

State-Federal Relations: Cooperative Coercion

By John Kincaid

Coercive federalism continues, although “cooperative coercion” seems to characterize the current situation with President Barack Obama and Congress because of a significant increase in federal aid to state and local governments, improvements in intergovernmental communication, and movement away from total pre-emption of certain state powers. Nevertheless, federal officials continue to insist that state and local governments adhere to federal policy priorities.

Volatility marked 2009 and the onset of 2010. The recession, which started in December 2007, as well as heightened federal spending drenched the federal budget, most state budgets and many local budgets with red ink and drove many voters into revolt. Many Americans believed, too, that the federal government cared more about Wall Street than Main Street. President Barack Obama achieved passage of a \$787.2 billion stimulus—the American Recovery and Reinvestment Act—in February 2009, pledging to keep unemployment below 8 percent, but his priorities thereafter seemed to be health care, global warming and education more than economic recovery. As unemployment reached 10.2 percent by the fall, the president’s approval ratings sagged, in part because he also could not satisfy some of the demands of his electoral base—such as closing the Guantanamo Bay prison (due in part to state resistance to receiving 250 detainees suspected of terrorism),¹ de-escalating the war in Afghanistan, ending the military’s “Don’t Ask, Don’t Tell” policy, re-negotiating the North American Free Trade Agreement, and obtaining congressional representation for Washington, D.C.

Then the GOP won the November gubernatorial elections in New Jersey and Virginia despite Obama’s campaigning for the Democratic candidates. The president played an aggressive role in state races,² including trying to convince New York’s Democratic governor, David A. Paterson, not to seek re-election. Then, in January 2010, a Republican who campaigned against the health care plan backed by the president and congressional Democrats won the U.S. Senate seat from Massachusetts that had been held for 47 years by Edward M. Kennedy, a chief Democratic champion of health care reform. The Democrats’ Senate majority dropped to 59, and health care reform came to a halt until Democrats used the

reconciliation process to pass their health plan two months later. Brown’s election, especially, was a stunning reversal for a president inaugurated a year earlier with an apparent mandate for change after having won 52.9 percent of the popular vote and 67.8 percent of the electoral vote.

It initially appeared that the president and the large Democratic majority in Congress would institute cooperative changes in intergovernmental relations. “As a former state legislator, I know,” Obama said, “how important it is to have a strong partner in Washington ... I am committed to being that kind of partner.”³ Democrats, moreover, are ideologically friendlier than Republicans to federal aid to states and localities, and the Recovery Act reflected that preference. Obama met with governors before his inauguration and appointed Valerie Jarrett as senior adviser and assistant to the president for intergovernmental affairs and public engagement. Many state and local officials applauded the selection of Jarrett, a powerful member of the administration⁴ and long-time aide from Chicago. In another nod to intergovernmental relations, the president created a White House Office of Urban Affairs and appointed Adolfo Carrion Jr., a former Bronx borough president, to direct it. Obama met with about 80 mayors in February, 2009—the first time a large mayoral delegation had met with a president since Bill Clinton. Cities also weren’t forgotten in the Recovery Act, which includes about \$20 billion for urban programs. At the same time, in order to take advantage of this seemingly more favorable environment in Washington, DC, state and local governments stepped up their lobbying in 2009 in order to garner more dollars and also fend off mandates that might be added to spending programs for states and localities.⁵

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Throughout 2009, however, the administration and Congress moved more toward continuity⁶ than discontinuity with coercive federalism trends that have prevailed since the late 1960s.⁷ They increased federal aid to state and local governments but also used conditions of aid to advance federal objectives. Federal officials continued to rely on categorical grants with no new emphasis on block grants. Democrats reversed President George W. Bush's push for extensive federal pre-emption of state powers, but retained pre-emption preferences in some key policy fields. The president has improved intergovernmental communication, but that communication aimed to obtain cooperative state and local implementation of federal priorities. Meanwhile, the Supreme Court remains a lukewarm friend of the states with no consistent philosophy of federalism.

