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**Opportunistic Federalism is Failing:
A Case for Change in Ouroborosian Policy Making**

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A Case for Change in Ouroborosian Policy Making**

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ABSTRACT

The current federalism paradigm has been on a path to failure since its inception. The various methods of federalism from the past have attempted to effectively fuse both federal and state power based on the most pervasive interpretation of the Tenth Amendment. While some eras have experienced a rise in national power and others experienced rising state power, no era of federalism has seen such pervasive and individualized pursuits of policy control than the current opportunistic era, where both national and state policy power are given equal, and thus divisive and corrosive, implementation. This disruptive form of intergovernmental relations gained steam during George W. Bush's presidency and has continued into the Obama administration. Change is necessary if federalism is to move forward in a positive direction. Effective policy prescription needs cooperation, coordination, efficient flows of information, and stakeholder/public input. Since the opportunistic method does not provide these quality control elements a form of controlled devolution is necessary. This would involve more state-led initiatives, less federal mandates and preemptions, plus a national intergovernmental board to oversee federalism affairs (much like the now defunct U.S. Advisory Commission on Intergovernmental Relations).

Keywords: federalism, opportunistic, intergovernmental, policy

TABLE OF CONTENTS

| | |
|---|----|
| Introduction | 1 |
| Research Question/Hypothesis | |
| Summary of Arguments | |
| Historic Background | 7 |
| Issues with the Opportunistic System | 32 |
| Alternatives to the Current System | 43 |
| Recommendations | 53 |
| Conclusion | 64 |
| Tables | 67 |
| Bibliography | 70 |

Introduction

“Each state, in ratifying the Constitution, is considered as a sovereign body, independent of all others, and only to be bound by its own voluntary act. In this relation, then, the new Constitution will, if established, be a FEDERAL, and not a NATIONAL constitution (Madison, 1788 No. 39).”

The above quote, from one of the many *Federalist Papers* writings, describes the reasoning behind the incorporation of a federal governmental system into the Constitution. The founding fathers, fearing tyrannical rule from a strong and centralized government, made sure that the new country they were creating would be able to stop power from becoming encapsulated in one central arm of their new governmental body. Instead, they felt that individual states/localities/regions should be able to defend their citizens from centralized rule by specifically giving the national and state governments separate powers that could not be circumvented. The Constitutional framers were afraid of a political redistribution of wealth, sometimes referred to as the *tyranny of the majority*, so the barriers of federalism were put into place to act as a check on the will of the majority. The current model of federalism has been systematically destroying the foundational relationships between the levels of government. Opportunistic federalism has run its course, causing confusion and chaos from local to federal levels. It is time for a new system to be put into place to fix the damage done to intergovernmental relations since the end of Clinton's presidency. Alternative models are analyzed in an attempt to institute a new intergovernmental system that allows for better agency communication and control of policy implementation. The focus is on more state-led initiatives/autonomy and less federal preemption and mandates.

The concept of federalism, broadly defined as the division of power between national and regional governments, has been woven in and out of the American political system since the

founding fathers first argued over the best way to govern. Unlike unitary and confederal systems of government, a federal system divides and occasionally shares power between the various levels of government. This divide facilitates certain benefits that the other two systems cannot produce: a cooperative separation of powers, government is kept closer to the people (where the US government supposedly derives its power), it accommodates local and state/regional differences through a mutual compatibility of shared values, it permits experimentation and teamwork, it can work to preserve national unity and it can provide the states economic benefits from a larger market; and all of these help to achieve national goals because the national government can protect its states from external pressures.

Federalism, like any governmental framework, does have its disadvantages. The lack of a strong, centralized authority moving policy in one uninterrupted direction can make things more complex for business. Obviously a federal system can breed conflict over, and for, the distribution of power; something that has been happening since the US government formed. The divided government, separation of powers and local autonomy in the policy making process have the chance to promote duplication which could reduce efficiency and accountability, two things necessary for successful policy implementation. Coordination, cooperation and control, three vital aspects of a federal system, can become quite difficult with power disbursed so diversely through so many states/regions and across a land mass as large as the US. Last, but certainly not least, the autonomy given to states and localities can, and *has*, produced inequalities to such a large extent that the national government must step in to fix them.

For the past couple centuries, federalism has been incorporated differently by every successive president/administration in some form or another. Beginning with dual federalism after the Bank Controversy of 1819, and its contrasting theories of middle ground and layer cake

federalism, through cooperative and new federalism, the entire idea of constitutional versus political power has been interpreted differently. It wasn't until the past few decades that a new concept of federalism, opportunistic, began to emerge. Specifically, the idea reared its ugly head during George W. Bush's first term of office in 2000. Federalism began to exhibit signs of distress: a lack of consistency in policy direction, little cooperation between governmental levels, and a paucity of cohesion.

Federal, state, and local governments, who at one time were working together through various means, began to start working against each other and for themselves. Conlan gives the best definition of opportunistic federalism: a system that allows and encourages actors to pursue their immediate interests with little regard for the institutional or collective consequences (Conlan 2006, 667). Bush federalism was the beginning of the end for modern, working intergovernmental relations. His administration formed policies that discouraged cooperation between the layers of government throughout the United States. At the same time, it implemented policies that would try to strengthen states' rights *and* enhance the powers of the national government. This is an extremely difficult, if not impossible task. Again, the previous Clinton administration began this practice, but not at the levels that the Bush administration proliferated. This opportunistic approach created a monster out of public policy, one that can best be described as Plato's Ouroboros (see Figure 1).

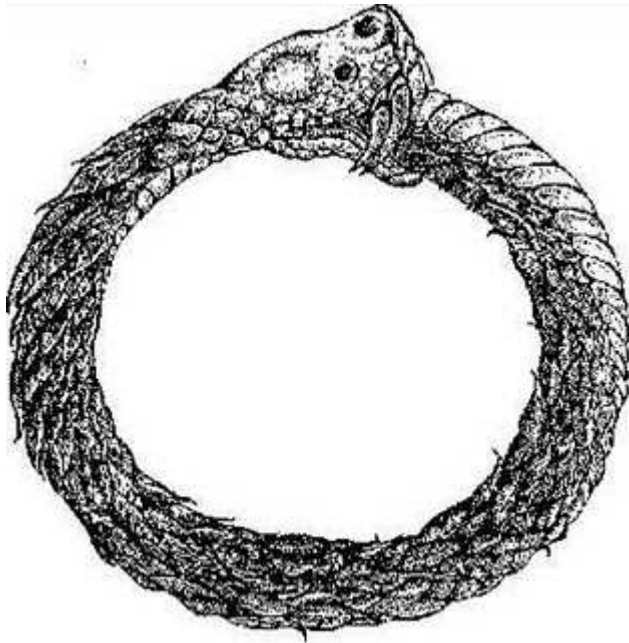


Figure 1: Plato's Ouroboros

This ouroborosian policy is continually attempting to eat itself like the previous illustration demonstrates. Policies that try to strengthen both the state and federal governments at the same time eventually fail. Once the snake eating itself gets to the end there is no place else to go. Essentially, the government is creating a power struggle between the areas of control given to the national and state governments. This power struggle comes at the confusing cost of trying to decipher what level of government is really in control.

Allowing states to take more control over their more immediate spheres of influence by legalizing medical and recreational marijuana usage, sodomy laws, welfare policy, and discretionary use of grant money may seem like an intergovernmental policy that would work. These policies are currently in place. Unfortunately these allotments of state power come at a cost of vastly increased scope of national government's power through policies like No Child Left Behind, the PATRIOT Act, the creation of the Department of Homeland Security, the Medicare Prescription Drug, Improvement, and Modernization Act (an unfunded mandate) and the federal income tax cuts given to the wealthy. These policies can create *spillover*, a term that

comes from the correspondence principle which states, “If you use it, you determine it.” When done incorrectly, pieces of policy, like some from the aforementioned NCLB, can spill over from one level to another which drastically affects the coordination between the levels of government, and coordination is key for proper policy implementation.

Up until opportunistic federalism emerged, most political administrations used federalism in certain, specific ways. Most often one arm of the government would be strengthened while another was weakened. In other words federalism was normally used to facilitate the power struggle between the federal government and state government. Many presidents would decide which way they wanted their specific administration to focus on federalism, or which arm of the government they wanted to strengthen. Normally the president would then follow that direction for the rest of his term of office even if policies were unpopular, because they do like consistency in the executive branch. The opportunistic approach does not bring about consistency. Instead it breeds confusion, contempt, and selfishness (in an administrative capacity).

Opportunistic federalism goes against all other forms of federalism in such a haphazard way that, as George W. Bush’s administration and now the Obama administration have shown, it is harmful and confusing. Past forms of federalism have held institutional and collective consequences in high regard. This only makes sense. If an administration wants to enact a policy that is supposed to strengthen the federal government, then that policy better benefit, not harm, the federal institution. Opportunistic federalism throws this concept out and pursues the immediate interests of whoever is using it as their framework for policy changes. Instead of focusing on shared goals within the government, individual, political and jurisdictional interests are put above all others. The importance of one branch is put above all others, even though this same branch might be deemed unimportant within the very next policy! Consistency is nowhere

to be found. It is this practice that led to too much of the Bush administration's muddled policy initiatives and the ongoing power grab during the Obama administration.

What the United States needs is a new form of controlled devolution where state-led innovations in the public policy arena are coordinated and controlled financially by a federal intergovernmental board like the Advisory Commission on Intergovernmental Relations used to. This form of federalism could alleviate many of the problems the opportunistic model has caused. An analysis of the previous federalism paradigms will show how federalism has evolved, and recently begun to devolve. Such analysis will help create a unified structure to build a new form of federalism based on using various aspects of previous forms and new models focused on cooperation. Adlai Stevenson said, "In a democracy, people usually get the kind of government they deserve." The American people deserve better than what the opportunistic model provides.

Historic Background

Before the ratification of the Constitution there really wasn't a true form of federalism. The mess that the Articles of Confederation made showed the founders and framers that some sort of organization was going to be necessary to properly govern this new country. The “uneasy federalism” that existed from the time of ratification until 1819 came directly from the overriding fear of tyranny, a monarchy, and strong executive power, which were the largest reasons the revolution had been fought. This era of federalism focused on the undefined areas of control created by the Articles of Confederation and the power struggle spurred by the fear of a new tyrant.

Ratification gave birth to federalism through the various clauses and amendments written into the Constitution: expressly delegated powers (those specifically written), implied powers (suggested, but not written), reserved powers (based on an interpretation of the 10th Amendment) and the national supremacy clause (found in Article 6 and states that federal law overrides state law). The time period between ratification, a process that lasted from September 1787 until May 1790, and the *McCulloch v Maryland* Supreme Court decision in 1819 can be seen as 30 years of the newly formed government coming to grasps with its new powers and trying to enact some working form of cooperation between the states and the federal government. The Marshall Court's decision in that court case changed the nature of the relationship among the three branches of government. Finally, the judicial branch was attempting to take power away from its rivals in the other two branches.

The essence of the *McCulloch v Maryland* case was a state attempting to tax a national bank, thereby taxing the federal government. In the state's view, there was nothing prohibiting that form of taxation in the Constitution. The Supreme Court did not agree and in its decision

established the first real form of federalism in the U.S. It was a monumental decision that laid the groundwork for future governmental interaction (Lee, Johnson and Joyce 2013). The Court's use of the necessary and proper clause and assertion of implied powers strengthened the power of the national government over that of the states. This supreme federalism lasted for about 20 years until it was overtaken in about 1837 by the first truly giant federalism paradigm known as dual federalism.

The Marshall Court's decision established a few important federalist tenets that have laid the groundwork for intergovernmental disputes ever since. First, the Constitution derives its sovereignty from the people, so therefore the national government derives its power from the people as well. Second, the Necessary and Proper Clause means more than a strict literal definition of the word necessary. It is too difficult to perform all of the enumerated powers that way, making the clause quite vague. This made the clause a useful tool for the government to give itself more power. Third, the Supremacy Clause clearly defined the Court's decision that the state could not interfere in the national government's functioning, so the state could not tax the national bank; making federal/national laws superior to the laws of the states and their localities.

These tenets immediately began to have a strong impact on the relationship between the states and the national government. Their relationship had been altered forever by the third branch created to do exactly that: work as a check and balance on the executive and legislative branches. By affecting the interaction between those governmental entities, the Supreme Court guaranteed there would be future conflict among the three about who has the power to do what, when where, why and how. This supreme era lasted a relatively short time because of the conflict it created; while making some parts of the Constitution more vague and others more exact and enumerated, the Court ensured arguments. The conflict created by the supreme era

would begin to pave the way for the eventual opportunistic model where conflict was a frequent occurrence among the varying levels of government. The *Bush v Gore* decision can be seen as a modern opportunistic example of when the Supreme Court decides to get involved in intergovernmental affairs.

