

# State-Federal Relations: Revolt Against Coercive Federalism?

By John Kincaid

*Partisan polarization characterizes the current period of coercive federalism, shaping state-federal relations in often conflictual ways. Major clashes have occurred over health care, immigration, education, environmental protection, voting rights and numerous cultural issues such as abortion. State-federal disputes over health care and immigration have, moreover, generated two U.S. Supreme Court contests that could mark a pivotal advance or rollback of federal power over the states. At the same time, austerity and scrambles for tax revenue continue to characterize intergovernmental fiscal relations, while social welfare spending drives state budgets and squeezes funding for nonwelfare functions and for local governments.*

Although 2012 is a presidential election year, the election will have little impact on federalism because coercive federalism<sup>1</sup> has been a bipartisan enterprise since the late 1960s. The parties differ on what they want to nationalize, but each nationalizes its policy preferences whenever possible.

The year, however, may be pivotal for federalism, if the U.S. Supreme Court uses several cases to restrain federal power. Potentially most potent is the court's case on President Barack Obama's Patient Protection and Affordable Care Act of 2010,<sup>2</sup> for which the justices held six hours of oral argument over three days.

At the same time, partisan polarization has revived a kind of dual, competitive federalism in which the party not in power in Washington, D.C., uses its dominance in a majority or sizable number of states to challenge policies of the party in power in Washington. Hence, state-based Republicans will continue challenging federal policies promulgated under President Obama, as they also did during Clinton's presidency, thereby generating intergovernmental conflict, just like state-based Democrats opposed some federal policies promulgated under President Ronald Reagan and the two Bush presidencies.

## Partisan Polarization and Federalism

In recent years, elected officials, media pundits and many voters have polarized into boisterous ideological monologues. Maine Republican Olympia Snowe's announced retirement from the U.S. Senate in 2012 marked, perhaps, the death knell for bipartisanship.

In 2011, for the second year in a row and only the third time in 30 years, "no Senate Democrat

compiled a voting record to the right of any Senate Republican, and no Republican came down on the left of any Senate Democrat."<sup>3</sup> Another indication of polarization is the rise of the Senate filibuster, which reached historic highs during the 110th and 111th Congresses, from 2007 to 2011.

Polarization has had two notable impacts on the federal system. It contributed significantly to centralization and coercive federalism because control of Congress, the White House, and a majority of the state legislatures and governorships by one party smooths the way for expansive federal policymaking. State partisan allies of the party in power in Washington, D.C., usually embrace policies emanating from their federal counterparts. Polarization also escalates state-federal conflict when the party in power in Washington, D.C., faces many states controlled by the other party.

The parties also differ rhetorically on federalism. According to Karl Rove, for example, Republican House members believe "that the federal government is doing too much dictating to states and localities and that state and local governments ought to be freed from constraints."<sup>4</sup> Democrats rarely express these concerns.

The much publicized photo of Arizona Republican Gov. Jan Brewer pointing her finger at President Obama during a heated exchange at the Phoenix-Mesa Gateway Airport in January 2012 dramatically symbolized federal-state clashes arising from polarization. She had given the president a letter stating, "We both love this country, but we fundamentally disagree on how to best make America grow and prosper once again."<sup>5</sup>

In his 2012 state-of-the-state address, Republican Gov. Gary Herbert of Utah inveighed against

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“the regulatory colossus created by an overarching, out-of-control and out-of-touch federal government.”<sup>6</sup> Texas Gov. Rick Perry has stood out for his frequent flaying of the Environmental Protection Agency,<sup>7</sup> criticism of the Obama administration over federal disaster assistance during the state’s summer wildfires and clashes with federal officials over Planned Parenthood. One can see the heightened stridency of today’s anti-Washington rhetoric by comparing the Republican Perry’s 2010 book *Fed Up!*<sup>8</sup> with former Utah Republican Gov. Scott M. Matheson’s 1986 book *Out of Balance*.<sup>9</sup>

Not all state challenges have a partisan hue, though. Vermont, with a Democratic governor, Peter Shumlin, and legislature, has challenged in court the federal Nuclear Regulatory Commission’s decision to allow the Vermont Yankee nuclear power plant to operate for 20 years beyond its 40-year design. The Democratic attorney general of Massachusetts has appealed the commission’s decision to relicense the Pilgrim Nuclear Station in Plymouth, and New York’s Democratic governor, Andrew Cuomo, wants to close the Indian Point Energy Center. The Vermont case might decide who can pull the plug on nuclear plants, the federal government or the plant’s host state.