Red-Ink Federalism

Rising federal spending and state-local budget cuts, along with increasing federal, state and local debts and deficits headlined 2009. Federal spending approached \$3.9 trillion in the 2009 fiscal year, twice the amount spent in the 2001 fiscal year; the president's 2011 fiscal year budget proposed to spend \$3.6 trillion. The public debt rose from \$5.8 trillion, 41 percent of GDP, to \$7.6 trillion, or 53 percent of GDP, in 2009. Debt could grow to 85 percent of GDP by 2018 and exceed 100 percent by 2022,⁸ crushing the U.S. economy.

Altogether, states faced a budget shortfall of about \$256 billion from the 2009 fiscal year through the 2011 fiscal year. States' general fund spending dropped 3.4 percent in 2009 compared to the 2008 fiscal year, and spending was expected to fall another 5.4 percent in the 2010 fiscal year—the largest declines since 1979 when the National Governors Association and National Association of State Budget Officers began tracking for their joint publication, the *Fiscal Survey of the States*.⁹ States closed a cumulative budget gap of \$145.9 billion at the start of their 2010 fiscal year budgets. This was on top of the gaps they closed in the 2009 fiscal year and, for many, gaps they closed in the 2008 fiscal year. By mid-2010, however, at least 41 states faced budget shortfalls of about \$35 billion requiring mid-year adjustments. State budget gaps for the 2011 and 2012 fiscal years could equal \$350 billion, while the Recovery Act includes only about \$140 billion for state relief.¹⁰

At the same time, many local governments, facing their own recessionary budget constraints, are experiencing reductions in state aid.¹¹ The U.S. Conference of Mayors charged that the states were shortchanging cities in their distribution of federal stimulus funds. Mayors urged Congress and the president to send more federal funds directly to cities.¹² These fiscal pressures have generated considerable political conflict within states as elected officials struggle to balance budgets. More than half the states could not enact their 2010 fiscal year budgets until the last minute, and four states—Arizona, California, Illinois and Pennsylvania—had no budget at the beginning of the fiscal year, while Connecticut, North Carolina and Ohio had passed only temporary budget extensions.

Most states have experienced increases in welfare caseloads for the first time since welfare reform in 1996 established the Temporary Assistance for Needy Families program.¹³ The number of food stamp recipients has increased in all states, and Medicaid enrollment also has expanded, adding more pressure to state budgets. At the same time, state and local governments face long-term unfunded liabilities for health and pension benefits for public employees.

California experienced the most publicized fiscal crisis. In May 2009, voters rejected five ballot propositions to solve the state's budget crisis, but approved a measure denying pay raises to the governor and legislators when the state's budget is in deficit. Gov. Arnold Schwarzenegger asked the federal government for \$6.9 billion in budget aid,¹⁴ but received a cool reception. The Obama administration advised the state to "make some very difficult choices." Critics charged that California had created its own budget problems and that bailing out the Golden State would compel bailouts of other states, encourage states to expect federal bailouts when they get in trouble, subsidize fiscally irresponsible states, and punish taxpayers in fiscally responsible states.¹⁵ California's defenders argued that the state subsidizes the rest of the country because it gets only about 80 cents back for every tax dollar its residents send to Washington, D.C., and that the state has been comparatively fiscally responsible. If California had the same deficit relative to its GDP as the federal government, it would have had a \$230 billion, not \$24.3 billion, shortfall at the start of the 2010 fiscal year.¹⁶ More generally, proponents of more federal aid to state and local governments argue

that such aid will reduce state and local spending cuts and tax increases that thwart federal stimulus policies and retard economic recovery.¹⁷

Federal Grants-in-Aid

Federal aid increased by 16.6 percent in actual dollars from the 2008 fiscal year to the 2009 fiscal year and is expected to increase by another 21.5 percent in the 2010 fiscal year, when aid will be about \$653.7 billion, for a two-year increase of 41.7 percent. Thereafter, federal aid is expected to decrease in the 2011 and 2012 fiscal years, followed by a slight increase in 2013. During the first quarter of 2009, federal aid became, for the first time in U.S. history, the single largest source of state and local revenue. Congressional earmarking continued as usual, however. Earmarked projects dropped from 11,610 in the 2008 fiscal year to 10,160 in the 2009 fiscal year, but earmarked funding increased from \$17.2 billion to \$19.6 billion.¹⁸

