching specific doubts about evolution (Wilgoren 2005). This past year six states (Georgia, Montana, North Dakota, Rhode Island, Vermont, and Washington) established bans on indoor smoking, and at least 159 cities did as well (Koch 2005). Idaho, one of six states without a governor's mansion, decided to offer naming rights to rooms and gardens as a means of attracting private donors to help pay for the conversion of a donated home into the official gubernatorial residence (Associated Press 2005).

### **Are "Happy Days" Here Again for State Budgets?**

Over the past four years, state governments survived one of their worst fiscal periods ever. Compared with FY2002, when forty-five states reported revenue shortfalls (Krane 2002, 19–20), FY2005 revenues exceeded projections in forty-five states and were on target in the other five states (National Governors Association and National Association of State Budget Officers [NGA and NASBO] 2005, ix). Instead of a US\$50 billion deficit (FY2002), state total balances for FY2005 came in at US\$38.5 billion (p. x), and since FY2001 states have reduced aggregate red ink by US\$263.8 billion (NCSL 2005d). This reversal in fiscal fortunes is due to (1) actions state governments took to cope with the precipitous decline in revenues that began in 2001 with the collapse of the dot.com economy and the terrorist attacks of September 11 (McNichol 2004; Jenny 2004), (2) a reinvigorated national economy and the concomitant rise in tax receipts, and (3) the recent increases in federal aid to state and local governments. Collections of personal income, corporate income, and sales taxes rose in every state in FY2005 (NGA and NASBO 2005, 8), and the upward trend continued into FY2006, although at a slower pace (Jenny 2006a). The percentage change in state revenues from FY2004 to FY2005 was nominally 10.7, and when adjusted for inflation and legislated tax changes, the real percentage change was 5.2 (Jenny 2006b, 2). The FY2004 to FY2005 percentage change in sales tax revenue was 6.7, in personal income tax revenue 12.5, and in corporate income tax 31.6. Twenty-seven of the forty-one states had double-digit percentage increases in personal income tax collections, from a low of 6.3 percent in Missouri to a high of 28.9 percent in Arizona and New Jersey. Corporate income tax increases ranged from a negligible 0.4 percent in New Jersey to a whopping 55.7 percent in California (Jenny 2006b, 3). Comparatively, taxes on personal income account for 33 percent of state taxes, whereas corporate income taxes comprise only 5.2 percent; general sales taxes constitute 33 percent of state taxes and selective sales taxes equal 16 percent. It is estimated that thirty-three states will close FY2005 with surpluses of 5 percent or more, and only four states were expected to begin FY2006 with less than a 1 percent surplus (NGA and NASBO 2005, 14).

State and local coffers also grew from an infusion of more than US\$121 billion in federal aid from FY2001 to FY2004, of which US\$88 billion went to state governments (U.S. Census Bureau 2001, 2004). Between FY2000 and FY2004, federal aid went up 31 percent (adjusted for inflation) and the total amount of federal aid from FY2000 to FY2006 is equivalent to the projected FY2006 federal deficit of

US\$423 billion (Cauchon 2006a). Despite the Bush administration's inattention to federalism (Krane and Keonig 2005, 40), the president and Congress since 2001 have expanded federal aid to state and local governments at a rate twice that of the last five years of the Clinton administration (Cauchon 2006b). The largest FY2001 to FY2004 increases in federal dollars flowing to states and localities can be found in the U.S. Departments of Health and Human Services (\$62 billion), Housing and Urban Development (\$27.9 billion), and Education (\$7.42 billion) (U.S. Census Bureau 2001, 2004). The principal program sources of these funds are Medicaid, Section 8 housing assistance, and NCLB. State government reliance on federal aid rose from 26 percent (FY2000) to 31 percent (FY2004) (Cauchon 2006b). Although federal dollars to states have grown, increases in federal assistance to people do not substitute for or serve the same purposes as federal aid to state and local jurisdictions. If the Bush proposal to eliminate Community Development Block Grants is successful, cities and counties will see the federal portion of their revenues drop below the current 4 percent level. Such a result could beggar local governments and force them to pursue “tin-cup” politics (Walters 2005, 22).

