

# State-Federal Relations: Back to the Future?

By John Kincaid

*State-federal relations continue to be buffeted by the increasing polarization between political parties that often accentuates intergovernmental conflict. The hoary antebellum doctrine of nullification also has risen from the dead to point to a future of more state-federal conflict as states controlled by one party, whether Democratic or Republican, enact policies contravening federal laws and judicial rulings. Nevertheless, coercive federalism continues its now 45-year-old onward march as federal power penetrates deeper into state and local authority.*

Despite persistent high unemployment, President Barack Obama won re-election in 2012 with 51 percent of the popular vote and 62 percent of the Electoral College vote. When unemployment is high, Democrats often persuade voters that they are better able to solve the problem than Republicans.<sup>1</sup> Democrats gained seats in the U.S. Senate, solidifying their majority at 53, plus two Democratic-leaning independents, and also in the U.S. House, although Republicans still control that chamber with 232 seats to the Democrats' 200 seats.

Outside Washington, D.C., the election resulted in 30 Republican and 19 Democratic governors plus one independent. Strikingly, single-party control of both state legislative and executive branches—24 Republican and 13 Democratic—marked a new high in party polarization among state governments. This polarization has weakened the bipartisan muscle of some of the states' national associations, such as the National Governors Association. As such, the 2012 elections continued the polarization evident in the federal government for the past three decades and heightened party polarization in the states.

As usual, federalism was ignored by most of the 2012 candidates, except for Mitt Romney's proposal—not loudly touted on the campaign trail—to convert Medicaid to a block grant. Federalism is not important to federal officials of either party. Democrats view federalism “as a quaint, 18th-century relic, another disposable constitutional concept that stands in the way of ‘progress.’ ... Republicans pay lip service to federalism but too often toss it aside to achieve their own policy goals.”<sup>2</sup>

Consequently, the 2012 election outcomes will not reverse the long-term course of coercive federalism,<sup>3</sup> even though polls report record low public trust in the federal government. By contrast, Gallup found high levels of trust in state and local governments in September 2012, with 74 percent of

Americans expressing a great deal or fair amount of trust in local government, and 65 percent in state government.<sup>4</sup>

## Secession and Nullification: Back to the Future?

Obama's re-election provoked thousands of people in all states to sign petitions endorsing state secession from the union. The first petition, from Louisiana, hit the White House's “We the People” website the day after Obama's re-election. Presidential aspirant and former U.S. Rep. Ron Paul of Texas, echoing John C. Calhoun in 1828, declared secession “a deeply American principle. ... If the possibility of secession is ... off the table, there is nothing to stop the federal government from continuing to encroach on our liberties and no recourse for those who are sick and tired of it.”<sup>5</sup>

The Obama administration promised to respond to any petition carrying more than 25,000 signatures. In January 2013, the White House answered a petition from Texas signed by 125,746 people, as well as petitions from eight other states. “The founders established a perpetual union,”<sup>6</sup> the White House wrote, establishing the right of the people “to change our national government through the power of the ballot,” not secession. The U.S. Supreme Court, in *Texas v. White* (1869), affirmed that “(t)he Constitution, in all its provisions, looks to an indestructible Union composed of indestructible States.”

Similarly, debate over federal gun control proposals following the December 2012 school shootings in Newtown, Conn., led some state and local officials to urge nullification of new federal gun laws. “Neither I, nor my deputies, will participate in the enforcement of laws that violate our precious constitutional rights,” Sheriff Terry Box of Collin County, Texas, said.<sup>7</sup> The Utah Sheriffs' Association announced in early 2013 that its members are “prepared to trade (their) lives” to prevent federal officials from

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enforcing new gun laws. Lawmakers in many states have introduced anti-federal government bills, including measures to authorize state nullification of federal laws, exempt guns made in-state from federal regulation, require federal officials to obtain a county sheriff's approval to serve a warrant or make an arrest, and ban enforcement of Agenda 21, a United Nations agreement promoting sustainable development. Alabama adopted the first state ban on Agenda 21 in 2012.<sup>8</sup>

Although few people expected any actual secession attempt, the petitions and nullification drives illustrate how federalism is often used as a symbolic hammer to express citizen discontent and partisan opposition in today's polarized political environment.

Nullification and interposition, however, could become more than symbolic as both parties increasingly use state powers to buck federal policy. A prime example was Colorado and Washington residents voting to legalize recreational marijuana in 2012. Eighteen states and Washington, D.C., also have legalized medical marijuana. Those laws contravene the federal Controlled Substances Act. Colorado's Democratic Gov. John Hickenlooper said in November 2012 that he does not believe the federal government will allow states "to unilaterally decriminalize marijuana," but added, "You can't argue with the will of the voters."<sup>9</sup> President Obama told ABC News in January 2013 there needs to be "a conversation about how do you reconcile a federal law that still says marijuana is a federal offense and state laws that it's legal."<sup>10</sup> The United Nations' International Narcotics Control Board has pressured the administration, charging that state laws legalizing medical and recreational marijuana violate international drug conventions.