Children's Health Insurance Program

President Obama's first major congressional victory was reauthorization of the Children's Health Insurance Program—now known as CHIP—at \$31.5 billion over four-and-a-half years. The act increases CHIP beneficiaries from about 11 million to 15 million by increasing eligibility to include families with annual incomes up to 300 percent of the federal poverty level—\$63,600 for a family of four. The act also eliminates the five-year residency requirement for legal immigrants, thus allowing legal immigrants to qualify upon arrival in the U.S. These expansions are to be covered by a 61 cent federal tax increase on a carton of cigarettes. States can insure children in families earning more than the federal cutoff, but the federal contribution will be reduced accordingly. Some states cover some adults, including pregnant women, but the reauthorization ended federal support for childless adults as of the 2010 fiscal year.

American Recovery and Reinvestment Act

The president's biggest legislative accomplishment was the \$787.2 billion (now estimated at \$862 billion) 1,100-page Recovery Act, which provides about \$250 billion to state and local governments for specific functions; about \$130 billion of that money was targeted for immediate fiscal relief, primarily for Medicaid and education. Most of the money is to be spent over three

federal fiscal years: \$47.4 billion in 2009, \$96.9 billion in 2010, and \$50.6 billion in 2011, although total spending, including about \$212 billion in tax cuts, is spread over 11 years.

Rather than establish a separate Recovery Act bureaucracy, the Office of Management and Budget is coordinating with 15 federal implementing agencies overseeing 215 funding lines and 86 existing grant programs. Most Recovery Act funds, therefore, are being distributed through existing formulas for federal aid programs, which usually require state and local matches. But these formulas do not always reflect current economic realities; consequently, states and localities hit hardest by the recession are not necessarily getting the most stimulus money.

A leading criticism is that the Recovery Act failed to create many jobs and prevent unemployment from exceeding 8 percent. Aside from the longstanding debate about whether spending hikes or tax cuts are the best response to recession, the Recovery Act contained many provisions associated with coercive federalism that weakened its impact. For one, health, education and welfare spending for individuals outpaced other stimulus spending in 2009. This pattern is consistent with the shift of federal aid from places to persons under coercive federalism. This spending preserved some jobs in health, education and welfare and cushioned the recession's blows for many people, but it weakened the Recovery Act's impact on unemployment.

Stimulus funds also were delayed by federal regulatory conditions and administrative hurdles associated with coercive federalism, such as the Recovery Act's Buy American rules, which pre-empted many state and local procurement rules, maintenance-of-effort rules in about 15 of the major programs, rules forbidding reductions of Medicaid benefits below levels in effect on July 1, 2008, expanded Davis-Bacon (prevailing wage) requirements, historic preservation standards, and rules prohibiting federal money from substituting for state money. The Recovery Act also includes general language about states and localities not spending money on "imprudent" projects, and Obama warned that if state and local officials wasted stimulus money, he would "call them out." Thus, the Recovery Act required states to take many large spending programs off the cutting table and to increase or maintain spending despite plummeting tax revenues.

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The Recovery Act established unprecedented oversight and accountability mechanisms for state and local governments; the Office of Management and Budget promulgated specific guidance rules establishing detailed procedural requirements and review procedures for Recovery Act funding; and Vice President Joe Biden and his special Recovery Cabinet act as a sheriff policing state and local uses of Recovery Act funds.

Some governors and legislators balked at accepting funds that might commit states to long-term spending increases. For example, the Recovery Act provides up to \$7 billion to extend unemployment benefits to people who lost low-wage, part-time and seasonal jobs. A few states, such as Alabama and Mississippi, declined to accept the funds because the Recovery Act requires states to modernize their unemployment laws to make more people eligible for benefits. Many governors objected to provisions requiring a \$25 per week increase in benefits that states could be politically compelled to pay for after stimulus funding is exhausted.

A notable success, though, has been the Recovery Act's taxable Build America Bonds by which the federal government subsidizes the interest payments that local governments make to investors, increasing their yield by 35 percent. About \$64 billion in Build America Bonds were issued in 45 states in 2009.

