

State-Federal Relations: Obstructive or Constructive Federalism?

By John Kincaid

The 2014 mid-term elections magnified the polarization between the political parties in Washington, D.C., and between blue and red states. In that respect, the elections signaled continuity in American federalism. Despite their congressional victories, lacking the presidency, Republicans are not in a position to effect major intergovernmental change. Increased Republican strength in the states will heighten state-federal conflicts over core Republican issues, while predominantly Democratic states generally will support federal policies endorsed by President Barack Obama. Whether one regards this state of affairs as obstructive or constructive federalism depends on one's point of view.

The 2014 elections strengthened the Republicans' right wing and the Democrats' left wing.

Republicans control both chambers in 30 state legislatures, Democrats control 11 and eight are split. Republicans control 68 of 98 partisan legislative chambers—exceeding their previous high of 64 in 1920—and they hold a super-majority in 21. Republicans also control nonpartisan Nebraska.

Republicans control both the governorship and the legislature in 24 states, something they have not achieved since the 1920s. Democrats control seven—the lowest for Democrats since before the Civil War. Nonetheless, 19 states (e.g., Illinois, New York and Pennsylvania) remain split. Republicans have 31 governors—one short of the previous high of 32—31 lieutenant governors, 27 attorneys general and 28 secretaries of state. Republicans flipped four governorships (Arkansas, Illinois, Maryland and Massachusetts); Democrats flipped one (Pennsylvania).

Republicans likely will challenge Common Core State Standards, student testing, data sharing with the federal government and Environmental Protection Agency (EPA) policies. They probably will seek to cut state taxes, enact abortion regulations, pass right-to-work laws, limit public-sector collective bargaining, expand private-school vouchers, and enact tort reforms, drug screening of applicants for cash and nutrition assistance, and job-seeking rules for Medicaid recipients.

Other issues on Democratic and Republican state agendas include pension liabilities, infrastructure, surface transportation, corrections, immigration, electronic cigarettes, cybersecurity, ride-sharing services (e.g., Lyft and Uber), marijuana legalization, rail transport of oil, specialty drugs that increase

Medicaid costs, right-to-try (experimental drugs) policies, net-metering viability, police-community relations, sex trafficking, social impact bonds and pretrial release policies.

The election results, therefore, promise more state-federal disagreements and divergence between blue and red states. Immediately after the 2014 elections, for example, liberal groups established the State Innovation Exchange for state legislators to counteract the conservative American Legislative Exchange Council.

States also might differentiate themselves even further by opting out of the Uniform Time Act of 1966, which established uniform daylight saving time. Twelve states are considering it. Arizona and Hawaii already have opted out. Some states might stay on daylight saving time and some on standard time all year, while others still will switch time twice a year.

Nationalists versus Federalists

Underlying state-federal disagreements is a long-standing debate between nationalists and federalists. When states resist certain federal policies, as in state refusals to establish a health-insurance exchange or expand Medicaid under the Affordable Care Act—also known as Obamacare—proponents of those federal policies inveigh against uncooperative or obstructive federalism.¹ In this nationalist view, the states should be administrative arms of the federal government. Opponents of federal policies endorse state resistance as constructive federalism. In this federalist view, the states are independent sovereigns rejecting unwise federal policies and protecting liberty against overweening federal power.

What complicates the federalism landscape, though, is that nationalists sometimes support uncooperative federalism, as in state legalization of marijuana, while federalists sometimes support national intrusions upon state sovereignty, such as prohibitions on states using federal-aid funds to pay for abortions.

The nationalist view was most recently pressed by former U.S. Supreme Court Justice John Paul Stevens, who advocates six constitutional amendments to negate court rulings from which he dissented.² The amendments would (1) overturn the court's anti-commandeering doctrine so as to require state and local officials to implement federal policies, (2) increase judicial involvement in congressional and state legislative redistricting, (3) curtail First Amendment challenges to campaign-finance laws, (4) waive state sovereign immunity so as to allow state governments to be sued for monetary damages, (5) abolish the death penalty, and (6) abolish an individual right to bear arms. Only Stevens' third and sixth proposals would augment state powers. The first and fourth would formally abolish state sovereignty; the other two would further circumscribe state autonomy.

Stevens believes states should be administrative arms of the federal government. He quotes approvingly Justice Stephen Breyer's dissent in 1997 in *Printz v. United States*: "The federal systems of Switzerland, Germany, and the European Union ... all provide that constituent states, not federal bureaucracies, will themselves implement many of the laws ... enacted by the central 'federal' body."³

However, Stevens does not propose constitutional amendments that would give the states the kind of clout over federal policymaking possessed by the cantons in Switzerland and the *Länder* in Germany, nor does he acknowledge Germany's 2006 constitutional reforms that emphasized decentralization. Similarly, all the federal member-states of the European Union have amended their constitutions to give their constituent states influential representation in EU deliberations affecting states' powers.