The president is considering legal action against Colorado and Washington, but such action is politically perilous because marijuana legalization is popular with the president's liberal base. The legal marijuana states also have taken a nullification stance that enjoys substantial public support. About 64 percent of Americans do not believe the federal government should enforce its anti-marijuana laws in states that have legalized it, and about 52 percent of Americans now believe marijuana should be legal.<sup>11</sup>

Many states have mounted a similar stand on abortion. In 2012, 42 states enacted 122 provisions on reproductive health and rights. One-third of the new laws—43 in 19 states—restrict access to abortion. This is less than the record-breaking 92 abortion

restrictions enacted in 2011, but is still the second-highest number of abortion restrictions passed in a year.<sup>12</sup> In March 2013, Arkansas enacted the most severe restriction by banning abortion after 12 weeks of pregnancy, when an ultrasound usually can detect a fetal heartbeat. This rule contradicts the Supreme Court's standard that gives women an abortion right until the fetus could be viable outside the womb, usually at about 24 weeks into pregnancy. The Arkansas law is being challenged in federal court, but the Supreme Court and lower courts have allowed many state regulations of abortion to stand since the court decided *Roe v. Wade* in 1973.

States also have sought to assert regulatory muscle against federal regulators. A case pending before a federal appellate court is whether the U.S. Nuclear Regulatory Commission can order a nuclear power plant, in this case Vermont Yankee, to operate without the approval of state regulators.

Abortion, marijuana and other issues raise difficult federalism questions. If the federal government looks the other way on one or more such issues, why should it not do the same on all similar issues? By what criteria, and under what circumstances, should Congress, the president or Supreme Court allow federal law to give way to contrary state law? These questions most likely will be answered on a political, not principled, basis. The antebellum nullification crises were resolved politically when the Alien and Sedition Acts of 1798 were repealed and allowed to expire in the early 1800s and the Compromise Tariff of 1833 lowered the 1828 Tariff of Abominations.

### Sequester Fiscal Blues

The major intergovernmental fiscal issue is the continuing federal budget crisis. In the 2012 fiscal year, the federal government spent \$3.5 trillion while raising \$2.4 trillion in revenue. During 2009–12, more than \$5 trillion was added to the national debt by deficit spending, "more than all the deficits and surpluses ... from 1987 through 2008 combined."<sup>13</sup> This fiscal course is unsustainable.

The most immediate crisis is the sequester, which complicated budget making for the states—46 of which start their new fiscal year July 1. While state and local governments are still recovering from the recession-induced revenue slump of 2008–12, the sequester arrived on March 1, 2013, to slice federal spending by about \$85.4 billion in 2013. Absent policy intervention, the sequester cut discretionary spending across the board by \$109.3 billion a year from 2014 to 2021. State and local officials sought

to have a voice in the federal budget talks, but they had little clout.<sup>14</sup> The budget debate was so bitter that even \$51 billion of federal aid for the states and localities devastated by Hurricane Sandy in October 2012 was not approved until Jan. 28, 2013.

The sequester is the result of a 2011 deal between the president and Congress that was intended to be so fiscally painful that federal policymakers would agree on a plan to reduce the federal deficit by \$1.5 trillion over 10 years before the sequester was to start Jan. 2, 2013. Although the sequester cuts only 2.4 percent of all federal spending, it puts sizable dents in programs involving some vital state and local functions, such as education, the Women, Infants, and Children program, and the Low-Income Home Energy Assistance Program, as well as programs that significantly affect all citizens and the economy, such as air traffic control.

The sequester does not touch benefits paid by such social welfare programs as the Children's Health Insurance Program, Medicaid, Medicare, Pell grants, Social Security, Supplemental Nutrition Assistance Program, Temporary Assistance for Needy Families and veterans' programs, even though some of these are the principal deficit drivers. The sequester also exempts most highway funding. Hence, about 82 percent of the federal funds received by states will not be reduced by the sequester. In 2012, states received nearly 35 percent of their revenue from federal grants.

Only about 4.2 percent of municipal revenue comes from direct federal aid; so, an 8.2 percent sequester cut to such programs as the Community Development Block Grant, community policing and job training will not be overly onerous.

In an effort to convince Congress—especially House Republicans—to reduce federal tax deductions to raise more revenue to avoid the sequester, the White House issued a report Feb. 25, 2013, while the National Governors Association was meeting in Washington, D.C. The report specified dire cuts for each state, such as a projected loss of 21,484 jobs in Kentucky along with a \$12 million cut in federal grants for K–12 education and some 1,000 children losing access to Head Start. Ohio, the White House said, will lose 30,000 jobs; New York will lose \$42.7 million in education aid; and California will lose about \$9 billion just as Gov. Jerry Brown announced the state's first balanced budget in many years. Almost half of the states already are spending less than they did before the recession, and 21 still collect less revenue than they did before the recession.