Generally, the Recovery Act's outcomes are consistent with analyses of previous federal efforts to assist states during recessions, which suggest that such programs are less than optimal because they are not usually well-timed, adequately triggered and effectively targeted.¹⁹

The Recovery Act also generated constitutional controversies involving state-federal relations and the separation of powers when Republican South Carolina Gov. Mark Sanford refused to accept \$700 million for education.²⁰ Congress enacted a Recovery Act amendment introduced by South Carolina Rep. Jim Clyburn, a Democrat, in response to Sanford's threat that authorizes a state legislature to override its governor by adopting a concurrent resolution. This provision intrudes upon state constitutional budget procedures. Furthermore, while Congress enacts concurrent resolutions that do not require the president's signature, many states do not have concurrent resolutions, and Nebraska's unicameral legislature has no concurrent procedures.

The South Carolina legislature included the stimulus money in the state's budget and overrode the governor's budget veto. Pursuant to Clyburn's amendment, the legislature also approved a concurrent resolution accepting the money and enacted a law specifying how the funds would be spent. Sanford filed suit in federal court arguing that the Recovery Act authorized only governors to apply for the money. He contended that legislative usurpation of this power vested in the governor by the Recovery Act violated the supremacy clause of the U.S. Constitution as well as the separation of powers mandated by the state's constitution. The Obama administration criticized the governor for refusing the funds but supported his lawsuit. In June, however, Sanford requested the federal funds after the state supreme court, in response to lawsuits filed by a student and school administrators, ordered the governor to comply with the legislature's budget law.

The Recovery Act also is problematic because the provision establishing the State Fiscal Stabilization Fund, which provides \$53.6 billion for education and other government functions, says, "The governor shall use..." That phrase contradicts state constitutional rules on spending money.

Interstate disputes arose as well under the Recovery Act when some states were accused of using stimulus money to lure businesses from other states.

Other Issues

While Congress authorized some federal aid, it failed to reauthorize No Child Left Behind and surface transportation. That inaction was somewhat offset by the Recovery Act's funding for education and transportation. Nearly 22 percent of the Recovery Act's funds are devoted to infrastructure, with an emphasis on "shovel-ready" projects, but piecemeal extensions of transportation funding mean states cannot plan for the long term and Congress continues to avoid reform of infrastructure financing.²¹

Cities and states are also concerned about what the 2010 census will bring. The decennial population count will affect not only representation in the U.S. House of Representatives, but also federal aid. The 10 largest federal-aid programs, such as Medicaid, use census data in their formulas. In the 2009 fiscal year, these programs accounted for 84 percent, or \$478.3 billion, of all federal aid.²²

Mandates and Other Regulation

Although the Unfunded Mandates Reform Act of 1995 reduced unfunded mandates, states have complained vigorously about *de facto* under-funded mandates in federal programs. From 2002 to 2008, moreover, the federal government promulgated an average of 527 rules per year regulating state governments and 343 regulating local governments.²³

In 2009, most governors expressed concern about congressional health care proposals to expand Medicaid to cover about 11 million more people.²⁴ The Recovery Act provided an \$87 billion increase in support for Medicaid, which states used to cover more beneficiaries, preserve eligibility criteria, maintain current services, and prevent payment cuts to hospitals and physicians. These funds will not be available after December 2010. But Medicaid enrollment grew by 5.4 percent in the 2009 fiscal year, the highest rate in six years, and it might grow by 6.6 percent in the 2010 fiscal year. Medicaid spending increased by 7.9 percent in the 2009 fiscal year, the highest in five years.²⁵ Although reform proposals called for the federal government to pay most of the additional costs for several years, states were concerned about their long-term costs thereafter.

Congressional deals struck to advance reform soured interstate relations. Proposals called for the federal government to pay all additional Medicaid costs for Nevada, Michigan, Oregon, and Rhode Island for five years. Florida and Louisiana received favorable treatment, and then, Sen. Ben Nelson, a Democrat, struck a deal for the federal government to pay 100 percent of the costs of Medicaid expansion in Nebraska forever. That provision was eventually removed from the proposal. States also split because more than 20 states that have already expanded Medicaid coverage would receive less federal aid for Medicaid than states that cover fewer people. "We are ... being punished for our own charity," complained Gov. David Paterson of New York.²⁶

Although health care packages supported by the president passed the House and Senate, reform came to a halt for two months, not because of cost-shifting intergovernmental concerns but because of the January 2010 senatorial election in Massachusetts.