For these reasons dual federalism can be seen as a retaliatory blow from those in the government who did not agree with the power rules established by the Court. For 100 years, from the mid 1830's until the 1930's, the dual era reigned supreme and one of the major themes of this federalist period is the national/federal government expanding its power. A popular term to label this era, and the first real model of federalism, is Layer Cake federalism.

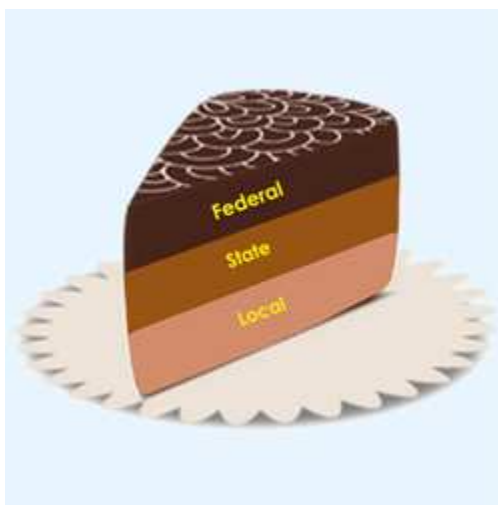


Figure 2: Dual Federalism

As *Figure 2* shows, this form of federalism can best be seen as a clear separation of the powers between the varying levels of government. The different layers of the US governmental system have distinct areas of law that they cannot share with the other “layers.” This model of separated powers clearly delineates constitutional powers, both enumerated and implied, in a way that echoes the views of Tenth Amendment supporters: no sharing (Lee, Johnson and Joyce 2013). The separate spheres of authority created in this model narrowly interpret the 10th Amendment when it comes to federal powers, but broadly interpret it in favor of state power.

One of the chief architects of the dual era was Chief Justice of the Supreme Court Roger Taney (famous for his *Dred Scott v Sandford* decision). Taney was a “strict constructionist” who believed the Constitution must be interpreted by the letter of the law. Enumeration was key to Taney because if a power is not specifically mentioned/written in the Constitution then Taney and other strict constructionists believed that power belongs to the states. He, and many others, believed that there should be no shared powers between the federal and state governments (which would look a lot like *Figure 2* above). Taney and other constructionists interpreted the Tenth Amendment's reserved powers clause in a way that saw sharing powers as unconstitutional. Naturally, during this era the powers of the state and national governments began to take on the scope seen today as many legal/constitutional delineations were being created and enforced. What the strict constructionists, who are still around today, fail to realize is that as society inevitably changes government must adjust with it. If the government refuses this then stagnation and societal unrest will follow. The federalism paradigm offered by the dual model is not sensitive to movement between the layers. Thus, making changes to intergovernmental relations under this model becomes difficult, time consuming, impractical, and costly; four things that policies do not need as obstacles to implementation.

Several federalism issues were raised and resolved during this era and their ramifications are still being felt. One of the biggest ways the national government was able to expand its power during the dual era was the Interstate Commerce Act, which was aimed at regulating businesses whose commercial operations were spread over multiple states. A state-centered federalist would have no problems with businesses doing this as long as the individual states were able to handle the monetary responsibilities. The federal government believed the opposite and with the passage of the act began to regulate commercial interactions involving multiple

states. This meant that the national government could start regulating private businesses. Before this businesses were giving most of their taxes to the states through wage taxes and labor laws. The Morrill Acts, and the land grant system that came with them, were an easy way for the national government to take control of large tracts of land that the states could have been in control of instead (Lee, Johnson and Joyce 2013).

The arguments over state-centered and nation-centered interpretations of the Tenth Amendment experienced during the dual era have not gone away and are still a large part of federalism disputes. The dual era paved the way for the opportunistic model's agency/policy-centered pursuits on interests instead of focusing on the collective governmental good. As long as a policy approach follows certain constitutional and legal frameworks then its implementation is inevitable under the opportunistic model. The fact that policies will strengthen both federal and state power simultaneously is not an issue according to opportunistic federalists as long as these individual policies follow dual era constitutional interpretations. These competing interests, while federally valid, eventually clash with each other leading to intergovernmental disputes and jurisdictional grievances.

Like many aspects of American life, the Great Depression had a profound impact on federalism's mechanisms. In the 1930's, after FDR took office, a new form of federalism was imposed by the new presidential administration. If the previous form could be seen as a layer cake of non-connected powers, the new cooperative federalism could be seen as a marble cake of inter-connected powers shared between the varying layers of government. Suddenly the national government was willing to devolve a little more power to the state and local governments and act in a parental fashion. After WWII the United States had made it out of the Great Depression and the national government had a surplus. Roosevelt's "New Deal" had helped out the struggling

state and local governments by creating many work projects, and other government funded projects to help stimulate job growth. After the war the states were still struggling monetarily due to lost revenue from income taxes and property taxes not collected due to the dire economic effects of the Great Depression. From the mid-1930's until 1961 the cooperative model helped bridge the gap between the national and state governments created by the previous dual model.

The main way that the national government was able to share policy power with the states was through federal subsidy programs and grant-in-aid programs (which would become a preeminent force in federalism power struggles from then until now). With the creation of the interstate highway system under Eisenhower, transportation funding became a driving force for state governmental interaction with the various federal entities involved in transportation. While the states were given more power to decide how to use some of the federal grant money they were receiving, the federal government was able to force states, when it was deemed necessary to cooperate with national plans by using federal funds. The best examples of this type of coercion was when the federal government forced states to standardize the minimum drinking age, speed limits, and seat belt laws by threatening to withhold transportation funding which states rely heavily upon to maintain their transportation infrastructures.

This was a tumultuous time in federalism's existence; societal growth and the natural progression of government necessitated a form of intergovernmental relations that could be flexible to the rising and falling tides modernization threw at it:

A general pattern of power distribution by policy fields evolved, centralizing trade and commerce at the national level while leaving culture, education and social policy at the sub-national level. Soon this became a problem for modernizing and democratizing societies. Federal trade and commerce policies created or reinforced patterns of uneven regional development. Overburdened with social policy problems, regional governments became dependent on federal transfers. Fiscal revenue was increasingly spent by governments which did not have the capacity to raise it. Fiscal distribution and transfer

schemes became the main preoccupation of federal systems. The original separation of powers became blurred, by political interlocking...by the wild growth of a mostly conditional federal grants system (Hueglin 2003, 287).

The cooperative model attempted to address the regional disparities and interlocking policy decisions that had historically been made by one level of government that were now being made by both because of the fiscal problems state and localities were facing. While the dual model had done its job allocating tasks to certain levels of government based on the current interpretation of the Constitution, growth and modernization had hit the United States hard from the late 19th to the mid-20th century. Regional disparities are going to happen because not every state and locality have the ability to generate the same amount of revenue. Unfortunately for the resident of some states, federal mandates hit hard during the coercive era.

The cooperative era embodied the good things that can happen when intergovernmental relations are approached in a way that focuses on coordination between the levels of government, something that the opportunistic model lacks. The modern erosion of this cooperation began with the coercive era, but it was the eventual overstepping of the federal government in its attempts to grab power during the cooperative era that led to the coercive era. This federal power grab served as a great modern model to follow during the opportunistic era. The forms of federal power extension experienced during the opportunistic era (the PATRIOT Act, Homeland Security, etc.) have flowed from the examples set during the cooperative era.

At the height of the cooperative model a new era in federalism began and the Civil Rights Movement was at the heart of the new coercive federalism. This paradigm was concerned with how the states, many of them southern, were handling race relations. The national government realized that if left to their own devices, many states would seemingly try their hardest to

continue segregationist practices. This was an effort to systematically step around provisions from the three Civil War Amendments to the Constitution (the 13th, 14th and 15th) and the various legal decisions since the end of the Civil War (primarily the *Brown v Board of Education* ruling). Something had to be done to force the states to comply with federal law. Fortunately the federal government had most of the money at this time.

This fiscal mismatch was the way the federal government used a “Carrot and Stick” approach during the coercive era. This new paradigm began in 1961 and the grants-in-aid programs the government had previously been using were the carrots offered to the states for desegregation compliance. Block grants, which have vague spending requirements, were not used as much as categorical grants, whose spending requirements are much more specific. JFK and LBJ dangled categorical grants to the states with the hope that the states' need for federal funds would outweigh their determination to not integrate. LBJ's Great Society was focused on fixing many of the societal ills that had rarely been addressed in the past: primarily racial tensions and the War on Poverty. When the states would not cooperate with the desires of the federal government's policy initiatives, the court system was used as the stick to punish the states.

The minimum standards set by LBJ's Great Society initiative required actions some of the states refused to take and the federal government began to attack states' illegal election practices through court action. The two court cases with the largest impact on the states were *Baker v Carr* and *Westbury v Sanders*. In the *Baker* decision, the one person, one vote principle was established and voting districts were required to be of equal size. Today this might sound redundant because of course districts are the same size. Why would the courts need to legislate that? Isn't that in the Constitution? This ruling created a shock wave through many states

because it impacted rural districts. The *Westbury* decision attacked the historic practice of apportioning certain voting districts in a way that would disproportionately affect one political party's electoral representation, a practice termed gerrymandering. This court decision made districts of unequal size illegal and primarily focused on the urban districts that had been created to disenfranchise the minority vote. If certain states refused to change their segregationist practices, then the national government would come down on them with new electoral hammers to drive home the death nails of these illegal practices.

Coercive federalism lasted as long as LBJ was in the White House. After the Civil Rights Act of 1964 and the Voting Rights Act of 1965 states began to finally bend to the desegregation will of the federal government. This form of federalism, while only lasting about seven years, had a profound impact on not only the federalist relations between the various governmental spheres, but also on American society as a whole. The Civil Rights Era is a black eye on the Statue of Liberty, one that will hopefully one day be healed, and is also an era that few people want the United States returning to. The mandates and preemptions used by the national government during this era are a great preview of some of the interactions between the national and state governments during the opportunistic era. The carrot and stick mentality of forcing states to enact federal policies they don't agree with did not leave with the coercive era. They stayed and have been used ever since when the federal government needs to force policy change through uncooperative state governments, sometimes to the detriment of local governments and citizens.

When Nixon took office in 1968 he brought the next intergovernmental paradigm: new federalism. This paradigm was unique to Nixon's terms in the White House and was his administration's way of exerting federal power over the states and his Democratic rivals.

General Revenue Sharing began to be used as the new form of grant-in-aid programs. Nixon liked to give Democratic states/districts/politicians categorical grants so the federal government could put in specific spending requirements that the Democrats had no control over. Basically he said here is the money, it must be used the way I want and others have no say in the matter! While this was a bastardization of the concept of federalism, it did work for a while. The Nixon administration used these grants as a carrot and then impounded appropriated funds and refused to release them to the intended states/agencies as a stick.

Unfortunately for Nixon, Congress made his impoundment method illegal in 1974 with the Budget Impoundment and Control Act. General Revenue Sharing wasn't working, and was not the equalizer that many thought it would be because the numbers were so easily manipulated. Though it still exists in some forms on the state and international levels, it is no longer used on the national level (Lee, Johnson and Joyce 2013).

The coercive and new federalism eras experienced certain events that shaped the federalism trends seen during the period from about 1960-1980. The Civil Rights era, General Revenue Sharing, the War on Poverty and the creation of Medicare and Medicaid were all byproducts and architects of the overriding trends. These two periods saw a massive increase in the flow of federal dollars (causing an increasing local governmental dependence on federal and state aid), a public dissatisfaction with government (because of the Watergate scandal during Nixon's second term and Vietnam War), increased suburbanization (creating a need for more coordination between the various government levels), and the emergence of a regional competition for growth and money between the frostbelt and the sunbelt (Lee, Johnson and Joyce 2013).

After fifty years of federalism paradigms attempting to expand national power at the expense of state autonomy, Ronald Reagan took office in 1980 and brought in the next era: the rather unimaginatively named new, new federalism. Reagan's model of federalism can be seen as a pseudo return to the strict constructionist era of the Dual model. Reagan, and many others, felt like the past 50 years had seen the national government stripping away the Constitutional rights of the states. The new constructionists had an interpretive view of the Tenth Amendment that echoed those of Taney. So Reagan's chant was "Cut, cut, cut" and the way his administration attempted to strip the national government of the power it felt had been wrongly taken from the states was through Reagan's 3 D's: devolution, decentralization, and deregulation.

The 1980's saw a major shift in a large portion of the US population's views about how the government should function. The New Deal and the Great Society had made believers out of many about how well the national government could work, as long as the states were along for the ride. The malaise and distrust created by the Nixon administration, and the shifting economy under the Carter administration, can be seen as the prime catalysts for Reagan's new federalism model. The federal government could no longer be trusted. Now was the time for the states to take back their power (Lee, Johnson and Joyce 2013).