Governors of both parties were critical. "The White House is engaged in scare tactics," declared Republican Gov. Dave Heineman of Nebraska. "Every governor ... knows how to cut their budget by 2 or 3 percent, and the White House ought to learn how to do it." Democratic Gov. Dannel P. Malloy of Connecticut said, "We don't do across-the-board cuts in state government, and it's a stupid idea in the federal government."<sup>15</sup> The governors pleaded for discretion in spending federal dollars. NGA's chairman, Democratic Gov. Jack Markell of Delaware, said, "Deficit reduction should not be accomplished simply by shifting costs from the federal government to the states or by imposing unfunded mandates. States should be given increased flexibility to create efficiencies and to achieve results."<sup>16</sup> Amtrak, for example, told states if they wish to maintain passenger train routes of less than 750 miles, they must pick up the costs or face service reductions and terminations.

Meanwhile, the privately funded State Budget Crisis Task Force headed by Paul Volcker and Richard Ravitch contended that states' widening gap between entitlement spending and revenue capacity is becoming unsustainable. Major threats to states' fiscal viability are Medicaid, federal deficit reduction, underfunded pensions, state budget gimmicks, local fiscal stress and a narrow, eroding and volatile tax base.<sup>17</sup>

This news, though, was already old news. The Congressional Budget Office, U.S. Government Accountability Office and many other observers have long highlighted the unsustainability of contemporary state and local fiscal policies. State and local governments, however, cannot solve these problems on their own because of the myriad federally induced costs that affect their budgets<sup>18</sup> and their entanglement with numerous federal programs, especially Medicaid, which is the single largest category of state spending and also constitutes 45 percent of all federal aid to states and localities. A grand intergovernmental partnership is needed to repair the federal-state-local fiscal house.

### **Tax Frights and Fights**

The need for such a partnership is reflected in federal proposals to fix the federal budget partly at the expense of states and localities. In particular, President Obama proposes to cap the tax deductibility of state and local bonds, which have enjoyed favorable tax treatment since the advent of the federal income tax in 1913. In 2011, the Simpson-

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Bowles commission recommended eliminating the tax deduction. Elimination would increase state-local borrowing costs by about two percentage points. Members of Congress also are entertaining elimination of the deductions for state and local taxes. Rational cases can be made for terminating these deductions, but not in the absence of a grand intergovernmental fiscal agreement.

At the same time, Congress has not moved to authorize state taxation of Internet and mail order sales, despite several bills introduced into the 112th Congress. Although NGA and the National Conference of State Legislatures continue to push the Streamlined Sales and Use Tax Agreement as a model for congressional action, only 22 states have joined the agreement. Its prospects for favorable action in the 113th Congress remain slim. Also, a sign of possible fracturing of interstate cooperation is that California and South Dakota have dropped out of the Multistate Tax Compact, reducing its membership to 25 states.

Forty-five states have sales and use taxes. It is estimated that states lost \$11.4 billion on interstate sales in 2012.<sup>19</sup> A growing number of states have sought to act on their own by passing “Amazon Laws” that presume an out-of-state seller has engaged in a taxable solicitation if it pays a state resident to allow its website to be used by in-state customers to click on the out-of-state sellers’ website. Some states with an income tax have been requiring tax filers to report and pay taxes on non-taxed mail-order purchases.

Voters showed some signs of reduced tax resistance in 2012, especially in California. Voters there approved Proposition 30, which raised the state sales tax from 7.25 to 7.5 percent and imposed higher tax rates on taxable incomes exceeding \$250,000. Florida voters torpedoed a property tax limit, and Michigan voters rejected a constitutional amendment to require a supermajority legislative vote to increase taxes. Washington voters, however, approved such a supermajority rule, and with the federal payroll tax increase that started in 2013, voters might now be less amenable to state and local tax hikes.

On another fiscal front, several states have joined a federal lawsuit challenging the “orderly liquidation” provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. The law allows federal officials to liquidate companies quickly and decide which investors win and lose without judicial remedy. States fear their pensions might be harmed, as happened to Indiana

when it had to absorb a \$6 million pension fund loss when the federal government restructured Chrysler in 2009.

### The Affordable Care Case

The blockbuster federalism case in 2012 was the constitutional challenge to the federal Patient Protection and Affordable Care Act of 2010—also known as ACA—brought by Republican governors and/or attorneys general of 26 states, along with several citizens and the National Federation of Independent Business.<sup>20</sup> Many Democratic governors and attorneys general defended the ACA.

Two provisions were at issue. One requires all citizens to purchase health insurance. Failure to do so triggers a financial penalty collected by the IRS. Congress justified enactment of this individual mandate under its constitutional powers to regulate interstate commerce and to enact laws necessary and proper to execute its delegated powers. The challengers argued that the federal government can only regulate interstate economic activity, not inactivity.