These “happy days are here again” numbers do not mean that the future fiscal situation of the American states is sound. As Scott Pattison, executive director of the National Association of State Budget Officers, explains,

The general picture is that revenue is coming in better than expected for quite a few states. The problem is that the states are like the guy who had been laid off and his income went way down, and now he's got a job again. But in the meantime, he put a lot of expenses on his credit card, his kids' tuition went up and he tapped into his retirement fund. That's exactly what a lot of states did. (quoted in J. Broder 2005b)

Pattison's observation reflects the budget pressures states face even with the return of rising revenues. States attempted to cope with the 2001 fiscal crisis first by draining reserves by an aggregate of more than US\$20 billion and then by cutting annual expenditures by more than US\$64 billion, while also raising fees and user charges by more than US\$25 billion (Krane 2004, 29). Not only have state officials had to replace these funds, but they also have had to address the constantly rising costs in Medicaid, K-12 education, and corrections, which together constitute 61 percent of state general fund expenditures. These three policy areas, individually and collectively, drive state spending relentlessly upward. Medicaid accounted for 17.6 percent of total general fund appropriations in FY2005 and is growing at a double-digit pace—12.7 percent last year (Perez 2005a, 19). Making matters worse, a majority of states will experience a reduction in their Federal Medical Assistance Percentage rate for FY2006 (Perez 2005a, 21). Elementary and secondary education, in good times and bad, requires a constant stream of funding, and since the enactment of NCLB, it is estimated states now spend an additional US\$10 billion annually to comply with the federal requirements (Eckl 2005, 22). Corrections also consumes more and more funds annually, last year at a 4.9 percent rate (Perez 2005b, 19). The good news about state revenues notwithstanding, in the first quarter of FY2006 nineteen states had spending overruns: “Medicaid is over budget in twelve states; corrections in seven, and education in three” (NCSL 2005d). Furthermore, all states are coping with increased energy and utility costs as well as increasing costs for employee health care and pensions.

“States have climbed out of their budget deficits,” notes Bill Pound, NCSL executive director, “and now they're working on the service deficits” (NCSL 2005d). For example, funding for public education struggles in many states to enhance teacher salaries, cover health insurance and pensions, and upgrade equipment and facilities, and legislatures also must find funds to comply with court rulings or avoid court orders to provide an “adequate” education (Eckl 2005, 22; Farney 2004). In addition, corrections costs are increasing due to the “graying” of the inmate population, thus pushing up health expenditures at double-

digit rates in some states, and also because of the epidemic of methamphetamine production and usage, which has forced a number of states to build more prisons, offer earlier parole, adopt community-based corrections programs, or establish drug courts and mental health courts (Perez 2005b, 19–20).

These policy areas illustrate how state officials need to use the new revenue prosperity to fulfill old obligations and meet new expectations, while being mindful that state finances are fragile and can be disrupted by unforeseen events such as Hurricane Katrina, a spike in energy prices, or an economic downturn. State officials now face the constituents of programs (e.g., higher education, local governments) sacrificed during the lean years who are pressuring them to repair the damage. The upswing in state revenues in FY2005 has returned to a rate of increase similar to that in the 1990s (Jenny 2006b, 4), but state total balances have yet to return to levels common before the 2001 downturn (NGA and NASBO 2005, x). McNichol and Lav point out that “state revenues would have to grow by more than 9 percent per year between now and 2008 in order to generate enough funds simply to restore the level of services that prevailed in fiscal year 2000, before the recession” (2005, 1).

This year's positive inflow of funds has stanchd the fiscal bleeding but has done little to remedy the long-term structural problems in state finances. A structural deficit in state finances occurs when a state's “normal growth of revenues is insufficient to finance the normal growth of expenditures year after year...[and] as a result the state faces gaps between estimated revenues and expenditures” (Lav, McNichol, and Zahradnik 2005, 1). More simply, structural deficits are caused by a “persistent mismatch between growth rates in revenues and spending” (Eckl 2005, 24). The Center on Budget and Policy Priorities (CBPP) analysis of state structural budget problems lists ten risk factors that contribute to structural deficits: (1) lack of services in the sales tax base, (2) corporate income tax weakness, (3) untaxed e-commerce, (4) extensive tax preferences for the elderly, (5) limited progressivity of the personal income tax, (6) tax policy mix and choices that worsen structural gaps, (7) growth of expenditure needs for state residents, (8) process barriers such as tax and expenditure limitations, (9) failure to detach from federal policies that reduce state revenue, and (10) presence of structural gaps found by other studies (as listed by Eckl 2005, 25). The more these factors characterize a state's tax policies, the more likely it is that the state experiences (or will experience) a structural deficit. The CBPP's analysis finds 11 states exhibit nine to ten of these factors, and only 11 states exhibit five or fewer of these ten factors. State governments typically address a shortfall in revenues by ad hoc solutions such as a temporary increase in the sales tax rate. However, several trends in the economy, in state and federal policies, and in the larger society make piecemeal measures increasingly ineffective. The current boom in state revenues may yield sufficient funds to recoup previous levels of services, but the long-term mismatch between revenues and necessary expenditures can be resolved only by modernization of a state's tax regime. Failure to align revenues with expenditures will leave state budgets with gaps such as those projected for FY2007 in Kentucky (12.5 percent), New York (13 percent), and New Hampshire (8 percent) (Lav, McNichol, and Zahradnik 2005, 5–6). It should be noted that Congress has used “unfunded mandates and other cost shifts” to export the national government's burgeoning deficit to the states (NCSL 2005c) and that this transfer of the federal structural deficit to the states only compounds state efforts to reduce their own structural gaps. Instead of “happy days,” lack of action to modernize state tax codes will leave states in the permanent fiscal crisis described by Osborne and Hutchison (2004).