Nationalists have had the upper hand since the New Deal, but public opinion has shifted to a more federalist view during the past two decades.⁴ In 2014, 72 percent of Americans trusted local government and 62 percent trusted state government a great deal or fair amount.⁵ Only 24 percent trusted the federal government always or most of the time.⁶ More than 71 percent believe that if the

Founding Fathers returned, they would say the federal government is too big.⁷ Fifty-four percent believe the federal government is a threat to individual liberty, not a protector of liberty, and 37 percent say they fear the federal government. A 2014 Reuters poll found that 24 percent of Americans strongly or somewhat support the idea of their "state peacefully withdrawing from the United States of America and the federal government."⁸

These polls suggest polarization not only between the parties, but also between the general public and many political elites.

Federal Aid and Fiscal Federalism

President Obama's budget proposal called for \$3.99 trillion in spending in 2016, a 7 percent increase over 2014. Congressional Republicans will seek to scale back spending. The Congressional Budget Office projects federal deficits to grow from \$467 billion (2.5 percent of GDP) in 2016 to \$1.09 trillion (4 percent of GDP) by 2025, with total federal debt increasing from \$13 trillion today to \$21.6 trillion (79 percent of GDP) by 2025. Projections of the long-term fiscal health of the federal government and state and local governments remain bleak.

As of late 2014, 30 states still had inflation-adjusted tax receipts below their pre-recession level. States employ 620,000 fewer people than six years ago, and municipal-bond sales were at a 15-year low. But 14 states cut taxes in 2014. State and local revenues probably will grow at a rate slightly above the cost of inflation in 2015–16. Low oil prices will depress revenues in states such as Texas and Alaska. States will, however, share half of a \$1.37 billion settlement over allegations that Standard & Poor's Ratings Services misled investors by giving overly optimistic ratings to residential mortgage bonds prior to the 2008 financial crisis.

Government balance sheets must now follow new rules set by the Government Accounting Standards Board, or GASB. The new accounting will highlight underfunded state and local pension liabilities.

Federal aid to state and local governments increased annually from 1987 to 2011, declined by 10 percent in 2012, but increased to \$628 billion by 2015—15 percent higher than 2012. Aid is expected to increase by nearly 4 percent to \$652 billion in 2016. However, consistent with long-term trends, 74 percent of all federal aid will be dedicated to social welfare—especially Medicaid—which, with state matching funds, is the single largest category

of state spending. Aid for infrastructure, transportation, education, economic development and other nonwelfare purposes will continue a relative decline that started in 1978.⁹

The number of grants-in-aid increased from 435 in 1987 to 1,099 in 2014. Only 21 (2 percent) of those 1,099 grants were block grants, compared to 13 block grants in 1987. In the past, intergovernmental reformers advocated reductions of categorical grants, but the system has raced in the opposite direction.

Congress and presidents prefer the tighter control of state and local spending offered by categorical grants. Given that Medicaid, which is a categorical grant, accounts for more than 45 percent of all federal aid, it is clear that the federal-aid system has been distorted, though not so much by state and local government pressure. Those governments prefer to coordinate and consolidate aid. Instead, interest groups beseech Congress to create categorical grants devoted to their interests because many federal-aid programs are implemented by nonprofit and for-profit entities in what is now often described as networked or collaborative governance.

On average, in real dollars, grants were funded at \$470 million each in 1987 and \$480 million each in 2014. Even though federal aid has increased, federal funds—except for several huge programs like Medicaid and transportation—are spread thinly across a large number of grants.

Nevertheless, in 2014, federal aid accounted for 30.3 percent of state spending—a historically high level—primarily because of Medicaid and other social assistance.¹⁰ Total federal spending in the states was equivalent to 19 percent of state economic activity in 2013, though the range was from 11.6 percent in Wyoming to 32.9 percent in Mississippi. Payments for individuals were 61 percent of federal spending in the states. From 2004 to 2013, federal spending in the states grew by 26 percent to \$3.1 trillion in 2013.¹¹

Reforming the grants-in-aid system has been impossible, mainly because no state wants to lose funds. For example, the Federal Funds Information for States recently calculated how federal aid for Medicaid would change if the federal formula accounted for cost-of-living differences, not just states' per capita income. Hawaii's current ranking of 21 would drop to 47, thus qualifying it for more federal Medicaid money. The federal formula probably will not be changed, however, because it would benefit only eight states, while making 32 states worse off.¹²