In 1985 Reagan's second term saw a landmark federalism court case, *Garcia v. San Antonio*, where federalism suddenly became a political question. The court overruled a previous decision made in the *National League of Cities* case of 1976 where the Tenth Amendment was reborn. In *National League of Cities* federalism became a Constitutional question because the pay for city/state employees became protected from intrusion. The *Garcia* decision attacked the federal minimum wage law originally protected by the *Darby* decision in 1941 and then upheld by *Cities*. The different federalism paradigms have approached intergovernmental relations with

either a political or Constitutional framework. What that means is when the people can go straight to the Supreme Court to enact policy change federalism has become a Constitutional issue because Congress is bypassed in favor of the Courts. Federalism becomes political when the classic flow of ideas from people>states>government is followed and the Courts are generally left out of the equation.

Reagan's main method of decentralization was to use privatization, or outsourcing, to shift control of policy implementation away from the national government and into the hands of private businesses. Once these businesses have control, the states in which they are based have a larger input into the implementation of the various policy areas that have been privatized. This happened on all three levels of government and its effects are still being seen today. Deregulation was another way Reagan's administration would use this new, new model to strip federal agencies of their power. This was the most successful of the administration's three D's, and it stripped federal agencies of the ability to exert their influence on policy implementation by giving private companies and governmental agencies more control over their tasks. Again, this was a way to increase state and local influence on areas in their control by using a state's rights interpretation of the 10th Amendment. The telecommunications, airlines and food industries were significantly affected by this policy preference.

The last of the D's, devolution, can be seen as the overarching view Reagan had on government: the national government should cede policy power to the states. Two of the largest ways the administration attempted to do this were by decreasing the number of block grant categories from seventy-seven down to nine and by instituting the "Big Swap." The swap would have become a massive failure in Reagan's legacy had Congress not voted against it. The concept behind the policy initiative was that the federal government would take control of

Medicaid and the state governments would take control of welfare, primarily in the form of food stamps. Reagan's federalism paradigm saw this action as one that would take a large future financial burden off of the states' hands and impose it on the federal government. The states would then inherit the smaller future financial burden of welfare programs. Under the new, new model state and local governments would have suffered more than the federal government; the exact opposite of what the Reagan administration intended. Local governments would have been effected the most, funding-wise, because they would end up receiving little to no federal assistance to pay for the various new policy implementations. State governments would be adversely effected as well, leading them to have to increase taxes to pay for the new initiatives. The failure of Reagan's new, new federalism paradigm is still being felt today throughout the economies and budgets of local, state, and national governmental agencies. This failure is also what led to the new federalism model initiated by the Clinton administration: a return to more cooperative federalism.

Since Reagan's terms, new forms of federal control have been used in an attempt to ameliorate funding issues that federal mandates have created. Direct orders, while rare, are occasionally used when the federal government has no other avenue to get certain policies enacted at the state and local level. These orders come with the full weight and force of national power and states/localities must abide by them or else serious measures can be taken; the Equal Opportunity Act of 1982 being a good example of a more recent direct order. Cross-cutting requirements, conditions on federal grants that are extended to all programs regardless of the source, have been used nationally to try to extend some sort of program fairness that might otherwise not exist. Title IX in athletics programs and student loans are good examples of these requirements. Cross-over sanctions involve giving and taking federal grant money away from

certain policy elements if the lower governmental levels aren't acting correctly (Lee, Johnson and Joyce 2013).

Preemption is maybe the most controversial, for strict constructionists anyway, of these new control mechanisms. Preemption can be seen as the embodiment, in a way, of the Supremacy Clause. The two primary issues involved in preemption are states' rights and saving states money. These can be addressed by one of the three preemptive measures: partial, mandatory partial and entire. Partial preemption is used when a state doesn't, or cannot, run an aspect of the policy program, whether it be because of a refusal to cooperate or a lack of funds. In this case the federal government steps in and runs that aspect of the program. Mandatory partial preemption is when implementation is imposed on states like in an unfunded mandate; the Clean Air Act of 1990 being a good example of this preemptive style. When these policies are not implemented the national government will come down on the states with "Hammer Provisions," something states do not want to encounter. Entire preemption, like the name suggests, is when the supremacy or commerce clause is imposed and the entire functions of the policy are federally taken over (Lee, Johnson and Joyce 2013).

Various presidential administrations, and their differing federalism models, approach these preemptions differently. One area where this can be seen is the last mechanism of federal control: matching state and local funds by the national government. Matching funds are an important way in which the federal and state/local governments work together to actively implement good policy. Most of these projects require the state to maintain the infrastructure funded primarily by the national government. Highway funding, for example, is normally 10% state funded and 90% federally funded. In essence, the federal government puts up the bulk of the money needed for the program and then the state is tasked with maintaining it into the future.

This not only guards against fungibility concerns, but also ensures that pre-grant levels are maintained. This makes sure that the states don't receive too much money to help avoid wasteful spending, an action that is never popular with voters (Lee, Johnson and Joyce 2013).

Many of the problems with the opportunistic model began under Reagan's presidency with his administration's ill-fated attempts at strengthening state power at the expense of federal power. Though the disastrous effects weren't immediately clear during Reagan's tenure, they began to become abundantly clear near the end of Clinton's presidency when the opportunistic model began to emerge. New, new federalism was a catalyst for the competing policy battles brought to fruition under the opportunistic model because of the negative effects and implications many of Reagan's policy goals had on intergovernmental relations.

Clinton's new take on the cooperative model focused on exactly what the term implies: clear intergovernmental cooperation. One of the ways in which the new administration approached this task was to take the unfunded mandate off the table. These mandates had been used in the past by the federal government to coerce the states into following national policy preferences over their own in the form of various types of grants. A famous example of an unfunded mandate is when the Americans with Disabilities Act forced every locality in America to alter its infrastructure to accompany those with disabilities without any funding help from the federal government (a mandate that put a severe strain on many local government's budgets who were unable to make the changes) (Lee, Johnson and Joyce 2013).

One of the best things for federalism to come out of the Clinton Administration was the Unfunded Mandates Reform Act of 1995. These types of mandates have been detrimental to state and local governments because of the revenue flow and budgetary limits of these governments. This reform was a big step in the right direction towards a more cooperative

intergovernmental model because these mandates were now limited by their overall cost figure. Along with cost limitations, placing new conditions on current grant programs was prohibited. Before the national government could initiate one of these mandates, analysis and estimation of the overall cost to the state/locality became required to make sure that the mandate wouldn't be economically harmful to the lower governments (Lee, Johnson and Joyce 2013).

The Clinton administration was also able to accomplish two tasks that seem like they would cancel each other out: the size of the government was reduced and the national government was given more power over the states. Reducing the size of the government doesn't sound like the policy goal of a Democratic president. Neither does increasing the size of the national government like George W. Bush did after Clinton, a goal that few Republicans desire. The National Performance Review that was tasked to Vice President Al Gore completely altered the way bureaucracy functioned on the national level and also altered the nature of intergovernmental relationships. By streamlining processes and agencies in a way to better facilitate the movement of information and protocols, the NPR fixed some of the muddled communication that had been in place since Reagan was in office.

The devolution prescription Reagan's federalism sought to apply to the U.S. continued its march through Clinton's Presidency. 1996 saw the implementation of the Personal Responsibility and Work Opportunity Reconciliation Act. An embodiment of state-centered devolutionist intergovernmental policy, this Act gave states more control over the use of the TANF block grants given to them by the federal government: "The discretion of states extended to the determination of eligibility, the design of methods of assistance, and the establishment of benefit levels. States could decide whether to operate new food stamp and employment and training programs, or whether to shift some welfare functions to local governments (Bowman

2002, 11).” While this Act was hailed as a progressive step in the right direction for state autonomy in the implementation of public policy, and a victory for the devolution crowd, time has not been kind to this form of intergovernmental redistribution of power.

From the implementation of the PRWOR Act, through the beginning of G.W. Bush's Presidency, devolution has not delivered what many thought it could. The Welfare reform championed under Reagan, G.H.W. Bush and Clinton was interspersed with non-devolutionary mandates that hampered state based control of the policy process. The problem was that the government was saying one thing and doing another (which shouldn't be terribly shocking to anyone): “Paul Posner's research on federal mandates found that, even in the aftermath of passage of the Unfunded Mandates Reform Act, new federal mandates were imposed and more preemptions were enacted (Bowman 2002, 12).”

The Clinton Administration is the beginning of the clashing policy goals of the opportunistic federalism that Conlan (2006) termed and will be discussed later. Competing policy preferences begin to be injected into the structure of intergovernmental relations. Once they began to conflict with each other the nature of federalist relations became fundamentally flawed. The big shift in this new form of federalism came with the G.W. Bush administration.

Much like the coercive and new federalism eras, the period from Reagan to midway through Clinton's presidency, about 1995, saw certain key events tie together with governmental trends that affected the functioning of federalism. The population shift from the frostbelt to the sunbelt that began in the 1960's helped the Republicans take control of Congress. The declining rate of federal aid to states and localities prompted an end to General Revenue Sharing. Not only was the cost of health care increasing, causing a shift in funding at the national and state levels (a fight that is ongoing to this day), but the increase in regulatory federalism, like the

implementation of the Americans with Disabilities Act, have not slowed down. The recent passage of the Affordable Care Act, and its subsequent implementation, will surely have a drastic impact on health care in the United States, but time is needed to see the full effects of the new policy.

Clinton's second term in office saw the end of one of the most important intergovernmental bodies ever established at the federal level: the ACIR (Advisory Commission on Intergovernmental Relations). This Commission, since its inception in 1959, had been tasked with seven goals to help facilitate the flow of intergovernmental policies from the federal to the local level:

1. common problems affecting the federal, state, and local governments;
2. the administration and coordination of federal grants and other programs;
3. the conditions and controls associated with federal grants;
4. technical assistance to the executive and legislative branches of the federal government, including review of proposed legislation to determine its possible effect on the federal system;
5. emerging public problems that are likely to require intergovernmental cooperation;
6. the most desirable allocation of functions, responsibilities, and revenues among the federal, state, and local governments; and
7. coordination and simplification of tax laws and administrative practices to achieve a more orderly and less competitive fiscal relationship between the federal, state, and local governments and to reduce the burden of compliance for taxpayers (McDowell 1997, 112).

The recommendations given by the commission varied widely depending on what current model of federalism was in place. In the beginning, its recommendations were focused on the functioning of state and local governments as much as they were on the federal government. The grant-in-aid programs were the primary concern of their federal recommendations while reform of tax codes and county governing were the majority of their state and local recommendations (McDowell 1997, 113).

It wasn't until Reagan took office that the ACIR began to focus almost solely on the federal government: “(the) ACIR was among the first to warn of the rising burdens on state and

local governments resulting from the multiplication of federal preemptions, mandates, and grant conditions. Commission task forces and reports were influential in shaping the Unfunded Mandates Reform Act of 1995 as well as the 1980 federal fiscal notes legislation upon which the 1995 law was built (McDowell 1997, 113-14).” The Republican led *Contract with America* under Clinton was the beginning of the end for the ACIR. During the government shutdown the Republican members in the ACIR took over the debate and policy recommendation process; thereby winnowing down the amount of mandates they felt the state and local governments should have to implement (McDowell 1997, 116). These actions can be seen as Republicans longing for Reagan's new, new federalism, and fighting against what they perceived as too much federal government regulation of matters state and local governments were more than capable of handling themselves.

The ACIR wasn't terminated because it was not doing a good job of assessing the various intergovernmental challenges that had been cropping up since Reagan's Presidency; in fact the ACIR had pointed to several challenges that needed some sort of governmental response:

A study of principles for the proper allocation of functions among the federal, state, and local governments to see whether the system can rely on anything more solid than deficit-driven federalism during the next few tumultuous political years; Assistance in convening and supporting a "conference of the states" to consider strengthening the constitutional and statutory positions of the states in relation to the federal government; Means of accelerating implementation of the nationwide computer network for exchanging criminal records to let law-enforcement officers check the backgrounds of suspects being temporarily detained, thereby keeping repeat offenders off the streets; Additional studies on public works investment policies to help the central cities; and Much more work on federal mandates (McDowell 1997, 120).

This was a time when a commission like the ACIR was a valuable asset for the federal government to use as a guiding light for fixing intergovernmental problems. The National Performance Review done by Al Gore at the request of Bill Clinton even recommended that the

ACIR be “reinvented and revitalized.” Of all things, the federal budget deficit ended up killing the commission (McDowell 1997, 120-21).

An intergovernmental commission like the ACIR is a great commodity for the government to have. Federalism issues are not always black and white. The complicated relationships between the various levels of government need coordinated and cooperative guidance to affect proper policy implementation and guard against preemptions and mandates that could be extremely harmful to state and local governments. Like most political issues in the United States, the budget deficit and political partisanship came first:

ACIR was a collaborative body. It worked by consensus throughout most of its thirty-seven year history. Thus, the loss of consensus on many domestic policy issues made ACIR's role more difficult, particularly as those policy differences became more politically divisive. This problem did not appear suddenly. Its roots went back to the early 1980s when the role of government came under attack, federal aid began shifting from places to persons and away from local governments to the states, the federal government began relying less on regional solutions to regional problems, and the national associations representing state and local governments—the organizations that nominated the state and local members of ACIR to the president—began having less common ground on which to reach agreements through ACIR (McDowell 1997, 122).