### **Federalism in Court**

Although the U.S. Supreme Court's Congress-curbing decisions over the past decade frequently placed the Court at the center of the federalism dialogue, the justices did not invalidate any congressional statutes on federalism grounds in 2005. In fact, in one key case, the Court even cast doubt on the significance of several recent pro-state commerce-clause rulings. As for cases concerning the legitimacy of state statutes,

the Court in 2005 passed judgment on the power of states to regulate a number of controversial issues; however, as has generally been their habit in previous years, justices invariably decided these cases on the merits of the particular policy questions rather than on federalism grounds. One way in which federalism played a quite prominent role in 2005 was through the Supreme Court confirmation process. The passing of Chief Justice Rehnquist and retirement of Justice O'Connor created the first Court vacancies since 1994, and the confirmation hearings for John Roberts and Samuel Alito featured extensive questioning about the nominees' views on federalism and prompted widespread discussion about the future of the Court's Congress-curbing rulings.

### *Federal Power*

Beginning in 1992 and continuing for the next decade, the U.S. Supreme Court routinely handed down constitutional decisions curbing expansions of federal power, whether by invoking the commerce clause, as in *U.S. v. Lopez* (514 U.S. 549 [1995]) and *U.S. v. Morrison* (529 U.S. 598 [2000]); the Tenth Amendment, as in *New York v. U.S.* (505 U.S. 144 [1992]) and *Printz v. U.S.* (521 U.S. 898 [1997]); the Eleventh Amendment, as in *Seminole Tribe v. Florida* (517 U.S. 44 [1996]), *Florida Prepaid v. College Savings Bank* (527 U.S. 628 [1999]), *College Savings Bank v. Florida Prepaid* (527 U.S. 666 [1999]), *Alden v. Maine* (527 U.S. 706 [1999]), *Kimel v. Florida* (528 U.S. 62 [2000]), *Alabama v. Garrett* (531 U.S. 356 [2001]), and *FMC v. South Carolina State Ports Authority* (535 U.S. 743 [2002]); or the enforcement clause of the Fourteenth Amendment, as in *Boerne v. Flores* (521 U.S. 507 [1997]), *Kimel*, and *Garrett*. However, in 2003 and 2004 the Court appeared to pull back from several of these earlier decisions (particularly regarding the Eleventh Amendment) when it determined that Congress had properly abrogated state sovereign immunity in *Nevada v. Hibbs* (538 U.S. 721 [2003]) involving the Family and Medical Leave Act (FMLA), and in *Tennessee v. Lane* (541 U.S. 509 [2004]) applying Title II of the Americans with Disabilities Act (ADA) to a disabled litigant seeking access to a county courthouse. The Court's 2005 decisions can be seen as a continuation of these past two years' decisions, in that the Court did not overturn a single congressional statute on federalism grounds and in fact issued commerce clause and Eleventh Amendment rulings that were quite unsympathetic to states.

In the year's key commerce-clause case, *Gonzales v. Raich* (125 S. Ct. 2195 [2005]) the Court sustained congressional power under the federal Controlled Substances Act (CSA) to prohibit the local cultivation and personal use of marijuana by individuals acting pursuant to California's Compassionate Use Act (one of nine state medical-marijuana laws enacted in recent years through the initiative process). The six-three ruling was noteworthy in several respects. First, in determining that the local cultivation of marijuana for personal use had a substantial effect on interstate commerce, Justice John Paul Stevens's majority opinion relied heavily on *Wickard v. Filburn* (317 U.S. 111 [1942]), which upheld the application of the Agricultural Adjustment Act to prohibit a farmer from growing wheat intended solely for personal consumption and is perhaps the most expansive interpretation of the commerce clause ever issued. The Court's reliance on this New Deal-era precedent, in the face of more recent and narrower interpretations of the commerce clause in *Lopez* and *Morrison*, demonstrates that for all of the attention paid in years to several of these recent federalism rulings, a number of quite expansive precedents from the 1937–1995 era remain undisturbed. Second, it is significant that the six justices in the *Raich* majority included not only the traditional four federalism dissenters—Stevens, David Souter, Ruth Bader Ginsburg, and Stephen Breyer—but also Anthony Kennedy and Antonin Scalia, leaving only Rehnquist, O'Connor, and Thomas in dissent. Moreover, Scalia, who had been a reliable supporter of the Court's previous Congress-curbing decisions, wrote a concurrence seeking to reshape the Court's approach to commerce-clause cases by asking not whether an intrastate activity has a “substantial effect” on interstate commerce but whether regulation of the activity may be “necessary and proper” for the regulation of interstate commerce.