In mid-2014, U.S. Rep. Paul D. Ryan—R-Wis.—proposed to expand the federal earned income tax credit and consolidate 11 federal anti-poverty programs, including food stamps and housing assistance, into an Opportunity Grant for the states. This block grant would emphasize state-local coordination of assistance to needy families, incentives and sanctions for poor people to exit poverty, and rules to ease convicted nonviolent criminals into work. In March 2015, President Obama announced a program to give \$200 million to 10 states to help food-assistance recipients find work.

The federal government also assists states through its tax code. Obama's 2016 budget proposed to expand tax-exempt private activity bonds into Qualified Public Infrastructure Bonds (QPIBs) to finance mass transit, ports, airports, water and sewer services, solid waste disposal, and other infrastructure managed mainly by private enterprises. QPIBs would have no expiration date and no annual cap on the number of bonds issued by states and localities. States' bond issuances in 2014 were about 10 percent lower than in 2013, but likely will increase in 2015.

States' Federal Priorities

The states' congressional wish list includes passage of the Marketplace Fairness Act, long-term surface-transportation funding, renewal of the Children's Health Insurance Program, deficit reduction, immigration reform, Medicaid reform, strengthened cybersecurity, more child-care and early-learning funding, state-based insurance regulation, and more National Guard funding. States do not want the federal government to eliminate the tax exemption for interest earned on municipal bonds, cut National Guard units and equipment, or increase EPA control over in-state waterways. Some governors want the National Guard to be equipped to help state and local governments defend against cyberattacks.

Polarization will limit achievement of these priorities, although the parties sometimes do act together. Dozens of House Democrats recently joined Republicans to enhance charter school access, promote natural gas exports, stop the EPA from expanding its power over domestic waterways under the Clean Water Act of 1972, increase federal rulemaking transparency, and extend, over state opposition, the Internet Tax Freedom Act through September 2015. Congress also passed, with states' support, the Workforce Innovation and Opportunity Act of 2014, which supersedes the Workforce Investment Act of 1998.

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The National Association of Insurance Commissioners commended Congress for reauthorizing the Terrorism Risk Insurance Act, which backstops insurers in the event of a catastrophic terrorist attack. The program had expired for a brief time at the end of 2014 after U.S. Senator Tom Coburn—R-Okla.—objected to a provision he said deprived states of their 10th Amendment right to regulate their own insurance agents and brokers.

State Taxation of Online and Mail-Order Sales

The Marketplace Fairness Act, first proposed in 2011, is a high priority for most states, although the prospects for House passage remain slim. The act would allow every state with a sales tax to require out-of-state businesses to collect and remit the sales tax on taxable goods sold to state residents. The National Conference of State Legislatures estimates states lost \$23.3 billion in revenue in 2012 from uncollected Internet sales taxes.

In March 2015, the National Governors Association urged U.S. House Speaker John Boehner—R-Ohio—to ensure House passage of the Marketplace Fairness Act. The bill passed the Senate in 2013 by 69 to 27. A competing House bill, however, would tax purchases based on the sales tax rate in the seller's home state. The Big 7 state and local government associations joined major retailers in warning Congress that the online growth of the Chinese company Alibaba—which might soon rival Amazon, eBay and Overstock—could decimate brick-and-mortar retailers.

Also in March 2015, the U.S. Supreme Court handed a small victory to online retailers who challenged a Colorado law requiring out-of-state merchants to report transactions by Colorado customers to state tax authorities. But in a concurring opinion, Justice Anthony Kennedy issued a startling statement that the court should not delay a reconsideration of *Quill*.¹³ This 1992 ruling—which prohibits state taxation of out-of-state mail-order sales without congressional consent—he opined, “now harms states to a degree far greater that could have been anticipated earlier.”¹⁴ This could be a signal that some justices might wish to effect policy change in fields left fallow by Congress.

Surface Transportation

Funding predictability for transportation programs has been a long-term concern of state and local governments. Congress has not reauthorized the surface transportation program since it expired in September 2009, nor has Congress increased the

motor fuel tax since 1993. Recognizing the looming insolvency of the federal Highway Trust Fund, most states cut back projects during the summer of 2014 due to funding uncertainty.