A number of states, both Democratic and Republican, oppose massive new regulations issued by the Federal Energy Regulatory Commission that require all electric utilities to join regional planning organizations, which, among other things, have substantial authority to decide who should pay for long-distance power line construction. States fear the new regional groups will curtail their regulatory authority, especially over local power lines.

### Federal Clashes with States and Localities

The federal government has not been quiescent in the face of state innovations and pushbacks. The Obama administration is, for example, challenging states’ voter ID laws. A spate of new laws, mostly in Republican-controlled states, require a photo ID to register or vote, demand proof of citizenship, reduce early voting and regulate registration drives by third-party groups such as the NAACP and the League of Women Voters. An ID is required to vote in about 32 states, 16 of which have enacted photo ID laws.

The U.S. Department of Justice found voter ID laws in South Carolina and Texas in violation of the U.S. Voting Rights Act. Polls indicate that about 70 percent of Americans support a photo

ID for voting. The U.S. Supreme Court upheld Indiana’s photo ID law in 2008, but left open a door to challenge such laws if they are applied discriminatorily.<sup>10</sup>

In May 2011, the administration objected to an Indiana law banning the use of Medicaid funds at Planned Parenthood clinics; a federal court later enjoined enforcement of the law. The Centers for Medicare and Medicaid Services warned all state officials that states cannot exclude physicians, clinics, or other providers from Medicaid “because they separately provide abortion services.” In March 2012, the Centers for Medicare and Medicaid Services also announced it would phase out its 90 percent share of the Texas Women’s Health Program because Texas lawmakers banned Planned Parenthood from the program.

Federal courts have blocked all or parts of many state laws involving such Republican-supported policies as abortion restrictions, immigration enforcement and funding cutoffs for Planned Parenthood. These federal interventions have brought relief to Democrats, who hope some of the cases will overturn laws they couldn’t stop.<sup>11</sup>

The proposed Child Interstate Abortion Notification Act, however, has picked up steam in Congress. This bill would criminalize the act of knowingly taking a minor across state lines to obtain an abortion so as to evade her home state’s parental involvement law. It also would prohibit performance of an abortion on an out-of-state minor without notification of one of her parents.

In June 2011, after the Texas House of Representatives passed a bill banning intrusive airport screening, the federal government threatened to halt all flights to Texas.

The administration is pressing suburban communities to provide more low-income housing and welcome more minority residents. Commenting on litigation involving Westchester County, N.Y., the deputy secretary of the U.S. Department of Housing and Urban Development said: “We’re clearly messaging other jurisdictions across the country that ... we’re going to ask them to pursue similar goals.”<sup>12</sup>

Under pressure from the Obama administration, St. Paul, Minn., withdrew its appeal in *Magner v. Gallagher*, which would have given the U.S. Supreme Court an occasion to decide whether the disparate-impact method of proving discrimination under the Fair Housing Act is constitutional. Even though the case was scheduled for oral argument, city officials announced, “The City of Saint Paul, national

civil rights organizations, and legal scholars believe that, if Saint Paul prevails in the U.S. Supreme Court, such a result could completely eliminate ‘disparate impact’ civil rights enforcement, including under the Fair Housing Act and the Equal Credit Opportunity Act.”<sup>13</sup>

Illinois, Massachusetts, New York and various communities have sought to opt out of Secure Communities because they object to having every arrested person’s fingerprints run through immigration databases. The program, they argue, ensnares too many innocent people and instills fear among Latino victims and witnesses of crime. The Obama administration declared their participation to be mandatory, however, and began terminating agreements with localities, arguing that the federal government needs no intergovernmental agreements to allow Homeland Security to search local arrest records for illegal immigrants.