Meanwhile, in the term's most heavily contested Eleventh Amendment case, *Central Virginia Community College v. Katz* (126 S. Ct. 990 [2006]), the Court considered whether the bankruptcy clause in Article I of the Constitution could abrogate state sovereign immunity. By a bare majority comprising Stevens, Souter, Ginsburg, and Breyer, along with O'Connor, the Court held that delegates to the federal constitutional convention had intended the bankruptcy clause to preclude states from asserting a sovereign immunity defense in federal bankruptcy proceedings; moreover, this conclusion was deemed by the majority to be particularly appropriate because bankruptcy cases were *in rem* proceedings and therefore did not intrude on state sovereignty. Thus, after a series of state sovereign immunity rulings during 1996–2002 that saw quite different outcomes (and generated a wide range of responses from state legislatures, as Matthew Bosworth shows in his article in this issue), the Court in the past three years has ruled against the states in three heavily contested cases, with *Katz* taking its place alongside *Hibbs* and *Lane*.

The Court largely sidestepped two other potentially controversial constitutional questions, one involving the Religious Land Use and Institutionalized Persons Act (RLUIPA) and another involving the application of Title II of the ADA to prisoners. In *Cutter v. Wilkinson* (125 S. Ct. 2113 [2005]) the Court unanimously upheld Section 3 of RLUIPA, a law that had been enacted in response to the 1997 *Boerne* ruling (which had struck down on federalism grounds the more sweeping Religious Freedom Restoration Act). Although there had been some discussion by litigants in lower federal courts as to whether RLUIPA was itself susceptible to a federalism challenge based on the spending or commerce clauses, the Court in *Cutter* declined to consider these federalism issues; rather, the justices were content with declaring that Section 3 of RLUIPA (dealing with the free-exercise rights of institutionalized persons) does not improperly advance religion and is therefore consistent with the establishment clause.

In *U.S. v. Georgia* (126 S. Ct. 877 [2006]), the Court ruled, again unanimously, that the Eleventh Amendment principle of state sovereign immunity did not prevent a prisoner from filing a federal lawsuit claiming a violation of Title II of the ADA. The justices set aside the question of whether Congress could abrogate state sovereign immunity based on the Section 5 enforcement power of the Fourteenth Amendment. As Scalia explained in his opinion for the court, it was not necessary to reach that controversial issue, because this litigant's claims were based in part on conduct that “independently violated the provisions of Section 1 of the Fourteenth Amendment” (p. 881), rooted as they were in claims of a violation the Eighth Amendment prohibition against cruel and unusual punishment, and there was no doubt about congressional power to abrogate state sovereign immunity in these cases.

Although the Supreme Court's constitutional federalism decisions generally attract the most scholarly attention, statutory-interpretation cases also have important implications for federalism, and this was particularly true in 2005. In *Schaffer v. Weast* (126 S. Ct. 528 [2005]) the Court was called upon to interpret a provision in the Individuals with Disabilities Education Act directing states to provide all disabled children with “a free appropriate public education” and requiring school districts to create for each disabled child an “individualized education program,” and then further providing that dissatisfied parents could request an “impartial due process hearing” to challenge the appropriateness of their child's education program. The question posed in this case, and resolved in favor of the school district by a six-two vote, concerned “which party bears the burden of persuasion at such a hearing,” and as O'Connor concluded in her opinion for the court, “the burden lies, as it typically does, on the party seeking relief” (p. 531).

Then, in *Gonzales v. Oregon* (126 S. Ct. 904 [2006]), the Court had to interpret the federal CSA and decide whether the U.S. Attorney General could issue an Interpretive Rule that the use of lethal drugs pursuant to Oregon's physician-assisted suicide law was not a “legitimate medical purpose” and was therefore prohibited under federal law. Oregon voters had legalized physician-assisted suicide through a



1994 initiative and then reaffirmed their support in a 1997 referendum, at which time the law took effect. The question before the Court in the instant case was whether to view Attorney General John Ashcroft's 2001 Interpretive Rule, which would have essentially nullified the Oregon law, as a reasonable interpretation of the CSA. By a six-three vote, with Kennedy and O'Connor joining Stevens, Souter, Ginsburg, and Breyer in the majority, and with Roberts, Scalia, and Thomas in dissent, the Court ruled that Ashcroft's Interpretive Rule was not a legitimate interpretation of the CSA, thereby permitting the continued operation of Oregon's Death With Dignity Act.