Reagan's legacy of smaller government, less federal control/regulations, and a general malaise for intergovernmental relations was finally affecting the day-to-day functioning of government. The decline of the ACIR didn't just appear out of nowhere. Reagan's federalism slowly began dissolving intergovernmental commissions/boards/agencies throughout the government in an effort to cut waste. In 1981 the House of Representatives renamed its IGR subcommittee and gave it new duties that slowly eroded its IGR agenda. In 1986, when the Senate came under Democratic control again, it followed the House's example with its IGR committee (McDowell 1997, 23).

The slow erosion of intergovernmental control mechanisms during Reagan's presidency didn't end with the House and the Senate. In fact it continued through George H.W. Bush's term:

The congressional practice of reviewing ACIR's performance every five years was discontinued after 1984...the General Accounting Office concluded that there was no longer a constituency for its own intergovernmental studies office, and disbanded it in 1990. Meanwhile, the Bureau of Intergovernmental Personnel Programs in OPM had been disbanded in 1981, and OMB's intergovernmental relations office followed suit in 1983. The White House Office of Intergovernmental Affairs-first established in 1956-has been more of a liaison with mayors, governors, and other state and local officials than a policy shop throughout most of its life.²¹ Clearly, the perception of a need for general purpose intergovernmental specialists had waned in Washington, D.C. It is now almost completely gone (McDowell 1997, 123).

The ACIR's death midway through Clinton's Presidency should have not come as a surprise. Not only had various bodies similar to it been dissolved, but the ACIR's budget had been cut in half during the 80's (McDowell 1997, 124) as part of the war on waste; another example of Reagan's attack on traditional intergovernmental relations.

One of the major ways the George W. Bush administration changed intergovernmental relations for the foreseeable future was the passage of the PATRIOT Act and the subsequent creation of the Department of Homeland Security, now a standing committee in Congress. The broad, and seemingly vice-like, grasp Homeland Security was given over the entire nation was unprecedented. This was a massive increase in the scope of federal power because the new department was given almost unlimited control to circumvent state, and even Constitutional, laws during times of crisis. This albatross around the neck of the Constitution is, unfortunately, here to stay. For the past 14 years the U.S. government has considered itself engulfed in a period of crisis because terrorism still exists and is still a threat to the peace, welfare, and security of U.S. citizens at home and abroad. This state of crisis gives Homeland Security the ability to

negate certain parts of the Bill of Rights and other federal/state laws that are supposed to protect civil liberties.

James Madison, quite presciently, wrote in *The Federalist Papers*, “The operations of the federal government will be most extensive and important in times of war and danger; those of the State governments, in times of peace and security (Madison 1788, No. 45).” In a perpetual state of war and danger, the state and local governments must cede power to whatever arm of the national government is given control over the protection from danger until the danger is gone. The flaw in the current line of reasoning is that terrorism will never go away, and if it never leaves then there will always be a state of emergency. The national government has given itself pseudo-permanent preemptive power over many policy decisions that could, and should, be handled by states and localities.

George W. Bush's administration began to pursue its immediate interests with little, or no, regard for the institutional, intergovernmental, and collective consequences of these policy actions. This opportunistic way of governing hurts every level of government because of the chaos and confusion it creates. The federal mandates, policy preemptions, and grant programs used by G.W. Bush, and later Obama, put varying individual, political, and jurisdictional goals over what should be the government's goal of shared interests and cooperation. The Obama administration has attempted to halt some of these competing policy preferences and has been successful in some areas.

Key events during Clinton's second term through G.W. Bush's second term were catalysts for the various shifts in federalism trends that had preceded them. Welfare reform, the terrorist attacks of September 11th, the subsequent passage of the PATRIOT Act and the creation of the Department of Homeland Security, the *Bush v Gore* decision, and the ineptness of No Child Left

Behind are all manifestations of the shift to an opportunistic model of federalism. Mandates, preemptions and regulations began to dramatically increase. An increase in the federal budget deficit accompanied a surge in the usage of block grants by the federal government. The upturn in state and local privatization (like the prison system) was a sign that the federal government was willing during this period to give some power back to the states. This rise in privatization was coupled with more state innovations at the administrative level, like civil service reform, that began to be applied more nationally.

The G.W. Bush administration faced numerous challenges to federalism, not all of which were the administration's fault. Unfortunately the way in which they were dealt with was not conducive to progress. Many of the factors were out of the administration's control and have continued into Obama's presidency:

Demographic changes-an aging population and increased ethnic diversity-will reverberate across governmental levels. Population mobility, especially the re-centering of the populace in a southern and western direction, continues. The economic boom of the late 1990s has slowed; now many state governments are falling victim to overly optimistic revenue projections. Health-care costs are escalating rapidly, and some of the most innovative state managed-care plans are threatened. Federal grants to state and local governments are on the rise, constituting 17.9 percent of the fiscal year 2002 budget. However, payments to individuals constitute an ever-increasing proportion of those federal outlays: 11.4 percent in 2002, compared to 8.0 percent in 1992. The issues run the gamut. The federalization of crime continues with the Bush administration's proposals for additional federal gun-crimes. With the reauthorization of the 1965 Elementary and Secondary Education Act, more federal government involvement in public schools is a certainty...At the same time, the growing threat of catastrophic terrorism on U.S. soil is encouraging a new form of intergovernmental cooperation: terrorism prevention. Interstate cooperation is on the rise. The number of interstate compacts has reached an all-time high; the use of joint legal action by states has never been greater. In states with direct democracy, the increased use of ballot initiatives is posing real challenges to representative democracy. In the international environmental arena, the United States is likely to face demands that it lower its emission of greenhouse gases, an action that would have broad domestic consequences...The only certain outcome is the continued evolution of the federal system. As Martha Derthick has said, "American federalism is a highly protean form, long on change and confusion, short on fixed, generally accepted principles" (Bowman 2002, 20-21).

The way in which the federal and state governments approach these issues will determine how a new era of federalism will manifest itself. The current Opportunistic model really sees no problem with the variety and interconnectedness of these problems. It almost seems like the opportunistic approach uses a “Kill 'em all and let God sort them out” mentality that refuses to believe that there are dangerous consequences to disconnected policy decisions.

It is a little difficult, and unfair, to criticize the current administration before it is over and can be placed into a historic context, but some of the policy goals and federalist tendencies can be seen and analyzed. Obama's federalism has been focused on reversing certain G.W. Bush policies and the institution of a more active federal government. The Stimulus Bill in Obama's first term and the Affordable Care Act of his second term are two great examples of the national government attempting to be more of an active and driving force behind governance than a passive and reactionary one. Administrative agencies have become more prominent under the current administration than during the previous one. States are being used as the laboratories of democracy that they were originally seen as by the founding fathers. Under Obama's federalism states have been pitted against each other to receive federal grant money, which isn't necessarily a bad thing. Forcing competition among the states has yielded innovations that may not have come to pass if the process for receiving grant money wasn't as rigorous, like the Work Fare program to get people off of welfare. These innovations, like the ones seen in the Race to the Top program, are then being adopted at the national level.

The one area that has not changed under Obama's administration is the expansion of federal power that began under G.W. Bush. The problem that this power expansion creates has to deal with the supremacy clause because, if and when enforced, the federal government can

supersede any state actions that it deems unconstitutional. The erosion of certain constitutional rights that began under G.W. Bush with the passage of the PATRIOT Act has not stopped, and in fact has increased. One of the problems/complaints that can be thrown at the national government when federal power is increased at the expense of state power is that the subsidiary principle may be violated. This principle is not always ignored when the federal government takes/is given more power. The concept behind the principle is that government responsibility resides with the lowest level that can provide it. If the national government is the only branch that can legitimately provide a service then that service should stay in the federal government's control.

The fundamental theory behind the subsidiary principle makes sense as long as there are not competing government interests fighting to get their piece of the pie, like the form of federalism the United States has been experiencing for the past fourteen years. This principle creates a need for accountability. Accountability can force agencies to accomplish their tasks in efficient and effective ways. If a level of government is tasked with the responsibility of administering a policy, then that responsibility must come with accountability even if the project is a failure. The accountability created can also work as a method to weed out what types of policies certain levels of government cannot handle on their own. This principle can create more cooperation between the levels of government and more self-governance, or devolution.

Issues with the Opportunistic System

Before discussing many of G.W. Bush's policy mistakes, the concept of opportunistic federalism needs to be looked at as discussed by one of its leading scholars, Tim Conlan (2006). He chronicled the shift from cooperative to opportunistic federalism, and the summation of his analysis is "(Opportunistic Federalism is) characterized by corrosive opportunistic behavior, greater policy prescriptiveness, eroding institutional capacity for intergovernmental analysis, and shifting paradigms of public management. These trends threaten to undermine effective intergovernmental relations and management (Conlan 2006, 663)." All of these critiques can be found in the G.W. Bush Administration's policy initiatives along with their respective implementations. But if this system is so bad then why would it be implemented in the first place? Conlan (2006) argues that, on its face, the opportunistic approach seems much better suited than past approaches at dealing with "the range and behavioral dynamics of contemporary intergovernmental behavior (Conlan 2006, 667)."

The relationship between public administration and federalism cannot be overlooked in any analysis of administration. The power paradigm between the federal government and state/local governments affects how well an administrator can effectively do his/her job. The shifts in federalist models throughout the last century will surely echo the shifts in public administration practices because the two are inextricably linked. Tim Conlan (2006) shows how the new opportunistic model of federalism has affected the practice of public administration on the federal and state levels.

Conlan proposes that opportunistic federalism has taken over from the cooperative model, and this has shifted the foundations of Public Administration. This hostile takeover has been evidenced by four main themes: corrosive opportunistic behavior, greater policy

prescriptiveness, shifting paradigms of public management, and the erosion of institutional capacity for intergovernmental analysis (Conlan 2006, 663). Of course these events did not pop up overnight. They slowly evolved through the years as new models of federalism were played with by the government. Conlan (2006) begins his analysis with an overview of the Kestnbaum Commission of 1955, which convened under the Eisenhower presidency with the goal of finding a way for federalism to successfully administrate federal, state and local governmental goals. The Commission's goals were to decide: the merits of federalism, analyze federal forbearance, modernize state and local governmental systems, endorse the idea of cooperative federalist practices and find the best way to institutionalize intergovernmental coordination and analysis. Conlan (2006) notes that the commission's recommendations were met with unusual success and throughout the 1950's and 1960's, in part thanks to the Intergovernmental Cooperation Act of 1968, cooperative federalism blossomed (Conlan 2006, 664-666).

The political culture in the U.S. is constantly changing. Today the opportunistic approach to federalism seems, to many politicians at every level of government, to be the best way to get their policies enacted. Conlan argues that G.W. Bush's administration was the best example to date of this ouroborosian policy agenda: "opportunistic federalism has been abundantly demonstrated in the Bush administration. One would be hard pressed to develop an intergovernmental agenda that was more dismissive of cooperative norms and traditional responsibilities (Conlan 2006, 667)." Bush's administration showed the glaring weakness of this policy approach and the disorganized policies enacted by this administration continue to hurt this country. Conlan (2006) ends his article by arguing that if the Opportunistic policy approach is allowed to continue, then the intergovernmental system of the US will continue to disintegrate and weaknesses will become magnified. Globalization and the constantly changing economy

are, and will continue to be, affected by this federalist approach. Change is needed. Conlan (2006, 673-674) argues that a more cooperative approach must be taken and it “requires the political will to resist opportunistic politics and to rebuild a culture of intergovernmental comity.”

Unfortunately for the cooperative fans, the new paradigm that was driving federalism began to unravel until it became the opportunistic system known today. Conlan (2006) points to the proliferation of federal mandates and preemptions, the paradigm shift from intergovernmental management to performance management, the erosion of institutionalized and systematic analysis of the intergovernmental system, and the pure disregard for state and local governments from the federal tax policy as the key death nails in the cooperative model’s coffin (Conlan 2006).

George W. Bush’s two terms as president at the beginning of the new millennium will rightfully go down as one of the most controversial presidencies of all time. There had not been a president since Richard Nixon that so polarized the nation; people either loved or hated Bush. His policy decisions were hailed by many as fantastic and by others as foolish power plays. Many see his time as president as a huge failure that only hurt this country. Putting the War in Afghanistan aside, since that was inevitable no matter who had been president after the 9/11 attacks, it was his use of competing ideals of federalism throughout his terms that hurt him. He would, with some policies, attempt to strengthen the federal government and then turn around and enact policies that tried to strengthen state power. History has shown that once a president chooses one federalist route to go down, it is best to keep on that path. Competing avenues for federalism only seem to muddle up the administration’s goals. The policies eventually begin to

cancel each other out leaving nothing changed and causing a big mess for the next administration to clean up.