Another facet of coercive federalism has been the nationalization of criminal law. Federal criminal cases have increased by 70 percent over the past decade alone.<sup>14</sup> The federal courts are backlogged with criminal and civil cases. Many observers have raised civil liberties concerns about this nationalization, concerns that were heightened in early 2012 when U.S. District Court Judge Emmet G. Sullivan reported “systematic concealment of significant exculpatory evidence” in the U.S. Justice Department’s prosecution of former Alaska Sen. Ted Stevens, who was convicted of corruption in October 2008. Six months later, Sullivan dismissed the charges against Stevens after first learning of prosecutorial misconduct. Sen. Lisa Murkowski of Alaska contended that Stevens would have been re-elected in November 2008 had this misconduct not led to his conviction.<sup>15</sup>

### **Affordable Care Act at the U.S. Supreme Court**

The blockbuster state-federal constitutional clash for 2012 is the court battle over the Affordable Care Act. At a U.S. Capitol press briefing in October 2009, then House Speaker Nancy Pelosi was asked, “Where specifically does the Constitution grant Congress the authority to enact an individual health insurance mandate?” She replied: “Are you serious? Are you serious?” Now this issue has come to a head.

The attorneys general and governors of 27 states, virtually all Republicans, petitioned the U.S. Supreme Court to overturn the Affordable Care Act’s individual mandate to buy health insurance

and its mandatory expansion of state Medicaid programs. In early 2012, the Democratic governor of Washington, Chris Gregoire, 12 Democratic state attorneys general and 500 liberal state legislators filed amicus briefs defending the Medicaid expansion. Before reaching the high court, the Fourth, Sixth and District of Columbia federal appeals courts had upheld the Affordable Care Act, while the 11th Court of Appeals had struck it down.

The individual mandate requires uninsured citizens and legal residents to purchase federally approved health insurance by 2014 unless they are exempt (e.g., for religious reasons). Those who do not buy insurance will have to pay to the U.S. Treasury a penalty of up to 2.5 percent of their annual income. When Congress debated this mandate, the president said the penalty was “absolutely not” a tax, but when states challenged the mandate in court, the U.S. Department of Justice defended the mandate as a proper exercise of Congress’s “power to lay and collect taxes.”<sup>16</sup> The key constitutional points of contention are the suing states’ arguments that the mandate exceeds Congress’s commerce and tax powers and violates the 10th Amendment.

The Supreme Court also agreed unexpectedly to review the act’s mandatory Medicaid expansion. The suing states argued that the penalty of losing all Medicaid funding for not complying with the expansion is coercive and an illegal commandeering of states’ autonomy. States, they contend, have no real choice to leave Medicaid. Starting in 2014, individuals who earn up to 138 percent of the federal poverty line, effectively, will qualify for Medicaid. The federal government will pay all additional costs—other than administrative costs—until 2016. By 2020, states will pay 10 percent of the expanded program.

In 1936, the Supreme Court opined that unrestrained conditional grants “could become the instrument for the total subversion of the government power reserved to the individual states.”<sup>17</sup> In 1987, the court seemed to suggest that, “in some circumstances, the financial inducement offered by Congress might be so coercive as to pass the point at which ‘pressure turns into compulsion.’”<sup>18</sup>

If the Supreme Court voids the individual mandate or the entire Affordable Care Act, the suing states will have blocked a significant expansion of federal power and reinforced the court’s occasional willingness since *United States v. Lopez* (1995) to limit Congress’s interstate commerce reach. The justices, however, likely would frame

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such a rejection as an exception rather than a precedent readily applicable to other cases.

If the court strikes down the Medicaid expansion as unconstitutionally coercive, it will set an entirely new precedent. Again, though, the Supreme Court likely would cast such a ruling as an exception because Medicaid is such a gargantuan federal aid program. If the Affordable Care Act falls, health reform could shift to the states.