### *State Power*

The Supreme Court in 2005 considered the legitimacy of several important state laws, and with clear implications for federalism in each case. However, as has generally been the practice throughout U.S. history, the justices' decisions in these cases were guided primarily by their views on the particular policy issues at stake rather than by an assessment of the consequences of the rulings for the federal system.

Many of these challenges to state laws involved constitutional claims. Thus, in a five-four ruling in *Roper v. Simmons* (543 U.S. 551 [2005]), with Kennedy joining Stevens, Souter, Ginsburg, and Breyer in the majority, the Court interpreted the Eighth Amendment, as applied to the states by the due process clause of the Fourteenth Amendment, as prohibiting states from executing minors. In issuing this decision, the Court thereby overturned *Stanford v. Kentucky* (429 U.S. 361 [1989]), which had established sixteen as the minimum permissible age for executions. In the view of the *Roper* majority, the fact that a handful of states had in the intervening years raised their minimum age to eighteen constituted evidence of an emerging "national consensus," and therefore all thirty-eight death-penalty states (eighteen of which by this time already had an eighteen-year minimum age, and twenty of which set a minimum age of sixteen or seventeen) were now required to adopt this particular requirement.

Meanwhile, in *Van Orden v. Perry* (125 S. Ct. 2854 [2005]) and *McCreary County v. ACLU of Kentucky* (125 S. Ct. 2722 [2005]), the Court grappled with whether public displays of the Ten Commandments violated the First Amendment's Establishment Clause, and the justices issued a split decision, with Justice Breyer the only justice standing with the majority in both five-four rulings. In *Van Orden*, Breyer joined Rehnquist, Scalia, Kennedy, and Thomas in allowing a forty-year-old Ten Commandments monument to remain on the grounds of the Texas State Capitol, because in the particular circumstances and setting, the monument was seen as conveying a predominantly secular message. However, in *McCreary*, Breyer joined Stevens, Souter, Ginsburg, and O'Connor in concluding that the posting of the Ten Commandments in two Kentucky county courthouses was not motivated by a legitimating secular purpose and therefore could not be sustained.

The Court also heard several cases claiming state or local government violations of the Fifth Amendment's Takings Clause, including *Kelo v. City of New London* (125 S. Ct. 2655 [2005]), which attracted as much attention as any other ruling issued this year. The question in *Kelo* was whether eminent domain can be invoked to condemn private property for the purpose of economic development, or whether this would violate the "public use" requirement of the Fifth Amendment. By a five-four vote, with Kennedy joining Stevens, Souter, Ginsburg, and Breyer in the majority, the Court held that "there is no basis for exempting economic development from our traditionally broad understanding of public purpose," thereby sustaining the city's invocation of the eminent domain power (pp. 2665–2666). However, as is the case with most judicial decisions, the Court's *Kelo* ruling is far from the last word on the subject, as state legislators responded to widespread public criticism of the decision by proposing—and in some cases enacting—statutory and constitutional measures to limit these sorts of eminent domain proceedings. Alabama, Delaware, Ohio, and Texas enacted statutes that in various ways restrict the use of

eminent domain for economic development purposes (NCSL 2005e). The Michigan Legislature became the first in the post-*Kelo* era to submit such a constitutional amendment to the voters (Price 2005). Meanwhile, the U.S. House of Representatives responded to public dissatisfaction with the ruling on November 3, 2005, by voting 376-38 in favor of a bill (which has not been taken up by the Senate) that would withhold federal economic development funds from any state where private property is condemned for economic development (Richey 2005).

Other notable rulings involving constitutional challenges to state statutes were *Clingman v. Beaver* (125 S. Ct. 2029 [2005]) and *Ayotte v. Planned Parenthood of Northern New England* (126 S. Ct. 961 [2006]). In *Clingman*, a six-justice majority that included Breyer, along with Rehnquist, O'Connor, Scalia, Kennedy, and Thomas, rejected a First Amendment freedom-of-association challenge to Oklahoma's semiclosed primary law, which permits participation in party primaries only by members of the particular party and by registered independents. In *Ayotte*, the Court considered the constitutionality of a New Hampshire abortion law that required parental notification but declined to make an exception for medical emergencies where the health of a minor was at risk. Although court-watchers anticipated a significant ruling in the case—the first abortion case to come before the Court since the invalidation of Nebraska's partial-birth abortion law in *Stenberg v. Carhart* (530 U.S. 914 [2000]) and the first such case under Chief Justice Roberts—the Court ended up issuing a narrow ruling remanding the case to the Court of Appeals with directions to consider alternatives to the wholesale invalidation of the act. As O'Connor explained, although the absence of a medical-emergency exception would render the law unconstitutional in a limited set of cases, “invalidating the statute entirely is not always necessary or justified, for lower courts may be able to render narrower declaratory and injunctive relief” (*Ayotte*, 964).