Average annual spending on transportation projects was \$207 billion per year between 2007 and 2011, 40 percent of which came from the states, 36 percent from localities and 25 percent from the federal government. Between 2002 and 2011, overall spending dropped by 12 percent in real dollars, with state spending falling by 20 percent. Between 2002 and 2012, federal gas tax revenue dropped by 31 percent in real terms; state gas tax revenue fell by 19 percent.¹⁵

The federal surface transportation program also needs reforms. For example, the trust fund does not send more revenue to states with bigger highway systems, more highway use or lower median incomes. Instead, less urban states and states better represented on the program's four key congressional committees benefit more.¹⁶

K–12 Education

For nearly a decade, Congress has failed to reauthorize and re-name the No Child Left Behind Act of 2001 (NCLB), funded at \$23.3 billion in 2015. Many congressional Democrats and Republicans want to scale back the federal role in K–12 education, but President Obama wants to increase it and especially retain annual testing of students in math and reading between the third and eighth grades and once in high school. Testing in some form is likely to remain in any reauthorization. Due to congressional inaction, however, 43 states operate under waivers from the NCLB.

Another major controversy linked to reauthorization is the Common Core curriculum standards developed by the National Governors Association and the Council of Chief State School Officers in 2009. Forty-six states signed onto the initiative, but five states have since voted to repeal or replace it. Initially, opposition came mostly from conservatives objecting to certain values embedded in the standards and the use of federal aid to induce state adoption. Louisiana Gov. Bobby Jindal filed suit in federal court in 2014, arguing that Common Core violates state sovereignty. Some prominent conservatives, however, such as William J. Bennett, defend the Common Core.¹⁷ Some liberals expressed opposition, especially to the rigorous testing attached to the Common Core.

Another controversial federal policy went into effect in fall 2014. Schools are required to comply

with federal nutrition standards for food and beverages sold during the school day. The standards, promulgated under the Healthy, Hunger-Free Kids Act of 2010, might require school bake sales to replace chocolate bars and cupcakes with multigrain bars and fruit cups. The federal government will provide \$4.5 billion to implement the standards over five years.

In late 2014, 18 states and 234 school districts and others won competitive grants under the new Early Head Start-Child Care Partnerships and Preschool Development Grants. Grants under the first program enable Early Head Start programs to partner with local child-care centers and family child-care providers serving infants and toddlers from low-income families. Preschool Development Grants fund states to enhance and expand preschool programs in targeted communities that can serve as models for expanding preschool to all 4-year-olds from low- and moderate-income families

Children's Health Insurance Program

Funding for the Children's Health Insurance Program, also known as CHIP, will run out in September 2015. CHIP insures children in families with incomes too high to be eligible for Medicaid. The federal government pays 70 percent of CHIP's cost, which is more than what most states receive under Medicaid. Republicans are proposing changes for the program and a two-year extension. Democrats want to continue the program in its current form for another four years at a cost of about \$10 billion.¹⁸ Thirty-nine Democratic and Republican governors have petitioned Congress to extend CHIP funding.

Immigration

Immigration reform has been a long-standing state concern, and states became especially concerned about the rise in illegal child migrants in 2013–14. However, just as the parties in Congress disagree on the substance of reform, so do blue and red states.

In the face of continued federal inaction, state legislatures passed 171 laws and 117 resolutions on immigration in 2014—34 percent less than in 2013.

"We ask our colleagues in Washington, D.C., to learn from state legislators, who are addressing immigration in creative and bipartisan ways in our state capitols," said Nevada state Sen. Mo Denis (D), co-chair of NCSL's Task Force on Immigration and the States.¹⁹

Nevertheless, 26 states have joined a federal lawsuit challenging the legality of President Obama's Deferred Action for Parents of Americans and Lawful Permanent Residents program, announced in November 2014. The program allows certain aliens who arrived in the United States on or before January 1, 2010, to apply for deferred action on deportation and to seek permission to work lawfully in the United States. The program applies to certain individuals who came to the United States as children under the age of 16 or who are parents of U.S. citizens or lawful permanent resident children. The plaintiffs argue that the president exceeded the bounds of prosecutorial discretion and abdicated his constitutional duty to faithfully execute the law. A federal district court in Texas issued an order temporarily blocking the program's implementation, which was due to start in May 2015. The National League of Cities, U.S. Conference of Mayors, and 12 states filed *amicus* briefs supporting the program.