### Health Reform in the States

The states have received federal funds to set up the exchanges and implement other facets of the law. As of January 2012, 14 states had made substantial progress toward establishing health insurance exchanges as set forth in the Affordable Care Act, 21 had made moderate progress, and another 15 had made little progress.<sup>19</sup> Florida and Louisiana have refused to implement much of the law, and many states are holding back because of the litigation.

The 14 states that have elected to operate their own exchange—a website allowing people to compare and purchase health insurance policies—will need to meet a Jan. 1, 2013, deadline to receive more federal funds. States also need to establish health information exchanges containing electronic health records accessible to health care providers so as to minimize treatment errors and duplications. Exchanges are supposed to open in January 2014.

In a November 2011 letter to U.S. Department of Health and Human Services Secretary Kathleen Sebelius, the National Governors Association expressed concern about curtailments of state autonomy. “Under the proposed federal-state partnership models, states would be required to cede many operations that have been traditionally handled at the state level, such as Medicaid eligibility, regardless of whether they implement a state-based exchange, implement a state-federal partnership model or turn over responsibility for the exchange entirely to the federal government.”

In a surprise move toward flexibility, HHS in December 2011 authorized states to define the “essential health benefits” insurance packages to be offered citizens by 2014; however, the packages must be comparable to benchmark private plans.<sup>20</sup> The Affordable Care Act requires a standard set of covered benefits involving 10 general areas, but states will have some flexibility.

A few states, such as Oregon and Vermont, want waivers to implement programs that go beyond the health care reform law. The act already includes State Innovation Waivers, but those waivers do

not become available until 2017, after states will have set up programs. Vermont wants to establish a single-payer plan. Some Republican governors want a block grant.

### State Budget Stress and Tax Quests

Although tax collections have improved for state and local governments, most are still experiencing the depressing effects of the recession. About 280,000 state and local employee jobs were eliminated in 2011. As of January 2012, states owed the federal government some \$38.5 billion for unemployment benefit loans.

In November 2011, the National Governors Association and National Association of State Budget Officers predicted dire fiscal straits for states for the foreseeable future. Additionally, the U.S. Government Accountability Office paints a bleak picture of the long-term fiscal health of the federal, state and local governments.<sup>21</sup> The principal drivers of fiscal stress are rising debt-service and entitlement spending, especially for health care.

President Obama’s \$3.8 trillion 2013 fiscal year budget, up from \$3 trillion in 2008, maintains entitlement spending, proposes to increase taxes on high-income people by \$1.5 trillion and spends more on popular programs, such as infrastructure. The president’s 2013 budget calls for a 3.5 percent increase in education spending, for example, but reductions of 2.7 percent in agriculture, 7.6 percent in housing and urban development, 8.4 percent in health and human services, and 9.1 percent in labor—all areas important to state and local governments. The president projects a \$1.33 trillion federal budget deficit for FY 2012.

States and localities are concerned about Obama’s proposals to reduce the tax exemption for municipal bond interest and to limit a provider-fee technique states use to reduce their share of Medicaid costs. Many state officials also express concern about maintenance-of-effort rules under the Affordable Care Act and the absence of triggers for federal aid if the economy plunges again.

States, therefore, are also scrambling to find new revenue sources. For example, since the U.S. Department of Justice reversed its position in 2011 that the Federal Wire Act of 1961 banned Internet gambling, many states are moving to allow intrastate Internet gambling. It is not clear whether states can legalize interstate Internet gambling.

To the amazement of many observers, bipartisan movement in Congress could authorize state taxation of Internet sales. Amazon, Best Buy, Home

Depot, JCPenney, Target, Wal-Mart, and some other large retailers now support state Internet sales taxes. Although eBay and some other Internet retailers oppose this movement, big brick-and-click retailers—such as Wal-Mart—have aligned with brick-and-mortar retailers on Main streets to enlist support from some otherwise tax-shy Republicans. The National Conference of State Legislatures estimates that states will lose \$23.3 billion from not collecting sales taxes from online and catalog purchases in 2012. Online retailers say this estimate is too high.

Meanwhile, a number of states have passed nexus laws requiring out-of-state sellers to collect and remit the state's sales tax when they advertise through affiliates located in the state. This policy, however, presents a dilemma for states because the big retailers usually then cut off these affiliates, harming many in-state small businesses and families that sell online.