The second provision required states to expand their Medicaid programs significantly or lose all federal Medicaid money. The federal government funds 50 to 83 percent of the cost of Medicaid, depending on a state’s per capita income. Given that Medicaid spending is so huge—totaling \$389 billion in federal and state spending in 2010—the challenging states argued that the federal promise to withhold all Medicaid funding from states refusing the program expansion was unconstitutionally coercive because states really had no choice but to accept the expansion.

By a 5-4 vote, the Supreme Court’s conservative justices agreed that the individual mandate exceeded Congress’s commerce power and violated the necessary and proper clause. This was an important doctrinal victory for proponents of restraining federal power over the states. By another 5-4 vote, however, the four liberal justices joined Chief Justice John Roberts to uphold the individual mandate, although with Roberts arguing alone that the penalty is a valid exercise of Congress’s taxation power. The net result of Roberts’ tax argument was to expand federal power because Congress’ tax power is deemed to be broader and less hindered by judicial restraints than is Congress’ commerce power. Overall, 46 percent of Americans agreed with this decision and 46 percent disagreed—79 percent of Democrats agreed, while only 13 percent of Republicans agreed with the decision.<sup>21</sup>

By ruling the individual mandate a tax, the court may have exposed the mandate tax to challenge for violating the Constitution's uniformity clause (Art. 1, Sec. 8, Cl. 1). This provision was intended, in part, to prevent any group of states from shifting federal tax burdens to other states. Given that low-income people above the poverty line can fulfill the ACA mandate by enrolling in Medicaid, while comparable people in states without expanded Medicaid will be subject to the tax penalty, the tax levy will not be geographically uniform.<sup>22</sup>

On Medicaid, Roberts joined his four conservative and two liberal colleagues to rule the Medicaid expansion was unconstitutionally coercive. The financial "inducement" offered by Congress for state Medicaid expansion was "a gun to the head," the majority opined. This is the first time the court has ever held a condition of federal aid to be unconstitutional. The last prominent case of this nature was decided in 1987, when the court upheld a condition attached to federal highway aid depriving states of 5 percent of their federal highway funds if they failed to increase to 21 the legal age for purchasing alcoholic beverages.<sup>23</sup> In the ACA case, the Supreme Court argued that the "threatened loss of over 10 percent of a State's overall budget" amounts to "economic dragooning that leaves the States with no real option but to acquiesce" to the federal will. The court also held the Medicaid expansion was "a shift in kind, not merely degree" in the nature of the Medicaid program, thus making it something quite different from what the states had signed up for when the program was created in 1965.

The Supreme Court seemed to suggest that successful future challenges to aid conditions will depend on whether:

- States will lose existing funds rather than future funds;
- The grant program is large;
- The aid conditions alter a program so significantly as to make it a new program; and
- The aid conditions threaten to terminate or alter other programs.

Although this ruling is historic, it is unlikely to be significant because no other federal aid program is as large as Medicaid. Congressional threats to conditionally withhold funds in the country's more than 1,000 other grants-in-aid will, with the possible exception of highway aid, not alarm the Supreme Court. Congress, moreover, likely will not

again threaten states with the loss of 100 percent of their existing program funds for failure to comply with a condition of the aid. The ACA marked the first time Congress had enacted such a draconian aid condition. Congress probably will be careful, too, to frame future conditions of aid as changes in degree, not kind, to a program.

### Health Insurance Exchanges

The ACA asks states to set up insurance exchanges to permit the purchase of qualified health plans by low-income households through Medicaid and federal tax credits for insurance premiums. States were supposed to decide by Oct. 1, 2012, on whether to set up an exchange, but the U.S. Department of Health and Human Services extended the deadline four times.

Whether to create an exchange is a dilemma. If a state declines to establish its own exchange, the federal government will enter the state and set up an exchange, thus increasing its control of the state's insurance market. If a state creates an exchange, it furthers its role as an administrative arm of the federal government because it must adhere to detailed federal rules. States have some, but not much, flexibility.

As of early May, 16 states said they would establish a state-based health insurance exchange, seven would cooperate with the federal government on a partnership exchange, and 27 would default to a federally operated exchange.<sup>24</sup> Governors of the latter states expressed various objections to the exchanges, including the ACA's requirement to tax businesses that do not offer health insurance. The White House is trying to convince all states to adopt an exchange, or at least a partnership exchange that could evolve into a state exchange, partly by suggesting that early adopters will have more flexibility and that federal financial assistance might dry up for late adopters. The sequester already has cut \$66 million in funding for states to set up exchanges. States also are experiencing considerable pressure to adopt exchanges from in-state insurance companies, corporate interests and advocates for low-income people.

The Affordable Care Act also allows private insurers to contract with the federal government to offer nationwide insurance policies for individuals and small businesses. Many state officials fear these plans will enable the federal government to supersede state authority to regulate intrastate insurance products and also offer less consumer protection than is provided by many states.