Otherwise, the U.S. Supreme court upheld a lower court ruling requiring Arizona to issue driver's licenses to young illegal immigrants exempted from deportation by President Obama.²⁰

Marijuana Legalization

In December 2014, Congress enacted a continuing funding resolution stating: "None of the funds made available in this Act to the Department of Justice may be used" to prevent "States from implementing their own State laws that authorized the use, distribution, possession, or cultivation of medical marijuana."²¹ A Senate bill, the Compassionate Access, Research Expansion, and Respect States (CARERS) Act, would amend the federal Controlled Substances Act to reclassify medical marijuana as a Schedule II rather than a Schedule I drug, increase cannabis availability for research, allow some interstate transport of marijuana, make it easier for physicians to authorize marijuana for veterans in states where it is legal, loosen restrictions on banks wishing to service the industry, and prevent federal prosecution of patients and physicians in the 35 states that allow some type of medical marijuana use.

The U.S. Department of Justice told U.S. attorneys in December 2014 not to prevent Indian tribes from growing or selling marijuana on tribal lands, even in states that ban marijuana.

Six Colorado sheriffs filed suit in federal court arguing that the state's legalization of marijuana violates federal law. "The Colorado Constitution,"

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said one sheriff “mandates that all elected officials, including sheriffs, swear an oath of office to uphold both the United States as well as the Colorado Constitutions.”²²

The attorneys general of Nebraska and Oklahoma also filed suit against Colorado, arguing that marijuana brought into their states from Colorado has increased arrests and strained their budgets. Some critics label these attorneys general “fair-weather federalists” because their suit endorses an expansive Supreme Court definition of Congress’ authority to regulate commerce.²³ Seven Republican Oklahoma legislators opposed the suit, contending it could undermine the 10th Amendment rights of states to govern themselves.

The Affordable Care Act

The Affordable Care Act, also known as the ACA, is facing its third major legal challenge before the U.S. Supreme Court.²⁴ The lawsuit contends that individuals who purchase health insurance through a federal or partnership exchange are ineligible for federal tax credits. Such credits can be given only for insurance purchased on a state-established exchange. The federal government operates exchanges in 34 states, including seven where the state carries out some functions; 13 states operate state-created exchanges; and Nevada, New Mexico and Oregon maintain federally supported state-based exchanges. Seven states filed an *amicus* brief opposing the tax credits; 22 states filed a brief supporting the credits.

In contention are four words in Section 36B of the ACA that refer to the credit subsidies being available to individuals purchasing health insurance on an exchange “established by the State.” The act says that if a state refuses to establish an exchange, the federal government shall “establish and operate such Exchange within the State.” The case addresses the IRS’s 2012 ruling that the ACA permits tax credits for insurance obtained through exchanges established by the federal government within states.

The Obama administration maintains that the contested phrase is merely a legal term of art, which, if read in the context of the ACA as a whole, “encompasses both state-created exchanges and “exchanges that the states chose to have HHS create for them.”²⁵ However, states did not have a real choice. Nonetheless, the court has held that judges must determine “the plain meaning of the whole statute, not of isolated sentences.”²⁶ Elsewhere, for instance, the ACA defines a person “qualified” to buy insurance through an exchange as one who

“resides in the State that established the Exchange.” Literally, the phrase suggests that no one is eligible to buy insurance through a federal or partnership exchange. The administration also contends that the court must defer to the executive branch’s interpretation of an ambiguous statute. During oral arguments on the case, Justice Anthony Kennedy worried that “the states are being told either create your own exchange, or we’ll send your insurance market into a death spiral.”²⁷

Opponents of the tax credits argue that previous versions of the ACA provided credits for individuals enrolled through federally established exchanges, but Congress removed that language. Support for the subsidies is weakened also by the statement of Jonathan Gruber, one of the ACA’s consulting architects, who declared in 2012, “if you’re a state and you don’t set up an exchange, that means your citizens don’t get their tax credits.”²⁸ The ACA, moreover, appropriated money for state exchanges, but not federal exchanges. Because the federal government could not commandeer the states, tax credits and federal grants were incentives for states to establish exchanges.

Some ACA supporters argue that striking down the tax credits in states with a federal or partnership exchange would violate *Pennhurst’s* “clear notice” rule²⁹ that the federal government must give states adequate advance notice before imposing new policies. The weakness of this view, though, is that the 34 states that did not establish an exchange knew more than two years beforehand that not creating an exchange could deprive their residents of the federal tax credits. Justice Samuel Alito suggested that if the court strikes down the credits, it could delay implementation of the ruling beyond the usual 25 days to the end of the tax year.