More states also are becoming aggressive about collecting their use tax from residents for online purchases. Pennsylvania, for example, added a use tax line to its income tax form and included a table showing presumed use tax amounts due for filers in various income categories.

### Federal Aid Diversions and Dilemmas

In June 2011, the U.S. Conference of Mayors urged an end to the wars in Afghanistan and Iraq so the peace dividend can be spent on urban programs.<sup>22</sup> The Iraq war has ended, and the Afghan war is expected to end soon, but no peace dividend will flow to cities. Money saved from the wars will be used to soften some federal budget cuts, counteract some tax cuts, and, above all, pay for increased social welfare and debt service spending.

For example, the Community Development Block Grant was cut by nearly 12 percent for 2012.<sup>23</sup> Some localities lost even more than that due to data from Census's American Community Survey being used for the first time in the allocation formula. President Obama's 2013 budget proposal preserves almost \$3 billion for Community Development Block Grants and \$1 billion for HOME, which was cut by 38 percent in 2011, but these are at the same levels as in 2012. Community Oriented Policing Services was cut by 60 percent to \$199 million for FY 2012. Other state and local law enforcement and first responder grants also were cut. The Partnership for Sustainable Communities and Choice Neighborhoods programs were slashed to \$100 million each for 2012. Workforce training was cut by nearly \$1

billion. Grants for Public Health Emergency Preparedness have been reduced by about \$72 million since 2010. The federal highway program was cut by \$900 million for 2012.

One major feature of coercive federalism has been a huge shift in federal aid from places to persons since 1978.<sup>24</sup> That year was an historic high point in federal aid to state and local governments; only 31.8 percent of aid was dedicated to Medicaid and other social welfare payments to individuals. In 1988, that figure increased to 54.7 percent of aid, and by 2008, it was 65.2 percent of aid. In 2017, three-quarters of all aid will go to Medicaid and other social welfare for individuals (see Figure 1). Thus, even though total aid is projected to increase by 18.6 percent from 2011 to 2017, aid for persons is expected to increase by 39.9 percent, while aid to places will drop by 19.2 percent.

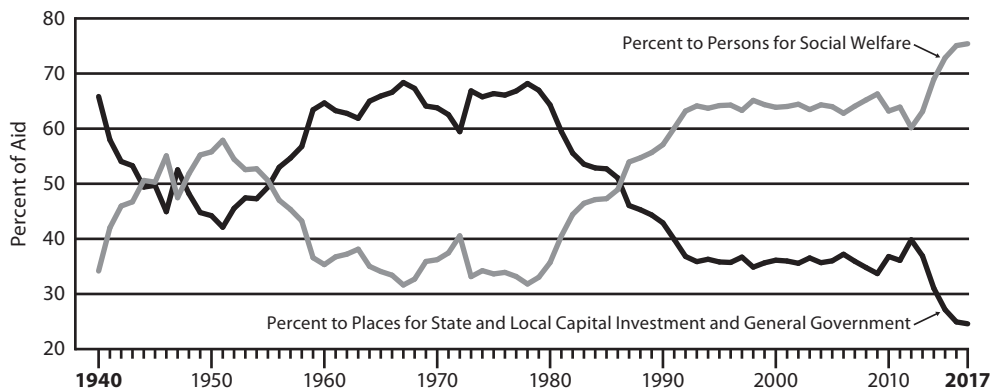
This change in the composition of federal aid is the main reason local governments have seen a precipitous decline in federal aid since the late 1970s. Local governments have principal responsibility for most nonwelfare functions such as infrastructure, education, libraries, criminal justice, housing, parks and recreation, economic development and similar public services. The portions of state budgets devoted to nonwelfare services have likewise experienced sharp declines in federal aid. In turn, most states have reduced aid to their local governments.