### Medicaid Expansion

Under the ACA, the federal government will pay 100 percent of the cost of new Medicaid enrollees until 2016, dropping to 90 percent by 2020 and afterward. Expansion is up to 138 percent of the federal poverty level—about \$30,657 for a family of four—and could cover about 18 million more people if implemented by all the states. As of early May, 20 states were expected to expand Medicaid while another four were leaning toward expansion. Of these 24 states, 17 had a Democratic governor and 16 had a Democratic legislature. Fifteen states were expected not to expand Medicaid while another 11 were leaning against expansion. Of these 26 states, 24 had a Republican governor and 23 had a Republican legislature.

Many state officials are concerned about whether the generous federal funding will continue for perpetuity, whether states will be given more flexibility to manage Medicaid, whether hospitals will be compensated at low rates for caring for more patients, and whether there will be enough physicians to treat more Medicaid patients. Some governors also fear the woodworking effect, where Medicaid expansion will attract not only the newly eligible, but also people long qualified for Medicaid but never enrolled. The Obama administration has rejected partial Medicaid expansion and made it difficult for states to get Medicaid waivers.

As part of a deficit-reduction plan, the president proposed in 2011 to cut Medicaid by \$100 billion over 10 years and to alter the matching rate so as to reduce the federal contribution. The ACA already is slated to cut Disproportionate Share Hospital payments—which are additional payments going to facilities that treat a large number of uninsured people—by 75 percent in the 2014 fiscal year. It is likely that any federal deficit-reduction legislation will diminish the federal contribution to Medicaid.

In some states, such as New Jersey, the governor elected to participate in the Medicaid expansion but not in a health insurance exchange. In an effort to convince more Republican governors to adopt expansion, President Obama announced that states can reverse their expansion decision at any time and also restrain Medicaid costs by reducing payments to certain health care providers. The president warned, though, that states might lose federal money if they delay expansion.

As of early April 2013, eight Republican governors had accepted Medicaid expansion rather than pass up the federal money. Republican governors, in particular, though, have insisted on a right to

withdraw from the Medicaid expansion if federal funding drops below 90 percent. One dramatic turnaround was Republican Gov. Rick Scott of Florida, who declared in late 2012 that his state would not expand Medicaid. With federal funds covering the cost, Scott said in early 2013, “I cannot in good conscience deny Floridians that need it access to health care.”<sup>25</sup> “We will support a three-year expansion of ... Medicaid ... as long as the federal government keeps their commitment to pay 100 percent of the cost during that time.”<sup>26</sup> However, the Florida legislature rejected the expansion, and the state Senate suggested taking the federal money in order to purchase private health insurance for low-income people. The U.S. Department of Health and Human Services has tentatively approved such a plan in Arkansas.

Governors are being pressured by hospitals and many businesses to expand Medicaid partly because without expansion, businesses will shoulder a larger share of the costs of insuring low-income workers. Hospitals argue that expanded Medicaid coverage will reduce the number of unpaid services for the poor that ultimately must be covered by taxpayers.

### The Arizona Immigration Case

The other important 2012 federalism case challenged the constitutionality of four of the 10 sections of Arizona’s Support Our Law Enforcement and Safe Neighborhoods Act of 2010.<sup>27</sup> This law was intended to “discourage and deter the unlawful entry and presence of aliens and economic activity by” illegal immigrants. Arizona has experienced the most illegal crossings along the U.S.-Mexico border. Its illegal immigrant population increased fivefold from 1990 to 2010, reaching some 460,000 people and constituting about 7.1 percent of the state’s population. The total number of illegal immigrants in the United States is about 11.5 million. Illegal immigration also is a highly partisan issue because most illegal immigrants are Hispanic, and Hispanic citizens vote for Democrats much more than Republicans.

The four provisions made it a state misdemeanor crime for an immigrant to fail to register with the federal government and to carry proof of status; imposed a misdemeanor criminal sanction on any illegal immigrant seeking or engaging in work in Arizona; authorized state law enforcement personnel to arrest a person without a warrant if the officer had probable cause to believe the person committed an offense that made him or her deportable; and required any state law enforcement offi-

cer who stopped, detained or arrested someone to make every effort to verify the person's immigration status with the federal government if there was reasonable suspicion that the person was illegal.

In a 5-3 ruling in which conservative justices Anthony Kennedy and John Roberts joined the majority, the Supreme Court ruled federal law pre-empted the first three provisions of Arizona's statute under the Constitution's supremacy clause, letting stand only the fourth provision of Arizona's law regarding verification of immigration status. Although the U.S. Constitution provides only that Congress can "establish a uniform rule of naturalization," Congress and the court defined this power very broadly during the 20th century, making the federal government virtually pre-eminent over immigration.