The Court also had on its 2005 docket the usual assortment of challenges to state laws based on the dormant commerce clause (used to invalidate laws that burden interstate commerce or discriminate against out-of-state actors) and based on the preemption doctrine. Several of these decisions are worthy of mention. *Granholm v. Heald* (125 S. Ct. 1885 [2005]) posed the question of whether states (in this case, New York and Michigan) could permit the direct shipment of wine to consumers from in-state wineries but not from out-of-state wineries. By a five-four ruling that confounded the usual voting patterns—Kennedy and Scalia joined Souter, Ginsburg, and Breyer in the majority, whereas Rehnquist, O'Connor, and Thomas joined Stevens in dissent—the Court overturned these state laws, finding them to be in violation of the dormant commerce clause and holding that they could not be saved by Section 2 of the Twenty-First Amendment. Meanwhile, in *ATA v. Michigan* (125 S. Ct. 2419 [2005]) and *Mid-Con Freight Systems v. Michigan* (125 S. Ct. 2427 [2005]), the Court assessed the legitimacy of a pair of annual US\$100 fees that Michigan imposes on trucking, one for trucks engaged in intrastate hauling and another for trucks operating entirely in interstate commerce. Both fees were upheld. In the *ATA* case, the Court ruled unanimously that the fee on intrastate commercial hauling did not violate the dormant commerce clause, with Scalia and Thomas both writing concurrences expressing their long-standing opposition to the Court's current approach to dormant commerce-clause cases. In fact, Thomas restated his position that the dormant commerce clause “has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application,” and “consequently, cannot serve as a basis for striking down a state statute” (p. 2426). In the *Mid-Con Freight Systems* case, the Court ruled six-three, with Kennedy, Rehnquist, and O'Connor in dissent, that the fee on trucks operating entirely in interstate commerce was not preempted by the federal Single State Registration System.

### *Supreme Court Nominations*

Justice O'Connor's July 1, 2005, announcement of her retirement and Chief Justice Rehnquist's death on September 3, 2005, created two openings on the Court and prompted significant debate about the

consequences for the Court's federalism jurisprudence. During his thirty-three years on the bench, Rehnquist was among the strongest supporters of limiting federal power and respecting state autonomy, dating back to his lone dissent in *Fry v. U.S.* (421 U.S. 542 [1975]) and his opinion for a bare majority in *National League of Cities v. Usery* (426 U.S. 833 [1976]). O'Connor was also a strong defender of state sovereignty during her near-quarter century on the bench and wrote eloquently and forcefully about the virtues of decentralization in a number of opinions. Given that nearly all important federalism decisions over the past decade were decided by five-four votes, it is possible that the departures of Rehnquist and O'Connor could change the Court's general approach to federalism cases, and, as Christina Rivers argues in her article in this issue, with important implications for state governments in particular areas such as Voting Rights Act cases.

It was no surprise, then, that President Bush's nomination of John Roberts (who was originally slated to fill O'Connor's position but was then nominated for the Chief Justice post after Rehnquist's death) and later Samuel Alito (who ended up replacing O'Connor) prompted intense scrutiny of the nominees' records on federalism cases. In fact, so prominent was the issue of federalism in the senate judiciary committee's confirmation hearings that it inspired as many questions as any other issue save the perennially controversial topic of abortion and the recently important topic of executive power. Democratic and Republican senators repeatedly pressed Roberts and Alito for their views on the Court's recent federalism decisions and sought assurances that the nominees would not second-guess Congress's determination of whether statutes were an appropriate exercise of federal power. Given that Supreme Court confirmation battles come as close as possible in the modern era to resembling a public seminar on the Court's recent decisions, the Roberts and Alito hearings elevated the federalism issue in the public dialogue to an extent rarely seen with the announcement of particular Court decisions.