One policy area where a president can assert his/her idea of federalism is Welfare Policy: should it be left up to the individual states to decide how it is apportioned, or should the Supreme Court be given the right to make a legally binding process that all states must follow when implementing welfare policy? Under Bush's Presidency:

Welfare programs have become more restrictive and behaviorally demanding...Core state functions have been contracted out to private providers, devolved to lower jurisdictions, and restructured as competitive markets...[which has led to] the rise of a mode of poverty governance that is, at once, more muscular in its normative enforcement and diffuse in its organization (Fording, Schram and Soss 2008, 536).

Welfare Policy under George W. Bush was an attempt to show that in his administration's eyes this matter of federalism was more of a political question than a Constitutional one. Instead of letting the federal government, or the Supreme Court decide, the policy's power has been devolved and privatized in an attempt to make welfare a non-judiciable policy area. This policy decentralization has been seen as a way to strengthen the states' "right hand" so that the central government doesn't have to deal with it; it is seen as a pragmatic solution to the problem (Fording, Schram and Soss 2008, 536-37). These authors also show how this policy has been left up to the states' discretion even more; some states have been allowed to devolve TANF (Temporary Assistance for Needy Families) authority to local authorities and some have chosen not to. This was not a decision of the US Supreme Court. It has been left to the states to decide as a way for Bush to show that he was a states' rights guy (Fording, Schram and Soss 2008, 550).

Of course no discussion about G.W. Bush's presidency would be complete without a discussion of the 2000 election. It was the closest election in recent memory and one of only four presidential elections where the victor took the Electoral College without winning the

popular vote. The intervention into the election recount by the US Supreme Court, the subsequent declaration by the court that Florida's Supreme Court had violated the Constitution, and the calling of the election for Bush were all watershed events that would set the stage for many of Bush's judicial-centered policy decisions and his strengthening of the federal government. The 2000 election also led to widespread distrust in the government along with a feeling that Bush, and his administration, had the power to do whatever they wanted.

The Supreme Court's decision only served to delegitimize national elections in many people's view. It also set a precedent for Bush's terms: when in doubt lean on friends in the Supreme Court. After the election, many people around the country felt a complete distrust in not only the national government, but in the electoral system as well (and this would continue throughout G.W. Bush's two terms). Many saw the electoral process as unfair, and why shouldn't they? In most people's view he who wins the popular vote should become President, even though many don't quite understand that Americans live in a *representative* democracy with an *Electoral College*, not a philosophically perfect "one person, one equal vote" democracy (Craig 2006, 579).

The election results, and people's feelings towards the election, seemed to undercut almost everything G.W. Bush did while in office. Many thought he was an illegitimate president and the clashing policies he enacted seemed to be trying to serve two masters at the same time. He would enact policies to strengthen the federal government to appease those on the left who didn't think the election was legitimate and then enact state-centered policies to appease voters on the right. Both of these become increasingly difficult when the populace exhibits political distrust, feels dissatisfaction with democracy, has a feeling that the government can be extremely

unresponsive to the will of the populace, and believes the Presidency is illegitimate (Craig 2006, 582-83).

The delegitimization of the Electoral College the 2000 election brought also held consequences for the future of electoral federalism. Though the results surprised many people, this was not the first time that a President won the Electoral College without winning the popular vote. It had happened three times previously, though the last time was in the 1800's so the collective memory of the American populace had forgotten. Calls for electoral reform began to spread across the country and this issue became important to most of the smaller states, not geographically small but population-wise since the Electoral College gives small states a disproportional electoral advantage. This brought up an intriguing federalism question: could the national government mandate change among the states? People realized very quickly that Constitutionally the federal government could not because of the process through which Constitutional Amendments must go through: "Even if there were sufficient congressional support to pass a constitutional amendment terminating the college, ratification by the required three-fourths of states is improbable. Smaller states have no incentive to support an amendment that lessens their influence in the process (Bowman 2002, 19)."

The election also brought the decentralized nature of national elections to the forefront of discussion. National elections are a great example of how spread out, in a federalism perspective, voting regulations and rules are. This is one area that truly requires cooperation and coordination between all three levels of government. When it goes wrong, like in 2000, it goes really wrong. The problems with this decentralized process were quite obvious after the election: "The election dramatized the degree of decentralization-and variation-in the electoral process. States set the rules for elections, and local governments, typically counties, conduct the elections.

States determine how much discretion their local governments have in selecting the types of voting machines to be used and in designing the ballots for those machines (Bowman 2002, 19).” This led many to call for reform. Unfortunately that reform can't really be done at the federal level, it must be done by the states. As of 2002, only two years after the election debacle “more than 1,600 election reform bills have been introduced in state legislatures, 167 have been adopted (Bowman 2002, 19).” Clearly there is little interest among the states to change their electoral operations.

Another damning aspect of the election was the widespread distrust in the government it fostered with the African-American community in the United States. The decisions Bush made throughout his presidency to quell this resentment largely fell on deaf ears and were seen as illegitimate (Avery 2007, 328). Avery does point out that African-Americans have long held a political distrust, not necessarily for individual politicians or policies, but in the institution of government itself. It isn't hard to see why since they have only had equal rights for about forty-five years. Avery shows that “mistrust of government among blacks is largely a function of unhappiness with the continued racial discrimination and racial inequality in political and economic power (Avery 2007, 329).” G.W. Bush's policies throughout his terms would never really hold sway with many African-Americans, especially when he got the Supreme Court involved (*Dred Scott* and *Plessey v. Ferguson* are still on many people's minds).

The United States Supreme Court was seen by many under G.W. Bush's terms as the bad guy. The intervention into the election seemed to cloud the eyes of the public when looking at the Court. The fact that the Court normally doesn't use judicial review to step in on state-based legislation, or state-based legal decisions, but did in the 2000 election was odd and unprecedented (Howard 2004, 141). Howard also points out that “Excessively frequent

assertions of judicial review...can lead to a lack of respect for the Court, political outcry to impeach activist judges, attempts to curtail the Court's power through restrictions of appellate jurisdiction, and even attempts to alter the composition of the court itself.” This is how the Court has acted in the past. With its response to the election many saw the Court overstepping its bounds, even if it wasn't. It is also interesting to see how the political ideology of the Justices affects their decisions, even though it isn't supposed to. Howard's research shows that on average the Court deferred to the Reagan administration's requests, but only the liberal Justices deferred to Clinton (Howard 2004, 142), and the same can be said during the G.W. Bush administration.

In the beginning of G.W. Bush's presidency the Supreme Court began to retreat from its policies of the last sixty years by overturning congressional statutes because they intruded into state sovereignty or because they exceeded the delegated powers of Congress (Conlan 2001, 254). These acts were viewed as the Supreme Court moving away from centralizing government like it had been for a long time. Decentralization was the new fad and G.W. Bush was fully in support. In the 1990's the Supreme Court began to restrict Congress' powers and tried to strengthen state power (Conlan 2001, 256-57).

The Supreme Court's move to embrace cooperative federalism was a retreat from the constitutional model of dual federalism, especially in the use of federal grants, and specifically conditional grants. But “Because the Rehnquist Court continues to accept spending power doctrines that give Congress the ability to regulate states through conditions of aid, in ways that it could not do directly, a major loophole exists in the Court's state autonomy exclusions (Conlan 2001, 269).” The Supreme Court at the beginning of G.W. Bush's terms seemed to be working against itself and only served to clutter up the whole idea of federalism.

History shows that in a president's second lame duck term his/her power and influence are seen as dwindling and limited. G.W. Bush had to fight hard to continue his policies and keep the conception of his power strong. Bush seemed to follow the historic second term goal of increasing influence on foreign policy instead of domestic (Dunn 2006, 95-96). This, unfortunately for Bush, only helped to muddle the competing federalist policies he had enacted. By retreating from domestic policy decisions that were at odds, and trying to settle the intergovernmental disputes they led to, Bush only served to show the public that things weren't working like they should be. Of course, the two wars that the United States was engaged in had to be addressed. It is very possible that the G.W. Bush administration saw its competing policy ideologies failing and decided to abandon any idea of correcting them and just focusing on winning the wars it had built up as a global war against evil (public relations concerns must be taken into account).

Dunn (2006, 104-118) points to many things that affected the Bush administration during its second term: limited and specific tenure, gathering opposition, preparing for succession, divided government, personnel depletion, agenda exhaustion, scandal, hubris, and the legacy of previous policies. Many of these factors were influenced by the competing policies enacted in G.W. Bush's first term and as history showed, served to inhibit his second term. Strengthening the federal government and the state governments at the same time just wasn't working out and it was only getting worse. Conflict was rampant and failure loomed large over the presidency. Because of this it isn't too difficult to see why domestic policy was abandoned for a strong foreign policy.

No discussion of G.W. Bush's presidential terms would be complete without looking at the PATRIOT Act. It is one of the most controversial bills to have come out of Bush's

Presidency, even though it got close to a unanimous consent vote in Congress. Though G.W. Bush campaigned on state's rights, the PATRIOT Act is one of the largest expansions of the federal government's power over the states in a long time. The PATRIOT Act helps to shine a light on Congress' problematic place in the separation of powers dispute, one of federalism's main concerns. Farrier argues that it is the "cycle of institutional ambivalence" where Congress yields power, then pulls some of that power back, and then yields some more (Farrier 2007, 93). The passage of this act made congress a "gatekeeper for a dramatic increase in executive power" as this new act addressed broad issues and delegated a lot of power into few hands (Farrier 2007).

Oversight became problematic and integration into people's everyday lives received heavy public backlash (Farrier 2007, 94). The problem here is that oversight is a central part of institutional power and without it, or when the process becomes muddled, things tend to go awry. Cooperation from the executive is the key to oversight in respect to checks and balances and without cooperation from the executive, like in this case, institutional cooperation cannot occur. Congress does not like to give up its power, especially to the executive, but the PATRIOT Act was a special event since the events that led up to it were rather unprecedented, at least in United States history (Farrier 2007, 96).

One of the most striking examples of G.W. Bush's competing federalist tendencies was the passage of Medicare Prescription Drug Benefit. This act not only created expensive new entitlements in support of Medicare, but it also attacked the foundations of Medicare at the same time (Jaenicke 2006, 217)! How is a program supposed to work when at the same time it is being instituted and attacked? This was one of the largest expansions of federal power enacted by G.W. Bush even though it went against his political party's ideals. Some argue that this was

actually a shift in the fundamental idea of how to control Medicare: from “program management” to “program transformation” which only helped to spur partisan dissent to the program (Jaenicke 2006, 219). The best argument against why this was such a difficult issue is, “It is difficult to reconcile the creation of an expensive new entitlement with a conservative desire to limit the role of federal government (Jaenicke 2006, 240.)” This act is a perfect example of how instituting competing ideas of federalism usually leads to failure.

Alternatives to the Current System

Opportunistic Federalism is obviously not the best solution to intergovernmental relationship problems, but what other options are there? Unfortunately since the inception of this concept there have been no new advances in the field of federalism so one must look to past examples for a better way forward: dual federalism, cooperative federalism, coercive federalism and new federalism. After these former federalism paradigms are analyzed, new ideas about how the national-state relationship can move forward will be proposed.

In the dual model separate spheres of authority are created in the government with clearly demarcated lines that one governmental level, or the other, could not cross. Cooperative federalism was the next theory to come because many politicians believed that dual federalism had become so entrenched in the political process that it was becoming increasingly difficult for the federal and state governments to get anything done. They were constantly squabbling over who really had the power. The cooperative method tried to solve this problem with a concerted effort to get things done and solve the problems created by the old theory. Instead of divisive government that created separate policies for each arm of the government, all branches, from the federal down to the local branches, would work together to enact policy initiatives that involved every actor and stakeholder equally. In theory this idea sounds wonderful, but in practice things become much more complicated.

Coercive federalism, where the national government could force the states to support a policy initiative they might not want by the incorporation of various coercive political methods, had some good and bad elements. Crosscutting requirements (environmental regulation), crossover sanctions (pass a certain law or lose federal funds), unfunded mandates (do it without help/\$\$\$ from the federal government or lose federal funding), and grants-in-aid (various federal

grant models – categorical, block and GRS) can all be used in good ways and bad ways. The important thing the government needs to realize is that if these methods are used in the right way intergovernmental relations can flourish.

The new form of federalism the Nixon administration instituted was not restricted to just Nixon; both the Reagan and Clinton administrations used the same concept. New federalism isn't necessarily restricted to any one overriding goal or mission; it is used more as a term that refers to new models that didn't follow their two predecessors, dual and cooperative. Nixon's administration focused on the efficient and effective management of specific goals. Under Reagan's administration the federal government took on Medicaid and the state governments took on welfare and food stamps. Finally, under Clinton's administration state powers were surprisingly revived under the mission statements of Reinventing Government and the Contract with America. The Clinton Administration also relied on unfunded mandates to achieve its overall goals.

Fixing the mess that opportunistic federalism has created is no easy task, and while Obama's administration is trying to fix it, the process is nowhere near complete. Opportunistic federalism clearly did not work for the G.W. Bush Administration the way some might have thought it would. Thankfully the mess helped to shed light on certain criteria that must be addressed when trying to rectify this issue.