The Supreme Court's majority rested the federal government's immigration authority not only on the naturalization clause, but also on its "inherent power as sovereign to control and conduct relations with foreign nations." "Immigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation," the majority wrote. "It is fundamental that foreign countries concerned about the status, safety, and security of their nationals ... be able to confer ... with one national sovereign, not 50 separate States." Indeed, Mexico filed an *amicus* brief before the court, arguing the Arizona law strained cooperative diplomatic relations between Mexico and the United States, risked violating the rights of Mexican citizens and interfered with principles of international law.

Although the court's majority acknowledged that "both the National and State Governments have elements of sovereignty," it held that national sovereignty prevails over state sovereignty in immigration. The majority, therefore, upheld only the Arizona law's immigration-status verification provision because it fits a cooperative federalism scheme in which Congress already requires federal officials to respond quickly to any request made by a state to verify a person's immigration or citizenship status. The court cautioned this provision could be subject to future constitutional challenge if Arizona officials detain individuals only to verify their status or they apply the provision in a discriminatory way, such as by racial profiling.

The conservative dissenters argued the court deprived states of "the defining characteristic of sovereignty: the power to exclude from the sovereign's territory people who have no right to be there." They also dismissed the majority's foreign

policy rationale. "Even in its international relations," Justice Antonin Scalia wrote, "the Federal Government must live with the inconvenient fact that it is a Union of independent States, who have their own sovereign powers." Justice Samuel Alito worried that under the court's logic, "States would occupy tiny islands in a sea of federal power."

The Supreme Court's ruling squashed similar immigration laws enacted by several other states, such as Alabama, but given that 44 states and Puerto Rico enacted 156 laws and adopted 111 resolutions on immigration in 2012—down from 306 laws and resolutions in 2011—states will continue to legislate on immigration and, in some cases, test the Supreme Court's limits. Most of this state legislation is not constitutionally infirm because it deals with housekeeping matters such as driver's licenses, social welfare benefits, housing and education for illegal immigrants, especially their children. Most state legislation is not punitive. Furthermore, many state and local law enforcement officers opposed Arizona's law because they believe punitive legislation inhibits cooperation with illegal immigrant communities to solve crimes and reduce criminal activity. The court's decision, therefore, could foster more cooperative federalism with respect to immigration.

A federal appeals court in 2013 struck down a section of Arizona's immigration law that penalized day laborers on street corners and their prospective employers for obstructing traffic. California's attorney general issued a directive to state and local officials that they are not required by the federal Secure Communities program to comply with federal requests to detain suspected illegal immigrants arrested for low-level offenses. As a result, several major counties, such as Los Angeles and San Francisco, do not comply with requests. President Obama also is ratcheting down the 287(g) program that enlisted local police and county sheriffs to identify illegal immigrants, in part because civil rights groups have criticized the program.

### Voting Rights

A major state-federal issue before the Supreme Court in 2013 is Section 5 of the Voting Rights Act of 1965. The section's pre-clearance rules require covered jurisdictions—i.e., all or parts of 16 states<sup>28</sup>—to persuade the U.S. Department of Justice or U.S. District Court for the District of Columbia that proposed changes to "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" do not violate

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or diminish anyone's voting rights. Such changes include imposing voter ID requirements, changing voting hours, closing or moving polling places, redistricting for state or local elections, merging local governments or switching to nonpartisan elections. Proposed changes are blocked until approved by the Justice Department or the D.C. court. Hence, the burden of proof is on the covered jurisdiction. Alabama, the plaintiff, argues that Section 5, which was intended to be temporary, has outlived its usefulness because racial discrimination is now "scattered and limited" and because Section 5's benchmarks for discrimination date back to 1964.

### Same-Sex Marriage

Two same-sex marriage cases before the Supreme Court raise important federalism issues. One case challenges the U.S. Defense of Marriage Act—DOMA—of 1996, arguing that DOMA violates the 10th Amendment by discriminating against married same-sex couples in the nine states where same-sex marriage is legal.<sup>29</sup> The case involves a New York woman who owes \$363,000 in federal estate taxes because her same-sex wife died, a tax that would not be levied if her deceased spouse were a man. The federal government, she argues, should defer to each state's definition of marriage. Obama is not defending DOMA, and most lower federal courts have been hostile to it.

In February 2013, Obama urged the court to strike down California's 2008 voter initiative Proposition 8, which bans same-sex marriage, although he did not ask the court to void such bans nationwide.<sup>30</sup> Instead, he urged the court to focus "on the particular circumstances presented by California law and the recognition it gives to same-sex relationships." Domestic partnership laws available in California and seven other states, the president's *amicus* brief opined, violate the equal protection of the laws clause of the 14th Amendment. The president's intervention in this case was unusual because, during the 2012 presidential campaign, he said states should decide on same-sex marriage. Historically, the federal government expressed no view in the *Loving v. Virginia* case in 1967, which struck down bans on interracial marriage, and in the *Lawrence v. Texas* case in 2003, which voided all state anti-sodomy laws.