Although Congress failed to reauthorize *No Child Left Behind*, President Obama signaled strong support for the *de facto* mandates contained in the law. This is already foreshadowed

in the \$4.3 billion *Race to the Top* Fund, a Recovery Act program that will distribute money during the 2010 fiscal year to states with records of acceptable school reform. Those reforms include linking student achievement data to teacher and principal evaluations, equalizing allocations of strong teachers between high-performing schools and low-performing poor and minority schools, which would require measures of teacher quality, intervening actively to repair or displace failing schools, easing restrictions on charter school creations, adopting internationally benchmarked standards for K–12 education and joining the standards consortium begun by the National Governors Association. Teachers unions have objected and several states have enacted laws limiting the use of student performance data in teacher evaluations.

Race to the Top grants are competitive and consistent with the administrative challenges of coercive federalism. The U.S. Department of Education estimated it would take states applying for the funds 681 hours to complete the grant application.

In a development with potentially widespread local impact, Westchester County, N.Y., reached a settlement with the U.S. Department of Justice and Department of Housing and Urban Development to spend more than \$50 million to acquire or construct 750 homes or apartments, of which 630 must be located in communities where residents are less than 3 percent black and 7 percent Hispanic. The settlement aims to reduce segregation between communities by enabling minorities to move into predominantly white communities. HUD announced that the settlement was a shot across the bow of some 1,225 state and local jurisdictions that receive Community Development Block Grant funds. HUD's Deputy Secretary Ronald Sims said, "We're clearly messaging other jurisdictions across the country that there has been a significant change in (HUD), and we're going to ask them to pursue similar goals."²⁷ He added, "This is historic, because we are going to hold people's feet to the fire."²⁸

For metropolitan areas, the president is emphasizing regionalism, growth limits, compact development and mass transit in part to "coerce people out of their cars."²⁹ The White House Office of Urban Affairs also will coordinate federal programs for metropolitan areas, including some 180 economic development grants and

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loans, about 108 transportation programs and some 44 worker training programs. Similarly, the administration is emphasizing programs that link many services in particular neighborhoods through a Choice Neighborhoods Initiative similar to the Green Impact Zone in Kansas City and also, through the Department of Education, develop cradle-to-college Promise Neighborhoods similar to the Harlem Children's Zone.

In July 2009, the Department of Homeland Security announced that all 66 state and local police agencies involving about 1,000 officers deputized to enforce immigration law under Section 287(g) of the Immigration and Naturalization Act would have to sign a new, uniform memorandum with U.S. Immigration and Customs Enforcement within 90 days. The new federal rules seek to prevent police from arresting people just to find out whether they are in the country illegally. The rules were prompted substantially by reaction against the behavior of Sheriff Joe Arpaio of Maricopa County, Ariz., whose department had identified some 30,000 illegal immigrants in the Phoenix area in recent years. The memorandum binds state and local police to federal civil-rights laws and to U.S. Immigration and Customs Enforcement oversight when they detain illegal immigrants for possible deportation. Homeland Security also said 11 new localities would join the 287(g) program by late 2009.

Cooperative Federal Responses to State Pushbacks

The Adam Walsh Child Protection and Safety Act of 2006 imposes a number of requirements on states, including establishment of a statewide registry of sex offenders that conforms to federal standards and is compatible with a new public National Sex Offender Web site. States that failed to comply by July 2009 risked losing 10 percent of their funding under the 1968 Omnibus Crime Control and Safe Streets Act. As a result of considerable state pressure,³⁰ the U.S. attorney general extended the implementation deadline to July 27, 2010.