One of the primary current problems in intergovernmental relations is how to best provide aid to local governments, whose revenue streams vary widely, making it difficult for these local governments to effectively administer the same policy goals throughout the country. Some areas simply do not have the funds to do so. Per capita expenditures are different in every state. These expenditures provide a great framework to evaluate whether or not a state

distributed funds equally among all of its counties. Most of the monetary aid local governments receive come from their state and an unequal distribution of wealth creates inequities among counties that effects policy implementation. The heavy local reliance on property taxes, and the varying degree to which smaller levels of government rely on them (50% of city revenue, 75% of county and 90% of townships) require the states and the federal government to coordinate help when it is needed (Lee, Johnson and Joyce 2013).

Some of the revenue solutions local governments depend on (sales tax, income tax, user fees, debt restrictions, and bond restrictions) cannot add up to a sufficient amount for effective policy implementation because of certain problems that occasionally arise and create financial crises (budgetary shortfalls, insufficient tax revenue, emergency situations, etc.). Emergency situations, normally unforeseen and devastating, can cause some localities to default on their debt (a situation that is unfortunately not without precedent). When this occurs the state must come in and save them because of the Constitutional premise that local governments are creatures of the state. Again, in times like this coordination and cooperation are key. Privatization, a method of contracting out certain services so the government doesn't have to administer them, has been very popular among strict federalist constructionists. This can create problems for local governments as well. At its best privatization can encourage competition, improve service quality, and save taxpayers money. At its worst the opposite of all three can happen and then the state, or federal, government must step in (Lee, Johnson and Joyce 2013).

Information overload causes problems in intergovernmental relations and there is more information available today than there ever has been. Dealing with this overload is one of the keys to effectively administering a new federalism path. The ACIR was a national body that could help decipher information flow between the levels of government, and since its dissolution

the government has had problems communicating. A new intergovernmental body like the ACIR is necessary for a new form of federalism to emerge. It would direct traffic to help avoid clustering and stagnation in policy implementation.

The three main criteria when addressing any political issue's impact on society, and the decision making process that entails are: political, social and economic. There are many sub groups within these three areas, but it all comes back to the main three areas. Different federalism paradigms have approached the political, social, and economic aspects of policy change and implementation with varying degrees of success. The alternatives to the current federalism model about to be discussed are an attempt to encompass these three important policy criteria to form a cohesive solution to the problem.

The political impacts of any federalist policy are extremely varied and consequential to the entire country, not just a few specific groups. When evaluating a new federalist route the impact upon the three levels of government, federal/state/local, must be taken into consideration. The whole problem with the opportunistic approach was that it didn't try to get these three groups working together. Instead it dealt with one at a time without considering the impact this would have on the other two. A new approach must attempt to achieve cohesiveness between the three levels if any positive impact on the overall framework of the government is to be had. Policy cooperation is necessary for any level of effectiveness, and an awareness of possible partisan dissent is crucial.

States' rights can be a somewhat loaded term. In this instance it is defined as states being able to influence various governmental spheres that the national government has usurped in the past. I'm not suggesting that a return to a strict constructionist view of the Tenth Amendment like in the dual federalism model is necessary. Instead, allowing more state-led initiatives

involving policy areas that they historically had control over, like education, would facilitate an atmosphere of cooperation. Policies like No Child Left Behind, and the current Common Core debate, erode the states' ability to regulate one of their most cherished policy arenas. This has caused strife, anger and disillusionment around the country. Removing the national government's control from areas like education, and giving them back to the states, would be a step in the right direction.

The social impact of policy implementation is extremely important, especially since most policies have a significant emphasis on social improvement of some kind. If the differing levels of government don't address this, like opportunistic federalism fails to do, then the social level of said policy becomes completely muddled and incoherent. A great example of this was the G.W. Bush administration's handling of the Medicare Prescription Drug Benefit Act. At one level it tried to vastly increase the federal government's power over this program with sweeping entitlement programs. At the same time it wrote language into the bill that attacked the whole program's foundation in an attempt to limit the federal government's power. The social impacts of failed policy can be somewhat hard to measure which is why it is the most difficult of the three variables to qualify. Political and economic ramifications can easily be taken into account. In their failings, societal implications are born. Failed health care policy not only affects the economy and causes political dispute, it directly affects individuals, families, and groups of people in different socioeconomic brackets in a negative way. The best way to limit the negative social impacts of bad policy decisions is to make sure that the political and economic variables are solidly in place. Positive social change can flow from there.

The economic impact of policy implementation might be the most visible of the three levels for the general population. While the public might not really focus on the interplay

between different levels of the government during policy implementation, they always seem to focus on the economic side of any policy. This is because most people don't think that government cooperation directly affects them. They do feel directly impacted by change in the economy; wallets must be protected at any cost. Of course if a policy is enacted that has a detrimental economic impact then that policy will obviously become rather unpopular. Stopping this from happening is extremely important for a policy's success. Budgetary constraints, tax revenues, and necessary federal aid all must be taken into account.

The use of federal grant money to influence the states to acquiesce to federal mandates, while it might have been necessary in the past, needs to stop. Instead, the federal government should use the grant system to help address the regional fiscal disparities around the country. A cooperative and compassionate approach must be taken in the usage of federal funds. Local revenue streams vary so widely that almost every state must constantly deal with local needs. Many states cannot deal with all of these economic problems themselves. This is where the federal government can step in and use grant money to assist local governments in their times of need. Again, an ACIR-like body at the national level could do this by analyzing the various budgetary and fiscal impacts of grant policy and work with state governments to allocate the money to places most desperately in need.

Fungibility also becomes an economic issue when trying to correct for detrimental effects caused at the state and local level by the opportunistic model. Federal grant money has become so important to intergovernmental relations that the fungibility of a program, or the ability to replace that program's grant money with money from state and local sources, becomes a key factor in whether or not the level of government the policy has been devolved to can realistically fund the program. This becomes an even bigger problem when certain policies are wide ranging.

Fiscal disparities abound at the state and, especially, local levels. Changes in intergovernmental policies can have dramatic effects on localities because of the huge gap between local budgets caused primarily by property taxes. This is why unfunded mandates are so unpopular at the state and local levels; some local/state governments simply cannot afford to enact unfunded policy changes because their revenue streams are incapable of supplying the necessary funds.

So under the already established criteria for a successful federalism policy which alternative would best suit all three? It would seem obvious that every form of federalism would attempt to balance all three criteria, political/social/economic, but this is harder to do than it seems in theory:

The question to be raised here is not whether modern federalism has become inefficient due to a decision-making process trapped in overlapping lines of authority...Once more, it is about a disjuncture in the history and tradition of federalism as a system of divided governance, and once again we return to the ninth Federalist Paper, in which Hamilton had told his readers that the purpose of such a division of powers was to separate the "general authority of the union" from governance for "local purposes." Such governance would be sustained, he extended further, by leaving to the states "certain exclusive and very important portions of sovereign power" (Hueglin 2003, 287).

For many decades dual federalism seemed to be balancing these criteria very well. All levels of government seemed to be functioning together within the separate spheres of authority that were established. The political, social and economic impacts of policies were working for a while but eventually everything began to disintegrate. It would seem that the dual model could successfully regulate the economic and social aspects of federalism, but as history showed it is the political aspect that it cannot control very well. The separate spheres of government created under the dual model could not ever seem to agree on whom actually had the most power.

The reverse can be seen in the cooperative model; the political aspect is handled rather well, but the economic and social aspects become quite complex and competitive because of the

use, or restriction, of federal grant money to the states. Politically this form works because there is so much emphasis put on each governmental arm linking together to successfully solve problems and get things done. This is where the dual model failed. The grants-in-aid and the various forms of coercive federalism under the cooperative model are where it failed. Unfunded mandates, economic sanctions, and various requirements were all ways that politicians held the economic aspect hostage to their whims. The social aspect was also devastated under this model because of the economic controls over various policies. Without proper funding, or monetary control, a policy cannot be as socially effective as it should be.

New federalism didn't have one overriding problem, like dual and cooperative did, because new federalism did not follow one path. Different presidential administrations chose alternate routes to their preferred federalist destination. The consequences of these alternate routes were different for each administration in the pursuit of the criteria previously mentioned. Nixon, Reagan and Clinton all showed disadvantages in certain aspects of their federalist policies. Under Clinton the economy did surprisingly well along with his social policies. The one area he didn't do well was the political aspect. Reagan used a semi-opportunistic model to try to enhance the federal government and the states at the same time. As a result the political side went well. But history has shown that the economic side, as well as the social, didn't quite pan out like they should have. As a result his administration suffered in those two areas. Devolution of federal power to the states also hasn't seemed to work like many thought it would: "it appears that devolution may be more hyperbole than empirical fact. But even if interest in devolution per se fades away, the issue of the federal-state balance is at the heart of federalism and will undoubtedly remain central to public debate (Bowman 2002, 12)."

The arguments for federal preemption come from many different areas and all carry a weight so large that preemption far outweighs the opposing views on the opposite side of the federalism scale. The Court has historically backed the federal government almost every time it has attempted to preempt programs. Economic and technological changes can provide an extremely sound justification that is hard to argue because the national government will always have the means to fund these innovations while states and localities might not be able to find the requisite amount of revenue. Powerful lobbies representing a wide array of interests can push for various preemptions that will advance whatever cause/business they represent. Some forget the political aspect of preemption and must understand that it is not a Republican or Democrat issue. Both parties are fans of preemption when it is their party in control of the government; they just have to complain about it when the opposing party is in power to look good for their constituents. Finally, a social component of preemption sometimes overlooked is that a lot of the time our society likes to see issues facing the country in the vague and general term of “rights” which historically have been protected by the national government. These incentives have the ability to overpower the federal government and can cloud the reasoning of certain agencies and policy makers when faced with such an easy, and legitimate, excuse to take control of public policy.

The coordination principle must be followed for successful intergovernmental relations. National, state and local governments have to work together because neither one of the three branches can handle every task that modern society throws at it. Putting aside the gigantic task of successfully maintaining an operational infrastructure covering three million+ square miles and serving 315 million+ citizens, which is mind boggling by itself, the simple everyday tasks of governmental functions are spread across all three branches: transportation, sewage, garbage,

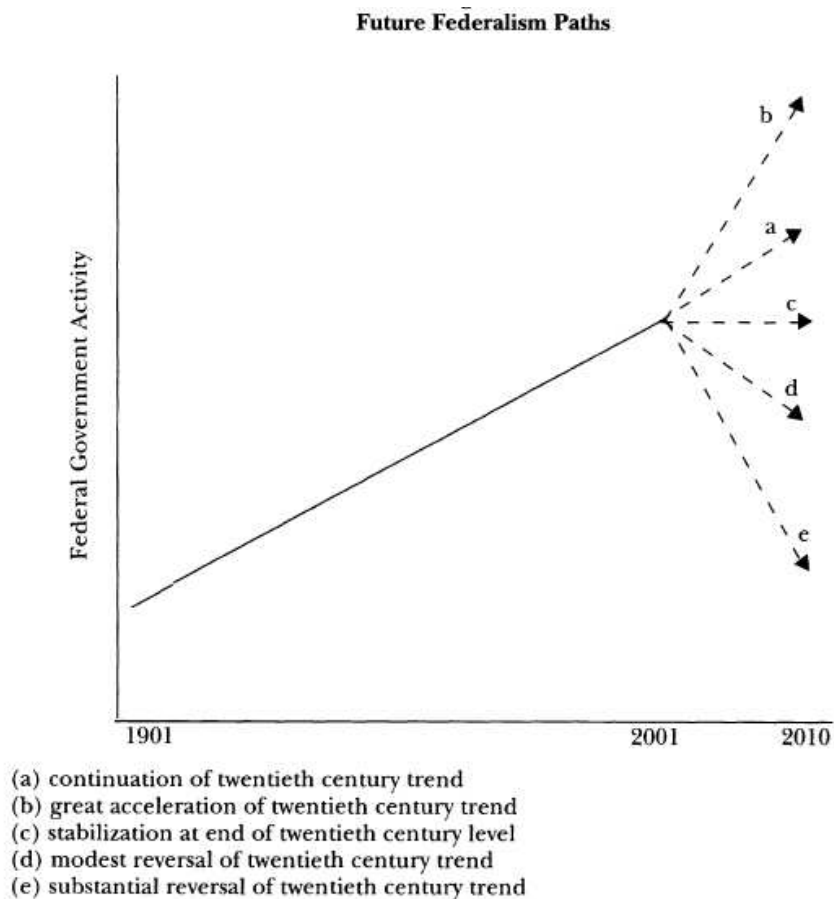
budgeting, welfare programs, health care, etc. Because of all these issues coordination and cooperation are imperative for intergovernmental success.