The more fundamental federalism question in the California case is the extent to which the federal government can quash the will of a state's voters. In the DOMA case, U.S. District Court Judge Barbara Jones opined that DOMA "does not square with

our federalist system of government, which places matters at the 'core' of the domestic relations law exclusively within the province of the states." Several state attorneys general likewise argued that DOMA "significantly intrude(s) on core state powers." If the Supreme Court strikes down DOMA on this ground, then how can it not uphold California's Proposition 8? Federal courts, however, have frequently struck down voter-approved statutes and state constitutional amendments. In November 2012, for example, a federal appeals court, by an 8-7 vote, struck down Michigan's constitutional ban on affirmative action, which was approved by 58 percent of voters in 2006.

State legalization of same-sex marriage is likely to accelerate because, nationwide, slightly more than half of Americans now support same-sex marriage. In the California case, a group of prominent Republicans and almost 300 corporations endorsed same-sex marriage. These developments illustrate how national political forces influence state-federal relations.

### Presidential Intergovernmental Policy

Presidential consultation with state and local officials diminished over the president's first term, and Obama asserted federal power over states in many areas, such as civil rights, energy, environmental protection, housing, policing and voting regulation, especially voter ID laws. The U.S. Department of Justice struck down several state voter ID laws under the Voting Rights Act. It also pressured St. Paul, Minn., to withdraw a lending discrimination case, *Magner v. Gallagher*, from the Supreme Court in exchange for not pressing a False Claims Act lawsuit against the city. The Department of Justice feared the court might void disparate-impact enforcement under the U.S. Fair Housing Act of 1968.

In 2012, the Federal Transit Administration began issuing safety standards for subway and light rail systems, thus expanding federal power over local mass transit. In January 2013, the federal government joined a lawsuit filed by the National Collegiate Athletic Association and other sports organizations to block New Jersey's effort to legalize sports wagering in Atlantic City casinos and the state's four horseracing tracks. The administration also has penalized states for violating the Higher Education Act of 2008, which requires states to spend at least as much on higher education each year as their average spending during the previous five years.

The president has offered occasional flexibility, however, as in providing waivers allowing states to

avoid tough penalties for not meeting goals set by the No Child Left Behind Act of 2001, such as having 100 percent of their students proficient in math and reading by 2014. Obama also provided controversial welfare waivers in 2012, loosening federal work requirements for Temporary Aid to Needy Families participants. Because only 16 states fully comply with REAL ID, for the fourth time since the law was enacted in 2005, the U.S. Department of Homeland Security extended the compliance deadline, this time to July 2013.

Absent congressional action, Obama has used executive power assertively, as in the case of Congress's failure to renew the Elementary and Secondary Education Act in 2011 and 2012. On such grounds, the administration waived some No Child Left Behind requirements and also offered \$4.35 billion in Race to the Top grants conditioned partly on states adopting the national common core state standards.

Presidential waivers of federal law, however, raise difficult questions of federalism and augmentation of the imperial presidency. Congress, no matter how ineffective, is the representative lawmaking branch of government. However much state and local officials like waivers, such exercises of executive power risk long-term dilution of the rule of law. The centralization of public education also might be counterproductive, and state and local officials might consider that Canada and Switzerland, two federal allies, have very localized education systems that generate better outcomes than the centralizing U.S. system.

Finally, the debate over drone killings that occurred in early 2013 highlighted the importance of domestic terrorism policymaking and the need to strengthen intergovernmental cooperation not only to prevent terrorism, but also to protect civil liberties. Unfortunately, fusion centers, previously held up as a model of intergovernmental cooperation, were lambasted by a U.S. Senate investigation in 2012, which concluded the centers "forward intelligence of uneven quality—oftentimes shoddy, rarely timely, sometimes endangering citizens' civil liberties, ... occasionally taken from already published sources, and more often than not unrelated to terrorism."<sup>31</sup>

## Conclusion

Escalating party polarization defines intergovernmental relations in ways that often favor conflict over cooperation. In part, this conflict also is a reaction to coercive federalism, whereby state and local

governments try to counteract expansive federal powers, even to the point of resurrecting notions of nullification and interposition. The dysfunctions of contemporary governance, however, are not due to dysfunctional federalism but to a dysfunctional party system that cannot produce the bipartisanship and cooperative federalism of yore.<sup>32</sup>

## Notes

<sup>1</sup> John R. Wright, "Unemployment and the Democratic Electoral Advantage," *American Political Science Review* 106 (November 2012): 699.

<sup>2</sup> David B. Rivkin Jr. and Elizabeth Price Foley, "Plenty of Debates, Not Much About States," *Wall Street Journal*, October 24, 2012, p. A15.

<sup>3</sup> See John Kincaid, "The Rise of Social Welfare and Onward March of Coercive Federalism," *Networked Governance: The Future of Intergovernmental Management*, eds., Jack W. Meek and Kurt Thurmaier (Los Angeles: Sage/CQ Press, 2011), pp. 8–38.

<sup>4</sup> Jeffrey M. Jones, "In U.S., Trust in State, Local Governments Up," *Gallup Politics*, September 26, 2012.