Additionally, the federal government plans to shut some military bases and close various regional facilities. The U.S. Department of Agriculture plans to close 249 offices in 2012, though members of Congress likely will resist some of those closures. Congress has approved closing 12 Agricultural Research Service laboratories. The federal government also plans to close about 1,200 of its 3,100 data centers by the end of 2015. Many communities will lose post offices over the next several years.

The current ban on congressional earmarks also will reduce federal funding for local projects. Adding to federal aid woes is Congress' failure to pass federal budgets and to reauthorize major multi-year programs such as education and surface transportation. These failures are rooted in partisan polarization. Even surface transportation, an historically bipartisan favorite, has been rent by party conflict.

The parties also differ on how to deliver federal aid. Republicans propose issuing block grants for Medicaid and other entitlement programs and returning some programs, such as surface transpor-

**Figure A: Federal Grants-in-Aid to State and Local Governments for Persons and Places as Percentages of Total Grants, 1940–2017**



Source: Executive Office of the President, *The Budget for Fiscal Year 2013: Historical Tables* (Washington, DC: U.S. Government Printing Office, 2012), 251–252. Note: 2012–2017 percentages are estimated.

tation, to the states entirely. Such policies would give states more flexibility and perhaps foster innovation and efficiencies. Many Democrats contend that such policies would degrade program quality by fostering interstate races to the bottom and greater differences in recipient treatments across states.

The Office of Management and Budget established a Council on Financial Assistance Reform in the wake of a July 2011 GAO report highlighting problems in the grants-in-aid system,<sup>25</sup> especially weak federal oversight and recipient accountability that resulted in, among other things, about \$125.4 billion in improper payments in 2010. In November 2011, the Big Seven state and local associations and other state groups complained that the council consisted only of federal officials and requested representation.

Policy conditions attached to federal aid are another feature of coercive federalism. States sometimes resist these rules. About 34 states, for example, have not complied with the Adam Walsh Child Protection and Safety Act of 2006, which requires states to upload sex offender data into a three-tiered national public registry. Consequently, these states could lose 10 percent of their Byrne Justice Assistance Grant funds in 2012. This block grant totaled about \$250 million in 2011. Many state officials regard the requirement as an unfunded

mandate entailing costs to install technology to upload digital DNA data and fingerprints and palm prints and to pay for additional processing time by police personnel.

For some states, compliance costs will exceed federal grant funds. Texas estimated that compliance would cost \$38.8 million, while the federal funding loss would be \$1.4 million.<sup>26</sup> New York reached a similar conclusion. As of July 2011, only eight states were deemed to be in substantial compliance with the law.

Nearly one-third of the states could lose 5 percent of their federal highway funds for not meeting a probable January 2014 deadline for their licensing bureaus to upload into a national database medical certifications that their licensed interstate truck drivers are healthy enough to drive.

### Medicaid's Upward Budget March

Medicaid is, by far, the largest federal aid program. It benefits more than 63 million people. State spending on Medicaid is expected to increase by 28.7 percent in 2012. The additional federal money states received for Medicaid under the American Recovery and Reinvestment Act of 2009 ended in June 2011, although states remained bound by the act's maintenance-of-effort requirement not to reduce Medicaid eligibility.

In 2011, Medicaid was the single largest category of state spending, accounting for 23.6 percent of state spending, compared to 21.9 percent in 2009. By contrast, state spending on elementary and secondary education dropped from 21.5 percent in 2009 to 20.1 percent in 2011. Recently, both red and blue states united to combat a proposed \$41 billion federal cutback in Medicaid funding.

A growing concern for state officials is that the Affordable Care Act will add about 17 million people to Medicaid by 2014. Although the federal government will provide 100 percent of the funding for newly eligible individuals from 2014 to 2016, phasing down to 90 percent by 2020, the expansion gradually will increase costs for states. State and local Medicaid spending is expected to increase from \$130 billion in 2009 to \$357 billion in 2020. Two Republican senators introduced a bill in September 2011 to allow states to opt out of the Medicaid expansion required by health care reform, but the bill is unlikely to succeed.