Recommendations

Opportunistic federalism clearly causes more problems than it should. As a federalist policy it has failed, yet it is still in use even though Bush's terms in office proved that this theory did not work. Today it is the leading form of federalist theory and many politicians seem to love it, probably because it allows them to pursue their immediate interests and show their constituents that they have delivered what they promised they would without having to worry about the detrimental side effects these policies have on other areas of the government. American governmental policy under G.W. Bush was a complete mess. While the opportunistic model might have seemed like a good idea in the beginning, its weaknesses became overwhelmingly apparent when new policies showed the different levels of government didn't know if they were coming or if they were going. Each level of government was being strengthened and weakened at the same time. By looking at past forms of federalism I believe a new approach can be taken that incorporates various aspects of each trend that worked well while getting rid of the trends that did not work. If the Bush administration had done this, things would have gone a lot differently.

In light of the alternatives to the current model certain intergovernmental functions must be put into place to help nudge federalism in a different and better direction. The weaknesses in the current opportunistic system can be mended by instituting change on both conceptual and practical levels. The modern preference for federal preemption and mandates needs to be curtailed and directed more towards state-led innovations and initiatives. This can be done by instituting an intergovernmental body similar to the ACIR on the national level to help direct, coordinate and communicate policy change/implementation between the levels of government (much like the second-order devolution discussed later).

There have been some recent suggestions for the future progression of federalism in the United States and some of these would be valuable additions to the current model. They attempt to address the problems local and state governments have had recently with the usurpation of power by the national government. These new suggestions also bring the idea of states being laboratories of democracy back into the forefront of discussion. Saving the government money will always be popular among voters and these new ideas argue that state and local innovation of policy initiatives can bring about desired change at a smaller cost to the taxpayer than if the national government was in charge. This idea adheres to the subsidiarity principle which needs to be applied more than it has been in recent federalism paradigms. A new course of federal government activity needs to be set, one that includes public choice.



The graph on the previous page, taken from Bowman's article, shows the 5 different paths federalism could take after Bush's Presidency (Bowman 2002, 5). The vagueness of these pathways is addressed by Bowman (2002, 5-6):

The federalism scenarios make no assumptions about the length of time represented by the dotted lines. It is quite possible, even likely, that the next decade or two will see several of these trends unfold at different periods. Increases may be followed by decreases, periods of no change could be interspersed among upward or downward trends.⁵ However, if in 2010 or 2020, one were to look back in an attempt to measure the direction of federalism since 2001, one of these five paths will be proven accurate.

These pathways to a new federalism model encompass various scenarios where the federal government, or the state and local governments, attempt to assert themselves in a greater capacity than they were during G.W. Bush's terms or in a smaller capacity. Growth of the federal government's power is not necessarily an institutional evil. In fact the continued growth during the 20th century was necessary in most instances. The problem facing the federal government during Clinton and Bush's presidencies was the schizophrenic way in which policy preemptions and mandates were used.

The call for less government, championed by Reagan and his cohorts, did not diminish after he left office. George H.W. Bush, Bill Clinton and George W. Bush all decreed that government should be, and would be, smaller. So one would assume that of the trends from Bowman's chart, option (c), (d), or (e) would have occurred since Bush's first term beginning in 2001. As we have seen this is not the case. At the beginning of G.W. Bush's first term it seemed like option (c) would be followed and the growth in federal power would stabilize and become a little more static. Surprisingly the opposite happened: a combination of options (b) and (c).

The modern problem federalism faces is a battle between two ideological bases: one that espouses public choice and competition and one that decries choice and competition.

Reconciling these two models is, at present, one of the biggest problems facing intergovernmental relations. The disagreement between the two camps is summarized in Bowman's (2002) article: Michael Greve, advocating the public choice model, is quoted "The federalism I have in mind-real federalism-aims to provide citizens with choices among different sovereigns, regulatory regimes, and packages of government services...Citizen choice and state competition are the chief virtues of federalism (Bowman 2002, 9)." The opposing view held by Paul Peterson argues: "states may engage in a race to the bottom as competition to attract mobile taxpayers compels them to lower taxes and, therefore, reduce the range and quality of services. When state and local governments have economic development as their main objective and when the federal government assumes the major responsibility for redistributive policy, then the price of federalism can be kept to an acceptable level (Bowman 2002, 9)."

Neither one of these arguments is completely correct in its assertions. Federalism is not a black and white issue, no matter what some of the dual model supporters might say. Taxpayers like having a say in how policies are implemented and paid for. That is their right as tax paying citizens. But, the states also have a responsibility to do what is in the best interest of their citizenry and sometimes this has to go against the will of the populace. Occasionally the federal government must step in and take over when the taxpayers and state governments are refusing to cooperate with the common good (just look to the coercive era for reasons why).

Local governments must own up to their share of fault for the modern hindrances in intergovernmental policy. Recently the dispute has been whether local governments should interact with the state and national government in a government or a governance capacity: "At issue is determining the optimal method for reducing the fiscal, social, and environmental disparities found in today's metropolis (Taylor 2007, 119)." The differences between the two

boil down to the classic federalism argument between strong centralized power or strong state/local power;

The **government** model: strong, centralized governmental institutions are in the best position to internalize the costs associated with urbanization and create efficiencies that heretofore have not been possible (Rusk 1999; 2003). The government model implies "formal institutions and elections and established decision-making processes and administrative structures," forming "a legitimate monopoly that takes responsibility for both providing and producing public services" (Taylor 2007, 120).

The **governance** model: Regionalism, the governance model suggests that regional problems can be solved with the participation and cooperation of local governments "rather than at their expense" (Nolon 1999, 1012)...voluntary cooperation among existing institutions...may take the form of consolidation of governmental functions or extensive use of intergovernmental agreements...horizontally linked organizations have the ability to increase effectiveness and efficiency at a lower political cost and are thus a more realistic solution than formal realignment of government hierarchies (Orfield 2002; Savitch and Vogel 2000; Thurmaier and Wood 2004) (Taylor 2007, 121).

Currently the governance model seems like the most practical of the two. The vast expansion of federal power and responsibility that the United States has been experiencing since the late 1990's does not need to include local boundary disputes that could easily be solved at the local level, like the subsidiarity principle argues should happen. This model might also help alleviate local fears of too much federal control and intrusion into regional matters. This does not seem like a governmental area the national government should be involved in. Occasionally the state might need to help settle disputes, but what is the point of having local/regional governments if they are not allowed to do anything on their own? The only time the federal government would need to get involved is if there was a dispute over federally owned land/property or a legal dispute involving the supremacy clause.

Political success, both practically and figuratively, needs consistency. If policies need to be enacted to strengthen one arm of the government, whether it is the federal, state or local,

another policy can't be put into place that attempts to disarm the one that originally tried to be strengthened! This was the G.W. Bush presidency in a nutshell. This practice must cause public administrators around the nation a series of never ending headaches. How can agencies effectively administer public policies when they are being asked to administer competing and ideologically opposed policies? Not only have the organizational changes in the executive branch, at the federal level, increased this confusion, but Conlan (2006) argues that the tools and processes of intergovernmental analysis, coordination, and consultation have fallen by the wayside.

A cooperative approach must be taken by the three levels of government for any success to occur. A combination of the cooperative approach and the dual approach seems like it could work very well. The worst aspect of the dual approach was the best aspect of the cooperative approach, the political aspect. The best facet about the dual approach, the economic and social aspect, was the worst facet about the cooperative approach. Had the G.W. Bush administration, and the current Obama administration, tried to fuse these two theories together a lot of the current mess would have been cleaned up, or wouldn't even exist at all.

The dual approach was absolutely correct in creating separate spheres of authority. All three levels of government can't have the same amount of power or else nothing would ever get done as they would just veto each other. But how these authoritative spheres interact with each other is the important facet that the cooperative approach can help facilitate. By injecting the problem solving and departmental cohesiveness strategies of the cooperative approach into the separate spheres of the dual approach many intergovernmental problems would be solved.

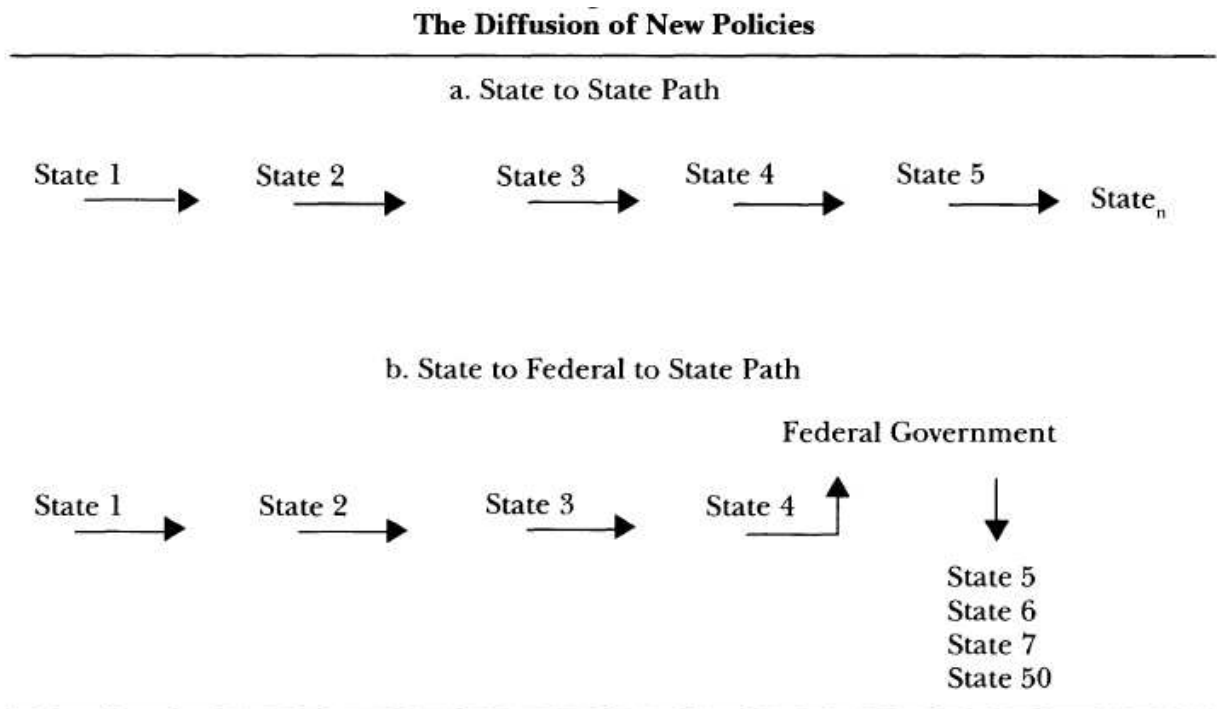
What should not be incorporated from the cooperative approach are the coercive aspects (mandates, sanctions, etc...) and many of the grants-in aid. Not all of these are bad approaches

because sometimes states don't follow certain policies that the rest of the country is instituting and sometimes these policies need to be followed, i.e. environmental policies. The federal government obviously must step in with some form of requirements, but a lot of these sanctions hurt the overall economic health of federalist policy. By taking these economic factors out of the new combined model and using the form that the dual approach used, the problems that the cooperative model faced would be solved.

While federal policy control is very important when it comes to large, over-arching policy areas, like health care and defense, smaller policy arenas should be approached with the subsidiarity principle in mind. There is a limit to how much power the national government can, and should, take away from the states before warning sirens should be sounded. If a policy can be effectively and efficiently administered by a lower level of government then it should be. Letting administrators who work closest to the people that policy change directly affects allows for a fundamental understanding of how the people will react to that policy. This has been one of the problems with unfunded mandates. The federal government sometimes doesn't see how detrimental forcing localities to institute change can be, not only on the administration of their agencies, but also on their budgets and revenue streams. The subsidiarity principle, if followed correctly, also allows for better cooperation and coordination between the levels of government.

If the subsidiarity principle is to be followed, then how should it be implemented? There are two ways in which states can become the laboratories of democracy they were meant to be: preemption or diffusion. Preemption, or the federal government mandating the spread and development of a new policy initiative that is successful in one state to every other state by making it a federal law, is not popular among state-centered federalists. It has been done correctly and incorrectly in the past with varying results in both instances. Diffusion, a more

popular mechanism for state-centered federalists, and one that more closely resembles the subsidiarity principle, is when a policy initiative naturally spreads to all of the other states through whatever means available until it has been adopted by most, if not all, states (Bowman 2002, 13). The difference can be seen in the chart from Bowman's article:



The problem with choosing either model is the way in which states have lost the power to do option (a) because of policy supremacy the federal government has taken over the years:

In some types of legislation, federal minimum standards are implemented by states (and localities). The federal government sets the bar; the states devise a way of reaching it. Different states use different methods to achieve compliance. In federalism terms, this is a fairly hollow arrangement. States have lost the ability to first, set the standard, and second, to decide without penalty whether to adopt the federal standard. States are simply charged with customizing the administrative apparatus to fit the state context. The key decisions about policy direction and funding are made at the national level. Granted, states typically have the latitude to exceed the federally prescribed minimum standard, if they desire to do so (Bowman 2002, 14).