If the court voids the tax credits, about 7.5 million people could lose insurance coverage. Premium costs for policies purchased through federal exchanges could increase by 255 percent. Enrollees in the 34 states with a federal or partnership exchange would lose about \$29 billion in federal subsidies in 2016 and \$340 billion over 10 years. Obama could ask Congress to amend the law, but Republicans want to replace the ACA. The 34 states that lack a state-established exchange will be pressed by their residents and health-care lobbyists to create one, although given the time required for establishing an exchange, states probably could not do so in less than a year. Furthermore, all 13 states with an exchange face funding challenges to support them and are considering such solutions as requiring

more people to shop on the exchange and taxing all health insurance policies. Legislators in some states have introduced bills to create a state exchange, while legislators in some other states have introduced bills to prohibit a state exchange.

States could perhaps use the federal portal until completing their own website. Nevada, New Mexico and Oregon do this. Another proposal is to create a grant for states to provide subsidies and premium assistance. The federal government also could help the states by, for example, determining applicants' eligibility.

Section 1332 of the ACA allows a state to obtain a federal waiver to implement its own health reform plan under which it can be exempt from the ACA's individual and employer mandates, essential health benefit rules, tax credits, and cost-sharing coverage subsidies. Such a state plan must be at least as affordable and comprehensive as that provided by the ACA. However, such a plan can only start in 2017. About 26 states have considered adopting an alternative to the ACA called the Health Care Compact, an interstate compact by which member states would take primary responsibility for regulating nonmilitary health care, but only nine states have enacted the compact into law.

Meanwhile, some states also have declined to adopt the ACA's consumer information provisions and have not applied for federal grants for consumer assistance centers.

Medicaid Expansion

Medicaid expansion is another ACA controversy. Federal funds will cover 100 percent of the cost of expanding Medicaid to 133 percent of the federal poverty limit through 2016, 95 percent in 2017, 94 percent in 2018, 93 percent in 2019, and 90 percent in 2020 and subsequent years. Twenty-eight states have expanded their Medicaid programs. Six Republican governors, as well as Alaska's Independent—formerly Republican—governor and the Democratic governors of Missouri and Montana have proposed Medicaid expansion, but met opposition from their legislatures. Pennsylvania's new Democratic Gov. Tom Wolf scrapped his Republican predecessor's partial Medicaid expansion in favor of a traditional ACA expansion.

To encourage expansion, the Obama administration has given waivers to several Republican states allowing Medicaid to pay premiums for private health insurance and, in Indiana, requiring some Medicaid enrollees to pay monthly premiums equal to 2 percent of their household income.

Academic research suggests decisions to expand Medicaid and establish a health-insurance exchange are unique in state policymaking because they have been motivated almost entirely by partisan politics, rather than a combination of politics and socioeconomic factors.³⁰

Other Issues and Developments

In March 2015, the U.S. Department of Justice issued a scathing report on racial police practices in Ferguson, Mo., but declined to prosecute the police officer who killed an 18-year-old black man in August 2014. The federal government conducted investigations of about 25 police departments from early 2014 to mid-2015. More than a dozen city police departments have signed consent decrees to reform their policies and practices, although some departments, such as Austin, Texas, have received a clean bill of health.

The Supreme Court has been more lenient toward rough cops as in a 2014 decision holding that West Virginia police did not use excessive force when they shot at a fleeing automobile, killing the driver and a passenger.³¹ But in December 2014, Obama signed the Death in Custody Reporting Act requiring states to report quarterly the deaths of people detained or arrested by state or local police.

There also has been rising criticism of the militarization of local police that was spurred by about \$34 billion in federal grants for military-type equipment since 9/11, as well as the Pentagon's 1033 program, which transfers surplus weapons and other gear to police—including public school security units—some of which have created SWAT teams. The Pentagon's program was authorized by the 1990 National Defense Authorization Act. In August 2014, faced with televised images of protesters confronting militarized police with equipment more suitable for Fallujah than Ferguson, President Obama ordered a review of these programs.

The Obama administration is expected to announce new child support enforcement rules that will allow states to use child support funding for job training. The new rules also are expected to incentivize states to engage in more discretionary enforcement and forgiveness of arrears, while making it more difficult for states to determine the income of delinquent parents. For custodial parents living in poverty, support payments make up about 45 percent of their income.³²

In 2014, the Federal Aviation Administration re-interpreted the Airport and Airway Improve-

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ment Act of 1982 in order to require state and local governments to use airline fuel tax revenue for expenses related to air travel. States must either comply with the rule or repeal the tax. Some states objected, saying only state policymakers have constitutional authority to decide how their state's tax revenue is spent.