Many Republicans support converting Medicaid to a block grant.<sup>27</sup> Democrats oppose that, although Rhode Island has experimented with a block grant since January 2009. After a *Wall Street Journal* editorialist characterized Washington's Democratic Gov. Christine Gregoire as having signed a bill authorizing the state to apply for a Medicaid block grant waiver,<sup>28</sup> Gregoire penned a heated reply saying that she opposes "any congressional effort to impose Medicaid as a block grant."<sup>29</sup>

States, therefore, will continue to seek cost containments by trying to limit eligibility, which will be prohibited by the Affordable Care Act, cut benefits, and reduce provider payments. In light of program constraints, pressure is likely to build from governors for federal waivers to experiment with structural changes in Medicaid. In March 2012, the Bipartisan Policy Center's Governors' Council proposed to streamline and speed up the waiver process and allow successful waivers to become permanent or semi-permanent rather than requiring states to reapply regularly.

### Whither Education?

Another titanic partisan battle is being fought over reauthorization of the 1965 Elementary and Secondary Education Act, now called the No Child Left Behind Act of 2001. The education act's renewal is five years overdue. The Elementary and Secondary Education Act covered a mere five titles in 32 pages; the No Child Left Behind Act has 600 pages, 10 titles and more than 50 programs. States

want a new law, but they have been seeking waivers under No Child Left Behind. While Democrats and Republicans want to jettison the act's overly prescriptive features, they agree on little else.

In September 2011, President Obama warned that if Congress failed to reauthorize the Elementary and Secondary Education Act, he would exercise executive authority to waive portions of No Child Left Behind for states. If states do not fulfill waiver promises, the waivers will be taken away. In February 2012, Obama issued waivers freeing 10 states from some of the act's toughest requirements, especially the 2014 deadline for 100 percent student proficiency in math and reading. Another 26 states applied for waivers in early 2012.

Some members of Congress as well as constitutional scholars have challenged conditional waivers. It is not clear that the executive branch can unilaterally depart so far from the law and also make waivers contingent upon states making policy changes that fall outside current law. Waivers allow the president to pressure states to pursue his preferred education agenda regardless of Congress's intent behind No Child Left Behind and proposed reforms. Waivers also will create separate accountability systems for waiver states and No Child Left Behind states. More generally, the proliferation of waivers in a number of policy fields over the past two decades raises questions about the politicization of law and diminution of the rule of law.<sup>30</sup>

In further federal effort to improve education, 11 states and Washington, D.C., received \$4 billion in aid in 2011 from the Race to the Top competition, which was funded at \$700 million for 2012. This is a competitive program that awards federal funds to states willing to implement federally approved reforms. Most of these states have had major problems implementing their intended innovations, especially new teacher evaluation systems.<sup>31</sup>

Obama has proposed a competitive \$5 billion grant—Recognizing Education Success, Professional Excellence and Collaborative Teaching—for states to reform teaching by awarding tenure only with proof of good teaching, raising salaries in response to student achievement and improving teacher education. However, NCSL and the National Association of State Boards of Education expressed concern that states needing the most help might be among the least able to compete for grants effectively.

The president also has focused on higher education, proposing in early 2012 to reduce Supplemental Education Opportunity grants, Perkins loans

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and Work Study funds for colleges and universities that increase tuition too hastily or fail to provide good value for tuition dollars. Such extensions of federal accountability rules into higher education are likely to continue, although the ability of state universities to restrain tuition increases is substantially defeated by state budget constraints arising from Medicaid costs, which ordinarily win out over higher education in appropriations battles.

### Whither Transportation?

Reauthorization of surface transportation is another partisan bone of contention; hence, Congress enacted only a short-term extension in March 2012. A key structural problem is the decline in motor fuel tax revenue, which has necessitated appropriations of general revenues for highways and mass transit. Congress spent \$35 billion of general revenues bailing out the Highway Trust Fund in 2008, 2009 and 2010. This stalemate has led to a revival of calls for Congress to turn back transportation to the states.<sup>32</sup>

The governors of Florida, Ohio and Wisconsin rejected federal funds for high-speed rail, arguing that such rail service is not cost effective. In turn, Congress rejected Obama's funding proposals for high-speed rail and a national infrastructure bank.