Also exemplifying pushback, at the end of 2009, at least 46 of the country's 56 licensing jurisdictions had not met the federal REAL ID Act's "material compliance" deadline, so the U.S. Department of Homeland Security waived the deadline. However, all requirements must be met by May 11, 2011. As of Dec. 31, 2009, both chambers of at least 23 states, plus uni-

cameral Nebraska, had passed anti-REAL ID measures.³¹

Pre-emption

Generally, Democrats oppose total pre-emption of state authority in many matters of social and business regulation such as consumer protection, product liability and environmental protection. The Obama administration supports what some have called progressive federalism, whereby state and local governments forge ahead of the federal government on such things as consumer and environmental protection. The administration also supports states developing policies that can be adopted by the federal government.³²

In February 2009, the administration began reversing a Bush policy by announcing federal officials will no longer pursue dealers of medical marijuana who comply with state laws.³³ Fourteen states permit medical marijuana. This federal withdrawal also heightens the states' role in marijuana regulation.

In May, the president issued a federalism memorandum that restrains pre-emption by executive agencies by prohibiting pre-emption via preambles to regulations, requiring adherence to "legal principles governing pre-emption, including principles outlined in Executive Order 13132," and mandating agency reviews of regulations issued during the past 10 years. This memorandum, however, was motivated less by principled federalism concerns than by pressures from key constituencies, such as trial lawyers, within the Democratic Party.

In June 2009, Obama signed the Family Smoking Prevention and Tobacco Control Act allowing the U.S. Food and Drug Administration to regulate most tobacco products. The act specifically preserves state product liability laws.

In July 2009, the Environmental Protection Agency granted California the waiver under the federal Clean Air Act that it had sought since 2002 to enforce its own greenhouse gas emission standards, which 13 other states and Washington, D.C., also plan to enforce.

In other areas, the president is more amenable to pre-emption. For example, Obama wants the federal government to take over the establishment and enforcement of safety standards for mass-transit systems³⁴ and to increase federal regulation of insurance. During his campaign, he told Planned Parenthood, "The first thing I'd do as president is sign the Freedom of Choice Act"

that would pre-empt virtually all state and local laws deemed to be barriers to abortion. Obama also opposes the federal Defense of Marriage Act, but has not moved to repeal it.

In a bow to state laws, the Credit Cardholders' Bill of Rights Act of 2009 allows individuals to carry licensed, loaded firearms into national parks and wildlife refuges where such firearms' possession is permitted by state law. This might confuse visitors, though, because more than 30 parks span two or more states. Armed visitors must know which state's law applies in each part of these parks. Also, because guns are still banned in federal buildings, visitors cannot take firearms into park visitor centers or rangers' offices.

Taxation

A Recovery Act tax break for businesses involving the cancellation of debt income could cost 43 states about \$5.5 billion of revenue from 2009 to 2011 if they do not decouple their tax code from this provision.³⁵

Despite the strictures of *Quill Corp. v. North Dakota*,³⁶ states have continued to consider ways to collect sales taxes on out-of-state mail-order sales, especially by arguing that in-state market affiliates of big online retailers like Amazon should collect the state sales tax. The idea originated with former Gov. Eliot Spitzer of New York in 2008. Some states, however, have backed down in the face of online retailer threats to drop affiliates in their states and, thus, cause the states to lose businesses and jobs.

Federalization of Criminal Law

Critics, both left and right, have stepped up attacks on the rising federalization of criminal law,³⁷ another characteristic of coercive federalism. There are about 4,500 federal criminal laws. Also, the number of U.S. attorneys has increased from about 1,500 in 1980 to 7,500 today.³⁸ Business interests object, for example, to the federal theft-of-honest-services statute, which is frequently used to prosecute business executives and also public officials. Civil libertarians worry about rights deprivations occurring under federal drug laws and such statutes as the federal anti-riot act, which makes it a felony to cross state lines to "organize, promote, encourage, participate in, or carry on a riot." Of particular concern are federal laws that are overly broad, vague and punitive, including continued confinement of sex offenders after they have completed

their sentences. Furthermore, some significant federal laws lack requirements to prove traditional types of criminal intent, allow federal prosecutors to shop for a conviction-friendly venue, and produce disproportionately large private-property seizures compared to alleged offenses.