By a 3-2 party-line vote in March 2015, the Federal Communications Commission pre-empted laws in North Carolina and Tennessee that limited cities' ability to operate their own Internet service. Chris Nelson, chairperson of the National Association of Regulatory Utility Commissioners, declared: "By asserting jurisdiction where it clearly has none, the FCC is setting itself up for wasteful and unnecessary litigation."³³ The FCC's more general 2015 decision to regulate "net neutrality" under telecommunications laws from the telephony era will spark considerable litigation and require a sorting out of federal and state regulatory authority.

U.S. Senate Majority Leader Mitch McConnell (R-Ken.) sent a letter to all the governors urging them to reject the Environmental Protection Agency's proposed rule to require power plants to reduce carbon dioxide.³⁴ Under the rule, likely to be final in summer 2015, states would have to submit compliance plans by 2016 or possibly be required to comply with a federal "model rule"³⁵ that could shut down many coal-fired plants. The rule would mandate carbon dioxide reductions ranging from 72 percent in Washington to 11 percent in North Dakota. The reduction levels would be contingent on the EPA's estimates of what each state can attain by reducing consumption, changing fuels and improving efficiency.

A dozen states filed lawsuits to block the rule. They received support from Harvard University's constitutional scholar, Laurence H. Tribe, who argues that the EPA lacks authority to promulgate the rule and that the federal government cannot, in any event, commandeer the states to enforce such a rule.³⁶ Congress cannot thwart the rules until they are final.

Alabama's Supreme Court in March 2015 defied a federal court ruling and prohibited the issuance of marriage licenses to same-sex couples. Anticipating that the Supreme Court might legalize gay marriage this year, more than a dozen states are considering "conscience protection" bills that would, among other things, allow businesses and individuals to refuse certain services to same-sex couples. Texas has such a law, and Arkansas and

Indiana enacted such laws in 2015. Four federal appeals courts encompassing 21 states have struck down state bans on gay marriage.

Because exporting is important for most state economies, 31 governors signed a letter in 2014 urging congressional leaders not to end funding of the Export-Import Bank.

Six states filed suit in federal court to overturn California's ban on the sale of eggs produced by hens kept in cramped "battery" cages. About 95 percent of all eggs are produced in such cages. Michigan, Oregon and Washington have enacted laws requiring more space for hens. Ohio has banned new battery cages. Several other states are considering similar legislation.

In February 2015, a federal judge struck down Maine's two-year-old law that allowed residents to buy prescription drugs from some foreign pharmacies. The law was the first in the country.

In November 2014, a federal appeals court struck down an effort by Arizona and Kansas to require the federal government to add citizenship documentation requirements to the federal voter registration form. The ruling relied heavily on 2013 U.S. Supreme Court ruling that state voting laws are pre-empted when deemed to be in conflict with the National Voter Registration Act of 1993.³⁷ In March 2015, however, the U.S. Supreme Court declined to hear a challenge to Wisconsin's voter ID law.

Supreme Court Rulings

The U.S. Supreme Court continues to play a major role in state-federal relations.

Final Rulings

In 2014, the court ruled that some government workers who are not union members are not required to pay union dues,³⁸ struck down overall limits on individuals' contributions to candidates and political parties,³⁹ upheld a Michigan voter initiative banning affirmative action admissions to the state's universities,⁴⁰ struck down a Massachusetts' law on buffer zones around abortion clinics,⁴¹ required police to get warrants to search cellphones of detained people,⁴² and ruled that a corporation "closely held" by a religious family cannot be compelled to pay for workers' contraception coverage. It is not clear yet whether the latter ruling will override "contraception equity" laws in 28 states.

The court overturned a nearly 20-year precedent when it held federal agencies need not engage in notice-and-comment rulemaking pursuant to

the Administrative Procedure Act before changing a rule that interprets a legislative rule.⁴³ This decision will make it more difficult for state and local governments to influence federal agency policy when agencies want to change an interpretive rule.

In January 2015, the court ruled that, under the Religious Land Use and Institutionalized Persons Act of 2000, a Muslim inmate of an Arkansas prison could grow a half-inch beard.⁴⁴

In February 2015, the justices ruled that a state licensing board controlled by “active market participants” is immune from antitrust laws only if its state government supervises it actively.⁴⁵ The case arose in 2006 after North Carolina’s dentist-controlled board prohibited spas, salons and other businesses from offering teeth whitening services. States are concerned that the court did not define “actively supervised,” and they believe this mandate will be costly and will limit gubernatorial and legislative discretion in making board appointments.

This case reflected a rising attack on state licensing practices deemed to restrict competition. For example, 47 states have enacted laws making it easier for spouses of military personnel who move into the state to practice an occupation, such as massage therapy or dental hygiene, they practiced with a license in other states.