<sup>5</sup> Ron Paul, "You're Not Free If You Can't Secede," November 19, 2012, at <http://www.ronpaul.com/2012-11-18/ron-paul-youre-not-free-if-you-cant-secede-from-an-oppressive-government/>.

<sup>6</sup> The phrase "perpetual union" appears in the Articles of Confederation of 1781, though not the U.S. Constitution.

<sup>7</sup> KTBC, Fox 7, <http://www.myfoxaustin.com/story/20664254/mclennan-co-sheriff-will-not-enforce-new-federal-gun-ammo-laws>, January 23, 2013.

<sup>8</sup> However, among the 1,200 cities worldwide that belong to the International Council for Local Environmental Initiatives (ICLEI), which seeks to implement Agenda 21, more than 528 are U.S. cities.

<sup>9</sup> John Ingold, Tim Hoover, and Kirk Mitchell, "Hickenlooper reaching out to feds on Colorado marijuana legalization," *Denver Post*, November 8, 2012, p. 1.

<sup>10</sup> See also Charlie Savage, "Administration Weighs Legal Action Against States That Legalized Marijuana," *New York Times*, December 7, 2012, p. A20.

<sup>11</sup> Kevin Robillard, "Pew poll first: Most say legalize marijuana," *Politico*, April 4, 2013.

<sup>12</sup> Guttmacher Institute, "2012 Saw Second-Highest Number of Abortion Restrictions Ever," January 2, 2013 News Release.

<sup>13</sup> Karl Rhodes, "Revenue Breakdown," *Region Focus* 16:4 (Fourth Quarter 2012): 20.

<sup>14</sup> Michael Cooper, "States Want To Have Say During Talks Over Budget," *New York Times*, November 25, 2012, pp. 22, 24.

<sup>15</sup> Quoted in Robert Pear, "As Governors Meet, White House Details Drop in Aid to States," *New York Times*, February 25, 2013, p. A10.

<sup>16</sup> Quoted in Robert Pear, "As Cuts Loom, Governors Call for Discretion on How Federal Money Can Be Spent," *New York Times*, February 24, 2013, p. 18.

<sup>17</sup> <http://www.statebudgetcrisis.org/wpcms/report-1/>.

## STATE-FEDERAL RELATIONS

<sup>18</sup> U.S. Advisory Commission on Intergovernmental Relations, *Federally Induced Costs Affecting State and Local Governments*, M-193 (Washington, DC: ACIR, September 1994).

<sup>19</sup> Donald Bruce, William E. Fox, and LeAnn Luna, "State and Local Sales Tax Revenue Losses from E-Commerce," *State Tax Notes*, May 18, 2009, p. 537.

<sup>20</sup> *National Federation of Independent Business v. Sebelius*, 567 U.S. \_\_\_\_ (2012).

<sup>21</sup> Lydia Saad, "Americans Issue Split Decision on Healthcare Ruling," Gallup, 2012 at <http://www.gallup.com/poll/155447/Americans-Issue-Split-Decision-Healthcare-Ruling.aspx>.

<sup>22</sup> David B. Rivkin, Jr. and Lee A. Casey, "The Opening for a Fresh ObamaCare Challenge," *Wall Street Journal*, December 6, 2012, p. A17.

<sup>23</sup> *South Dakota v. Dole*, 483 U.S. 203 (1987).

<sup>24</sup> Kaiser Family, [http://statehealthfacts.kff.org/compare\\_mappable.jsp?ind=962&cat=17](http://statehealthfacts.kff.org/compare_mappable.jsp?ind=962&cat=17).

<sup>25</sup> Quoted in Dana Milbank, "Obamacare swaying GOP governors," *Express-Times* (Easton), February 24, 2013, p. A6.

<sup>26</sup> Quoted in Lizette Alvarez, "In Reversal, Florida Says It Will Expand Medicaid," *New York Times*, February 21, 2013, p. A13.

<sup>27</sup> *Arizona v. United States*, 567 U.S. \_\_\_\_ (2012).

<sup>28</sup> Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, and Texas and most of Virginia, four California counties, five Florida counties, two townships in Michigan, ten New Hampshire towns, three counties in New York, 40 North Carolina counties, and two South Dakota counties.

<sup>29</sup> The case is *United States v. Windsor*, No. 12-307.

<sup>30</sup> The case is *Hollingsworth v. Perry*, No. 12-144.

<sup>31</sup> Quoted in James Risen, "Criticism Of Centers In Fight On Terror," *New York Times*, October 3, 2012, p. A17.

<sup>32</sup> See also John Kincaid, "State-Federal Relations: Civil War Redux?" *The Book of the States* (Lexington, KY: The Council of State Governments, 2011), pp. 21–28, and John Kincaid, "State-Federal Relations: Revolt Against Coercive Federalism?" *The Book of the States* (Lexington, KY: The Council of State Governments, 2012), pp. 39–50.

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