Conlan (2006) points to two main factors in the evolution of opportunistic practices around the nation: social and economic changes, and new developments in the political system. The vast increase in federal mandates and preemptions since the 1950's and 1960's have come because of a wide variety of social causes, and injustices, that needed to be redressed. Economically, the acceleration of globalization has led to an increase of federal preemption statutes. Politically, electoral politics has seen a vast erosion of state and local power in elections, especially national ones. More detrimental to national and state politics has been the alarming increase in the polarization of partisan and ideological representatives. The national political scene has seen a decrease in moderate politicians and a huge increase in partisan politicians. All of this has led to a federalism culture that looks at how singular, immediate goals can be reached without concern for shared and long term goals (Conlan 2006).

The history of the ACIR is a great example of what not to do if the government hopes to maintain functional relationships between the various levels of control. The partisanship that preferred ideas from sources that parroted their own views on how government should work did not end with Reagan or Clinton. For federalism to work ideas need to come from nonpartisan, or bipartisan groups, established within the framework of the federal government, whose sole responsibility is limited to the effective, coordinated, and efficient dispersion of intergovernmental principles and policies:

Senator Daniel Patrick Moynihan probably was correct in the following remarks made to the United States Senate during debate on ACIR's final appropriation, 9 November 1995: "...the ACIR does important, if largely unheralded, work. And we stand on the brink of terminating it. This is a mistake which we will regret...without the ACIR, our knowledge of important matters will never be anything more than meager. The action we are about to take will harm our capacity to govern effectively" (McDowell 1997, 127).

Is there hope for America's federalist system? Conlan (2006) believes there is. He looks to the states in particular, probably because the national political scene is so divisive these days, and Conlan (2006) sees signs of change. He points to policy innovations that are occurring at the local and state levels. New tax systems and procedures are being toyed with and analyzed by states to solve problems such as internet sales tax and other issues that affect communities far more than the national government. States are also working together to form shared environmental policies that affect certain regions of the country more than the entire nation. Conlan (2006) also sees the rise in popularity of state government over federal government among the electorate as a promising sign of growth for a foundation of power that has the chance to produce change in federalist policy from the ground up (Conlan 2006).

One option to fix the mess that opportunistic federalism has caused, and a way to point intergovernmental relations forward down a new path in the hopes of establishing a new paradigm, is implementing a form of "democratic experimentalism" called "second-order devolution" in which a:

power shift enhances the role for local government not only to implement but also to design policies and programs...(where) power is decentralized to enable citizens and other actors to utilize their local knowledge to fit solutions to their individual circumstances...regional and national coordinating bodies require actors to share their knowledge with others facing similar problems.....Sub-national units of government are broadly free to set goals and to choose the means to attain them (Bowman 2002, 14).

This form of local problem solving follows the subsidiarity principle, so it will make the state-centered federalists happy, and it allows for the state and federal governments to step in if needed. The problem with this is that not every state, or locality for that matter, is willing to give so much autonomy to these municipal governments. Strong centralized federalists might fear that this idea lacks certain mechanistic controls to help maintain ordered and effective policy

goals, but under this model it is proposed that “Congress would help finance policy and program experiments that the states and localities would design and implement. Congress would issue general, but limited, guidelines (Bowman 2002, 14).”

Tables 1, 2, and 3 highlight the most important federalism trends and events that have come up during the opportunistic paradigm’s reign. The events near the top of the list have been highlighted in previous sections of this thesis (Welfare reform, NCLB, September 11th terrorist attacks, the PATRIOT Act and subsequent creation of the Department of Homeland Security, *Bush v Gore*, UMRA Act of 1995) because they have been the catalysts for new federalism trends (Weissert, Stenberg and Cole 2009). It is fairly obvious that these events represent both sides of the federalism spectrum. They either strengthen state power or national power. The trends these events have produced, as seen in table 3, have been two-sided as well, but the two overwhelming trends involve the use of federal power to supersede state power: increased mandates, preemptions and regulations, block grants for welfare and children's health and day-care programs (Weissert, Stenberg and Cole 2009). These are the trends that need to be slowly rolled back and replaced by trends like state innovation and privatization, which are both near the top of table 3; a good sign for the future of federalism.

Conclusion

A new approach to federalism is needed for American government to get back on track. It is always difficult for the dominant paradigm to be eschewed for a new one, but occasionally it is necessary. Unfortunately, the opportunistic approach seems to be popular today even though this model seems to be doing more harm than good. What many of the arguments for and against intergovernmental relations come down to is an acceptance of centralization or decentralization. If politicians could look back to their past and attempt to fuse the dual model with the cooperative model, and take the best of both worlds while disposing of the worst of each approach, all three levels of government, from the national level all the way down to the local, could begin to function much better. Communication issues could be solved with a better understanding of why the political aspect of federalism under the opportunistic approach is so skewed currently. The economic and social problems of this approach would begin to be remedied with this fusion as well. Until this occurs the current intergovernmental mess that the opportunistic approach has created will continue to linger over the entire country like a bad smell that just doesn't seem to go away.

“Controlled Devolution” seems like the proper path for federalism to begin to travel down. This would require a national intergovernmental advisement board, similar to the ACIR, to be reinstated. This board would act as the overseer of state-led policy initiatives and help facilitate the coordination and application of these initiatives across the states. Eventually, if everything went well, the board could recommend national policy changes. This second order devolutionary process would also help quell the federal mandates and preemptions through the grant-in-aid programs that the states have been economically effected by for the past few decades. If limitations were put on these processes by a new ACIR-like board then both the

coordination and cooperation principles would help infuse intergovernmental policy with the subsidiarity principle.

Arguments over whether federalism should be a political or a constitutional question have swung back and forth since John Marshall was the Chief Justice of the Supreme Court. At times the Supreme Court has interpreted the Tenth Amendment in ways that forced federalism to be a constitutional question, like many of the rulings during the supreme era of federalism. The power of the Supreme Court, since the Court gave itself the power of judicial review in the *Marbury v Madison* decision, has grown dramatically. Politicians and various presidential administrations have fought back against the encroachment of the Supreme Court's power grabs. Today federalism, for better or for worse, is a political question and will remain that way because politicians want to keep intergovernmental policy power out of the hands of the Supreme Court. Though I, and many others, would like to see federalism administered in a constitutional capacity occasionally, it is extremely difficult to remove politics from the equation. As long as politicians are involved in the policy making process federalism will remain a political question; the opportunistic model has shown as much except for the Supreme Court's involvement in the 2000 presidential election.

Cooperation and coordination are the two key components to federalism's functionality. Without them the country is doomed to either the over-encroachment of federal power to a point of pseudo-“tyranny” where citizens' input into intergovernmental relations has been squashed, or a country run fifty different ways in fifty different states with no communication between the governmental actors. Neither one of these realities is pleasing, or conducive to peace and functional implementation of GOOD policy that actually helps people. This warning has been with the country since James Madison wrote about it 226 years ago:

Ambitious encroachments of the federal government, on the authority of the State governments, would not excite the opposition of a single State, or of a few States only. They would be signals of general alarm...But what degree of madness could ever drive the federal government to such an extremity (Madison 1788, No. 46).

Table 1 Ranking of major intergovernmental events, 1995–2005

| Event | Rank | Points |
|--|----------|--------|
| The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Welfare Reform) | 1 | 909 |
| The September 2001 Terrorist Attacks | 2 | 827 |
| Passage of the 2001 “No Child Left Behind” Education Bill | 3 | 711 |
| Passage of the USA Patriot Act of 2001 | 4 | 554 |
| <i>Bush v. Gore</i> , 2000 | 5 | 533 |
| Hurricane Katrina, 2005 | 6 | 448 |
| U.S. Intervention in Afghanistan and Iraq, 2002–present | 7 | 341 |
| The Economic Growth and Tax Reconciliation Act of 2001 | 8 | 257 |
| <i>Kelo v. City of New London</i> , 2005 | 9 | 248 |
| <i>U.S. v. Lopez</i> , 1995 | 10 | 198 |
| Modification of Medicare programs to include Prescription Drug Plan, 2003 | 11 (tie) | 159 |
| Creation of the Department of Homeland Security, 2002 | 11 (tie) | 159 |
| Supreme Court rulings in several cases (such as <i>Printz v. U.S.</i> , 1997 and others) that seemed to question the limits of congressional power in favor of state and local governments | 13 | 147 |
| Passage of the 2002 Help America Vote Act | 14 | 143 |
| Unfunded Mandates Reform Act, 1995 | 15 | 136 |
| The 2000 Presidential election and the attention it brought to the Electoral College | 16 | 135 |
| Retirement of Supreme Court Justice O’Conner and death of Chief Justice Rehnquist, 2005, and appointment of John Roberts and Samuel Alito | 17 | 112 |
| National Voter Registration Act, 1995 | 18 | 104 |
| Agreement reached with the tobacco industry, 1997, resulting in billions of dollars in payments to states | 19 | 95 |
| The Balanced Budget Act of 1996 | 20 | 68 |
| Termination of the Advisory Commission on Intergovernmental Relations in 1996 | 21 | 66 |
| The Intermodal Surface Transportation Efficiency Act (ISTEA), 1997 | 22 | 65 |
| The Defense of Marriage Act, 1996 | 23 | 61 |
| Passage of the Internet Tax Nondiscrimination Act, 2004 | 24 | 55 |
| The collapse of Enron and other corporate scandals | 25 | 44 |
| Passage of the REAL ID Act of 2005 | 26 | 38 |
| Series of investigations mounted by New York State Attorney General Eliot Spitzer | 27 | 37 |
| Passage of the Deficit Reduction Act of 2005 | 28 | 36 |
| <i>U.S. Term Limits v. Thornton</i> , 1995 | 29 | 35 |
| Passage of the Class Action Fairness Act of 2005 | 30 | 33 |
| Expansion of performance partnership and other intergovernmental grant waivers as a way to encourage state innovation | 31 | 32 |

(Weissert, Stenberg and Cole 2009)

Table 2 Proportion of top event cited by each respondent group

| Group | 9/11 terrorist attack | 1996 Welfare Reform Law | <i>Bush</i> <i>v.</i> <i>Gore</i> | No child left behind law | USA Patriot Act |
|--|-----------------------------|-------------------------------|---|--------------------------------|-----------------------|
| APSA (207) | 0.31 | 0.17 | 0.09 | 0.09 | 0.09 |
| IGR (116) | 0.23 | 0.22 | 0.09 | 0.09 | 0.04 |
| SIAM (139) | 0.23 | 0.15 | 0.12 | 0.08 | 0.07 |
| Federal Experience (84) | 0.33 ^a | 0.15 | 0.04 ^b | 0.13 ^b | 0.07 |
| State/Local Experience (144) | 0.20 ^c | 0.22 | 0.09 | 0.11 | 0.07 |
| Neither Federal nor State/Local Experience (50) | 0.31 | 0.17 | 0.11 | 0.05 | 0.09 |

Notes: Numbers of respondents in each group are in parenthesis. The federal experience group includes those with only federal experience; the state experience group includes those with only state-local experience.

^aThe difference between federal and state/local experience is significant at <0.05.

^bThe difference between federal and no experience is significant at <0.05.

^cThe difference between state/local and no experience is significant at <0.05.

(Weissert, Stenberg and Cole 2009)

Table 3 Ranking of major intergovernmental trends, 1995–2005

| Trends | Rank | Points |
|---|------|--------|
| The increased use of mandates, preemptive statutes, and regulations | 1 | 1,392 |
| Increased use of block grants in such areas as welfare, children’s health, and day-care programs | 2 | 1,167 |
| Innovative activity on part of many states | 3 | 737 |
| Growth of the federal budget deficit | 4 | 699 |
| Increased privatization of certain state and local policy areas | 5 | 639 |
| Continued shift of federal grants-in-aid from places to persons | 6 | 542 |
| Continued decline in trust and confidence in the federal government by citizens | 7 | 505 |
| Growing use of ballot initiatives in various states | 8 | 468 |
| The ever growing importance of the courts in defining intergovernmental roles | 9 | 463 |
| Continued and increasing concerns about illegal immigration | 10 | 425 |
| Increased use of congressional “earmarking” | 11 | 338 |
| Increased price of oil, natural gas, and gasoline | 12 | 232 |
| Increased use by states of various gambling devices | 13 | 221 |
| The increasing focus of the nation’s businesses on national actions, rather than states, to achieve their goals | 14 | 196 |
| Growing influence of many state officials in national policymaking | 15 | 152 |

(Weissert, Stenberg and Cole 2009)

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Figure 1: *Sobre la muerte de la ciudad del valle germinará mi canto*, Jorge Carrera Bolaños, cited in *Bridges: Mathematical Connections in Art, Music, and Science; Conference Proceedings, 1998*. Reza Sarhangi, ed., Winfield, Kansas, 1998, p. 292.

Figure 2: Retrieved from: <http://www.civiceducationva.org/federalism6.php>