Federal Court Orders

Court orders have been another feature of coercive federalism. For instance, in August 2009 a special panel of federal judges ordered California to reduce the number of prisoners in its prisons from 150,000 to about 110,000 within two years because overcrowding debilitated the system's health care to a point that violated inmates' constitutional rights.³⁹

The Supreme Court's Federalism

In one of the court's most significant 2009 federalism cases, Justice Antonin Scalia and the four liberal justices opined that federal regulations promulgated under the National Bank Act of 1864 do not pre-empt states from enforcing their fair lending and consumer protection laws against the country's 1,500 national banks.⁴⁰ In another important federalism case, the court ruled 5-4 that state juries can award damages for harms caused by drugs even when their manufacturers comply with federal regulations.⁴¹

The court, however, rejected by an 8-1 vote a constitutional challenge to Section 5 of the Voting Rights Act requiring jurisdictions with a history of racial discrimination in voting to obtain federal "preclearance" for all changes in voting arrangements.⁴² Instead, the court said local jurisdictions in Voting Rights Act-covered states should be permitted to petition for exemption from preclearance. Nevertheless, the eight-member majority agreed that Section 5 "imposes substantial 'federalism costs'" and has other liabilities that might not withstand scrutiny between now and its 2031 expiration date. Earlier in 2009, moreover, the court ruled 5-4 that the Voting Rights Act does not require states to create voting districts to try to elect black officials where blacks are less than a majority of the population.⁴³ The decision voided a North Carolina "crossover" Senate district that was 39 percent African-American.

In a highly publicized affirmative action case, the court's conservatives and liberals split 5-4, ruling that New Haven, Conn., had discriminated against white firefighters when it failed to

promote them after they performed better on an examination than black firefighters.⁴⁴ The case garnered additional attention because Justice Sonia Sotomayor, then a court nominee, had voted against the white firefighters when the case came before her appeals court.

In *Caperton v. Massey*, the court ruled 5-4 that the failure of a West Virginia Supreme Court justice to recuse himself from a \$50 million civil case involving a company that had donated \$3 million to his judicial election campaign jeopardized the plaintiff's due process rights under the 14th Amendment.⁴⁵ The court's "probability of bias" test for recusal, however, is vague, leaving undefined "significant and disproportionate influence" in a campaign. How much money is too much from a contributor? Should judges recuse themselves from cases involving parties that spent large sums opposing their election? Does a probability of bias exist for as long as a judge sits on the bench?

In another 5-4 decision that sharply split the liberals and conservatives, the court ruled that criminal defendants have a right to cross-examine analysts who prepared forensic reports used against them in court.⁴⁶ The justices also ruled 5-4 in a case originating in Alaska that a convicted felon has no constitutional right to post-conviction access to DNA testing if a state does not allow it.⁴⁷ Forty-four states and the federal government permit such access to biological evidence for testing, but not Alaska. Although the Obama administration supported Alaska, only the court's conservatives voted to uphold states' authority to craft these rules.

In a potentially costly decision for public schools, the court held 6-3 that the Individuals with Disabilities Education Act requires a school district to pay tuition costs for a student whose parents unilaterally placed him in a private school after the district did not find the student eligible for special education and provide him such services.⁴⁸ The Obama administration supported the plaintiffs. The court also opined that a federal appeals court had erred in requiring continued federal-court supervision of Arizona's spending for teaching non-English-speaking students under the federal Equal Educational Opportunities Act. The "Court of Appeals used a heightened standard that paid insufficient attention to federalism concerns," wrote Justice Samuel A. Alito Jr. for the 5-4 majority.⁴⁹

State Activism

State policy activism, which is partly a response to and also result of coercive federalism, took a conservative turn in 2009.

For example, 10th Amendment resolutions asserting state sovereignty have been passed by the legislatures and signed by the governors in Alaska and Tennessee, and passed by the legislatures of Idaho, Louisiana, North Dakota, Oklahoma and South Dakota.⁵⁰ Bills have been introduced in the legislatures of Georgia, Missouri, New Hampshire and Oklahoma to create commissions to review the constitutionality of federal laws and, in the case of the Georgia bill, make it a criminal offense for federal officials to enforce laws not authorized by the U.S. Constitution. About 30 states are considering Health Care Freedom Acts that would guarantee the right of their residents to choose health insurers and services and prohibit state and local governments, as well as the federal government, from requiring citizens to purchase health insurance. These measures are unlikely to succeed in most states.