In March 2015, the court decided that Alabama’s legislature misinterpreted the U.S. Voting Rights Act and behaved unconstitutionally by using race too rigidly in 2012 to produce legislative districts with excessively large numbers of black voters,⁴⁶ even though the U.S. Department of Justice previously had approved the racial gerrymandering plan under the preclearance rule of the U.S. Voting Rights Act. The Supreme Court struck down the use of this rule in 2013.⁴⁷

The State and Local Legal Center supported Amazon in a case where the court held that the Fair Labor Standards Act does not require workers to be paid for time spent waiting to undergo security screenings.⁴⁸

In a victory for state campaign-finance regulation, the court upheld Florida’s ban on judicial candidates personally soliciting campaign donations.⁴⁹ Thirty states ban this. Eleven of those states and the Conference of Chief Justices filed *amicus* briefs supporting Florida’s rule.

Pending Rulings

The State and Local Legal Center also filed an *amicus* brief supporting a city’s right to impose more restrictions on temporary signs giving direc-

tions to a church event than on signs conveying political or ideological messages.⁵⁰

The court will decide whether an independent redistricting commission created by Arizona voters in 2000 violates the U.S. Constitution’s provision that “the Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof.”⁵¹ The case was brought by members of the Arizona legislature, who argued that voters lack authority to transfer power from the legislature to an unelected citizens commission. The legislature is excluded from the congressional redistricting process. (The lawsuit did not challenge the commission’s authority to redistrict state legislative seats.)

The constitutional clause regarding elections does not say the rules shall be prescribed by each state. The clause uses the word “legislature” in a manner consistent with all other references to state legislatures in the Constitution. Supporters of the commission contend that the state constitution defines the legislative power as including the people acting by initiative. A ruling in favor of the legislature could jeopardize other state election laws enacted by initiative, such as residency rules, voter ID and primary elections rules. California is the only other state that has an independent commission established via initiative. The NCSL filed an *amicus* brief supporting the Arizona legislature. The court also will decide whether Florida makes it too easy for juries to recommend executions of convicted criminals.⁵² In 2014, the court found Florida’s fixed cutoff of a 70 IQ score to be too rigid in the absence of an ability to present additional evidence on a defendant’s mental capacity.⁵³

The justices will decide whether Texas’ rejection of a specialty license plate for the Sons of Confederate Veterans violated the organization’s free-speech rights.⁵⁴ Nine states issue such plates. The court faces a difficult choice. If it upholds Texas, what neutral, rational criteria will govern states’ rejection decisions? If the court rules against Texas, will states be able to maintain specialty plates and the revenues derived from them in the face of groups wanting plates to celebrate Nazism or Al Qaeda terrorism?

In another case, the court might decide to strike down the “disparate impact” rule promulgated under the Fair Housing Act of 1968.⁵⁵ The rule does not require plaintiffs to prove intent to discriminate; they need only demonstrate that an allegedly discriminatory practice affects a particular minority group more than other groups.

Seventeen states and 21 cities filed *amicus* briefs supporting disparate impact.

In a case with broad implications for state tax powers, the court will decide whether a state must provide a credit against its own taxes for taxes a resident pays on income earned in other states. Maryland provides such a credit against its state income tax, but not against the piggyback tax the state collects for its 23 counties and Baltimore city.⁵⁶ The State and Local Legal Center filed an *amicus* brief arguing if Maryland is required to provide a dollar-for-dollar tax credit, a resident with substantial out-of-state income would pay significantly less for local services than a neighbor earning the same income in state, even though both benefit equally from local services.

Finally, in a potentially blockbuster cultural case, the justices will rule on four same-sex marriage cases in order to resolve differences among federal appeals courts.⁵⁷ The court might overturn all state statutory and constitutional bans on gay marriage.

Conclusion

An important question for the states is whether disagreements among the states and state resistance to federal policies will prompt stronger forms of program nationalization, including more centralized federal leadership and mandates.⁵⁸ This is not a foregone conclusion, but the federal system has become increasingly majoritarian in the sense that state policies tend to survive only when they enjoy national majority support, as in the case of marijuana legalization. When state policies, such as same-sex marriage bans, lose national majority support, they are usually overridden by federal action. States can be laboratories of democracy so long as they are not deemed, as comic John Stewart put it, “meth labs of democracy.”

Another concern for states is that state houses since 2003 have lost more than one-third of the newspaper reporters who report full time on legislative affairs.⁵⁹ Although the public trusts state governments much more than the federal government, diminished media coverage could make it more difficult for citizens to see and appreciate the positive work of state governments.

Notes

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