At Roberts's hearing, senators took particular note of his dissent from the DC Circuit Court's denial of an *en banc* rehearing in *Rancho Viejo v. Norton* (334 F.3d 1158 [D.C. Cir. 2003]), involving the application of the Endangered Species Act to the arroyo toad. Of particular interest was Roberts's complaint that the three-judge panel had mistakenly asked “whether the challenged *regulation* substantially affects interstate commerce, rather than whether the *activity* being regulated does so,” which had in turn led to the curious conclusion that “regulating the taking of a hapless toad that, for reasons of its own, lives its entire life in California constitutes regulating ‘Commerce ... among the several states’” (p. 1160). Taking note of the Court's recent commerce-clause rulings in *Lopez* and *Morrison*, Roberts urged an *en banc* review in part because it would “afford the opportunity to consider alternative grounds for sustaining application of the Act that may be more consistent with Supreme Court precedent” (p. 1160).

Pressed by senators to explain his reasoning in the “hapless toad” case and to give his opinion of the Court's recent commerce-clause and Eleventh Amendment rulings, Roberts repeatedly declined to take a stand on the propriety of the Court's recent federalism decisions, on the ground that they could come before him as Chief Justice. He did take frequent opportunities, though, to declare that these Congress-curbing rulings during 1995–2002 had to be understood in the context of the Court's more recent deferential rulings during 2003–2004. For instance, in response to a question from Senator John Cornyn (R-TX) about the reach of the commerce clause, Roberts argued that “a proper consideration of *Lopez* and *Morrison* has to take into account the more recent Supreme Court decision in *Raich*, where the court made the point that, yes, we have these decisions in *Lopez* and *Morrison*, but they are part of a 218-year history of decisions applying the commerce clause and they need to be taken into account in the broad scope” (U.S. Congress. Senate 2005). And in response to questions from Senator Mike DeWine (R-OH) about the 2001 *Garrett* case, where the Court had second-guessed Congress's findings, Roberts noted that “there are, of course, the more recent cases that you know of, the *Tennessee* against *Lane* and the *Hibbs*

case, *Nevada* against *Hibbs*, where the court did defer to the fact-finding in those cases” (U.S. Congress. Senate 2005).

With fifteen years of service on the Third Circuit Court, in comparison with Roberts's two years on the DC Circuit Court, Alito had a longer paper trail on federalism issues, as well as many other issues, and this made for a more contentious hearing. Two of Alito's federalism opinions attracted significant attention. First, in *U.S. v. Rybar* (103 F.3d 273 [3rd Cir. 1996]), in a case concerning congressional power to prohibit the transfer or possession of a machine gun, Alito dissented from a Third Circuit panel opinion upholding this law as a legitimate exercise of Congress's commerce power. As Alito wrote in his dissent, the federal machine-gun law “is the closest extant relative of the statute struck down in *Lopez*,” and therefore if *Lopez* was to have any meaning, this provision deserved to be invalidated (p. 287). Second, in *Chittister v. Department of Community and Economic Development* (226 F.3d 223 [3rd Cir. 2000]), Alito wrote a unanimous panel opinion holding that state immunity was not abrogated by a provision of the Family and Medical Leave Act requiring that leave be granted for an employee's illness (a different provision than was later at issue in the *Hibbs* case). Applying Supreme Court precedents such as *Kimel*, Alito concluded that Congress had not made adequate findings concerning “the prevalence, in public employment of personal sick leave practices that amounted to intentional gender discrimination in violation of the Equal Protection Clause” (pp. 228–229). Moreover, by “creat[ing] a substantive entitlement to sick leave,” this provision of the FMLA was not “congruent or proportional to any identified constitutional harm” (p. 229).

When Alito was pressed to explain his opinions in these federalism cases, as he frequently was during the hearings, he emphasized that members of Congress could in many cases easily avoid seeing future statutes invalidated if they were to build an adequate legislative record or merely include a jurisdictional element in the legislation. He explained in response to a query from Senator Cornyn regarding the federal machine-gun law that “if Congress had made findings [regarding the effect of the activity on interstate commerce], it would have been a very different case for me” (U.S. Congress. Senate 2006). And in answer to a question from Senator Dianne Feinstein (D-CA) about the same ruling, he made clear that “if there had been a jurisdictional element [permitting prosecution only in cases where the machine gun had moved in interstate commerce], then I think it's perfectly clear, under the precedents, that it would have been constitutional” (U.S. Congress. Senate 2006).

Alito and Roberts were both confirmed, although due to Alito's longer paper trail and his replacement of a more moderate conservative his vote margin was narrower. Roberts was approved by the Senate Judiciary Committee on a thirteen-five vote and confirmed by the full senate by a 78–22 vote on September 29, 2005, making him the seventeenth Chief Justice of the United States. Alito was approved in committee by a ten-eight party-line vote and then, after cloture was invoked by a 72–25 vote, confirmed on January 31, 2006, by a 58–42 vote, with the support of four Democrats and all but one of the fifty-five Republicans.