Some states, including California, want the U.S. Environmental Protection Agency to slow federal rulemaking to regulate industrial greenhouse gas emissions because fast rules could overwhelm states with administrative and regulatory costs while budgets are depressed, delay infrastructure and economic development projects, and undercut state climate-change programs.

In April 2009, Washington became the fifth state to join the Agreement among the States to Elect the President by National Popular Vote. Hawaii, Illinois, Maryland and New Jersey previously approved the compact. Together with Washington, they account for only 61 of the 270 electoral votes needed to win the presidency. Colorado, however, rejected the compact, which, if approved by enough states, would require all the member states to award all of their electoral votes to the winner of the popular vote in presidential elections.

Conclusion

The long-term outlook for the states as co-equal governing partners in the federal system is not strong because long-term fiscal pressures and trends in coercive federalism are working against them. There will be variations on these trends as the federal government flips between

Democratic and Republican majorities, but no party adheres to federalist principles that would call for more than marginal adjustments to the current balance of state-federal powers.

Notes

¹Chris Bodenner, “Not in Brownback’s Yard,” *National Journal* 41 (January 31, 2009): 50–51.

²Jeff Zeleny and Adam Nagourney, “Aggressive Push by White House in States’ Races,” *New York Times*, September 22, 2009, A1, A3.

³Quoted in “As They See It,” *State Legislatures* 35 (June 2009): 34.

⁴Michael A. Fletcher, “High-Powered and Low-Key: The quiet influence of Obama advisor Valerie Jarrett,” *Washington Post National Weekly Edition*, March 23–29, 2009, p. 13.

⁵Dave Levinthal, “States and Municipalities Aggressively Lobby Federal Government for Scarce Aid,” Center for Responsive Politics, September 3, 2009, at <http://www.opensecrets.org/news/2009/09/state-and-municipal-politicos.html>, accessed February 3, 2010.

⁶See John Kincaid, “State-Federal Relations: Agendas for Change and Continuity,” *The Book of the States 2009* (Lexington, KY: Council of State Governments, 2009), pp. 21–27.

⁷For background, see John Kincaid, “State-Federal Relations: Federal Dollars Down, Federal Power Up,” *The Book of the States* (Lexington, KY: Council of State Governments, 2006), 19–25; John Kincaid, “State-Federal Relations: Defense, Demography, Debt, and Deconstruction as Destiny,” *The Book of the States* (Lexington, KY: The Council of State Governments, 2005), 25–30; John Kincaid, “Trends in Federalism: Continuity, Change and Polarization,” *The Book of the States* (Lexington, KY: Council of State Governments, 2004), 21–27; John Kincaid, “State-Federal Relations: Continuing Regulatory Federalism,” *The Book of the States* (Lexington, KY: Council of State Governments, 2002), 25–32; John Kincaid, “From Cooperation to Coercion in American Federalism: Housing, Fragmentation, and Pre-emption, 1780–1992,” *Journal of Law and Politics* 9 (Winter 1993): 333–433.

⁸The Peterson-Pew Commission on Budget Reform, *Red Ink Rising* (Washington, DC: Commission, December 2009).

⁹National Governors Association and National Association of State Budget Officers, *The Fiscal Survey of the States*, December 2009 (Washington, DC: NGA and NASBO, 2009), p. vii.

¹⁰Anon, “Policy Points: Recession Still Causing Trouble for States,” Center for Budget and Policy Priorities, January 28, 2010, at <http://www.cbpp.org/cms/index.cfm?fa=view&id=1283>, accessed February 2, 2010.

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About the Author

John Kincaid is the Robert B. and Helen S. Meyner Professor of Government and Public Service and Director of the Meyner Center for the Study of State and Local Government, Lafayette College, Easton, Pennsylvania. He is former editor of *Publius: The Journal of Federalism*; former executive director of the U.S. Advisory Commission on Intergovernmental Relations; and co-editor of *Constitutional Origins, Structure, and Change in Federal Countries* (2005), *Interaction in Federal Systems* (2008), and *Local Government in Federal Systems* (2008).