## **Conclusions**

To note that federalism resurfaced on several occasions in the political debate in 2005, whether on account of Hurricane Katrina, state challenges to NCLB, or the Roberts and Alito confirmation hearings, is not to conclude that the president or Congress was any more receptive to state and local government concerns during the year. The passage of the REAL ID Act, stringent new federal requirements in the TANF reauthorization, and congressional intervention in the Terri Schiavo case are only the latest reminders that a Republican president and Republican-controlled Congress are quite willing to give short shrift to state interests when they come into conflict with conservative policy goals.

In fact, in many ways, the year 2005 was characterized by a continuation of recent trends in the behavior of and interaction among federal and state governments. Thus, the Bush administration and the Republican congressional majority continued to adhere to a doctrine of decentralization that honors privatization more than intergovernmental devolution, as seen most clearly in their emphasis on faith-based organizations and their policy initiatives concerning Social Security and the Medicare prescription drug program. Meanwhile, continuing complaints were heard from state officials about increasing federal budget deficits and corresponding calls for reductions in domestic spending, especially in programs such as Medicaid, where such reductions invariably put a crimp in state budgets, and at a time when states are seeking to act as policy innovators in health care and other areas that federal officials are unable or unwilling to address. Finally, the U.S. Supreme Court continued its recent (2003–2004) trend of retreating in several ways from its Congress-curbing rulings of the 1990s, as seen especially in commerce-clause and Eleventh Amendment rulings that were quite deferential to federal power and unsympathetic to state claims. In these and other respects, then, although federalism issues might have assumed more prominence in 2005 on account of unexpected developments and concerted efforts of state and local lobbying organizations, long-term trends in favor of centralization showed no sign of slackening, whether in 2005 or beyond.

Whether the preference of the Republican majority in Washington, DC, for national government dominance in domestic policy represents the abandonment of traditional party principles on federalism remains to be seen (Peterson 2003, 25–41), but it is fairly evident the Bush administration has shown little interest in an effort to rationalize, or “sort out,” functional and programmatic responsibilities among the levels of American government. Instead, as Nathan, Gais, and Fossett point out, “Where it really counts, the Bush II administration has paid very little attention to the niceties of federalism and the role of governors and state governors” (2003, 13). This about-face on federalism by the Republican majority is not their only reversal of party principles; equally striking and significant is the adoption of expansive and expensive public policies. The use of earmarks and tax expenditures as policy tools of choice makes it possible for the Republican majority to reward members of its intergovernmental political network as well as to expand it (Krane and Koenig 2005, 10–11, 39–40; Hacker and Pierson 2006, 6–7). National policy choices that direct monies for political purposes are nothing new, but their more centralized political coalition enhances the ability of the Republican majority in Washington to (re)structure party advantages across governmental tiers. The Texas redistricting affair (Krane and Koenig 2005, 10) is merely one example of how the nationalization of party and pressure group allies results in a higher level of integrated party activity than has been seen previously in the United States. Federal studies have long noted the connection between the character of political parties (e.g., noncentralized versus centralized) and “the proper functioning of federal government” (Elazar 1987, 340). If the centralizing trends in political parties and in national policy continue, then the future may well hold more than the national government’s “meddling” in tasks historically performed by state and local governments (Nivola 2005); the future of American federalism may be characterized by the end of any sense of partnership between national and subnational governments.

This type of reading of recent trends in American federalism may be too pessimistic because it ignores the cyclical and dynamic nature of American federalism. More than one student of the subject has developed a delineation of historical periods in American federalism that describes shifts between centralizing and decentralizing trends. The institutional “honeycomb” of American federalism 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. Richard Nathan and Martha Derthick 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 on the state level” (1987;

quoted in Nathan 2005). Thus, while national action has become more centralist, state governments have not been passive. Instead, state governments, despite their recent fiscal stress, have engaged in significant and substantial policy initiatives, often in advance of action by Washington. Carl Friedrich called attention to the dynamics of federalism and urged scholars to view federal systems from a longitudinal perspective so that any one design or pattern of activity would be understood as part of a “continually evolving political reality” (1965, 1). The structures, finances, and policies of a federal system are not permanently fixed; rather federal arrangements are “elastic,” and citizens and officials can take advantage of this flexibility as they strive to achieve their policy goals (Krane 1987). They may even go so far as to alter (over time) various institutional patterns of their federal system (Krane 1998). Some observers may have a favorable view of the national government's current policy directions, whereas others may decry it. But Richard Nathan offers a more balanced judgment of the current trends in American federalism when he declares that in the longer run, “there will always be a New Federalism” (2005, 1).

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