### Environmental Protection Regulation

The Obama administration has given environmental protection high priority. This policy area produced more bipartisan action and state-federal alliances than many other areas, although many state-federal conflicts still exist.

After six years of controversial development, the U.S. Environmental Protection Agency issued its Cross-State Air Pollution Rule in 2011, which aims to slash emissions from power plants in 27 states in the eastern half of the country. Efforts to block the regulation failed in Congress. The EPA, however, also proposed to give 10 of the 27 states more enforcement flexibility, including permission to emit more pollution than before the new rule was issued. Texas sued the EPA over the rule and a federal appeals court stayed implementation of the rule in December 2011.

In November 2011, New York led 10 states in filing suit in federal court to compel the EPA to issue new, stricter air quality standards for fine particles. The states contend that the EPA has not complied with a 2009 court order.

The Supreme Court held 8-0 in June 2011, however, that eight states, New York City and three

private land trusts could not proceed under the federal common law of nuisance to sue utility companies to cap global warming emissions because the Clean Air Act authorizes the EPA to manage greenhouse gas emissions. There is no basis for parallel judicial action so long as the EPA enforces emissions limits.<sup>33</sup>

### Culture Wars

The so-called culture wars are an integral part of today's polarization. One area of cultural controversy has been medical marijuana, which is legal in 18 states. After saying at the outset of his administration that he would not pursue medical marijuana prosecutions, the Obama administration has become aggressive.<sup>34</sup> The Internal Revenue Service has sought to extract extra taxes from dispensaries, the Treasury Department has pressured banks to close the accounts of marijuana businesses that are legal under state law, and the Bureau of Alcohol, Tobacco, Firearms and Explosives has ruled that patients using medical marijuana cannot buy firearms. U.S. Attorneys have threatened to target media outlets that run ads for dispensaries and to seize properties rented to dispensaries and possibly jail the landlords.<sup>35</sup> In June 2011, a federal judge ordered Michigan to turn over to federal officials the medical marijuana records of six people.

In November 2011, the governors of Rhode Island and Washington petitioned the U.S. Drug Enforcement Administration to reclassify marijuana as suitable for medical use. Meanwhile, Arizona, Florida, Indiana and Missouri have passed laws requiring drug tests for people applying for benefits such as food stamps, job training, public housing, unemployment and welfare. Thirty-six other states are considering such a policy.

The U.S. Court of Appeals for the Ninth Circuit invalidated California's 2008 voter-approved ban on gay marriage, perhaps setting the stage for a Supreme Court review of the issue. Same-sex marriage has been legalized in eight states and Washington, D.C., while 30 states have a constitutional ban on gay marriage. North Carolinians will vote on a constitutional ban in May 2012.

A federal appeals court held that Oklahoma's "Save Our State" constitutional amendment, approved by 70 percent of voters in November 2010, "is likely unconstitutional." The amendment prohibits Oklahoma courts from enforcing Sharia. Arizona, Louisiana and Tennessee have passed similar statutes. Another 21 states are considering such laws. Opponents of the "American laws for



American courts” movement charge that such laws “are unnecessary, unconstitutional and motivated by anti-Muslim bigotry.”<sup>36</sup>

### Federal Pre-emption and Court Orders

Federal pre-emptions of state law and federal court orders are other leading characteristics of coercive federalism. In January 2012, for example, the Supreme Court held that the Federal Meat Inspection Act pre-empts a California animal rights slaughterhouse law that prohibited the slaughter or sale of animals unable to walk.<sup>37</sup> The court also ruled, by a 5-4 vote, that the Federal Arbitration Act of 1925 pre-empts state laws that bar contracts from forbidding class action lawsuits, thus making it harder for consumers to file such suits.<sup>38</sup>

A potentially forthcoming pre-emption is the National Right-to-Carry Reciprocity Act, which passed the House in 2011 and was introduced in the Senate in 2012 by two Democrats. The bill would allow anyone with a state-issued concealed firearms permit to carry a concealed handgun in any other state that issues such permits or does not forbid the carrying of concealed firearms for lawful purposes. Forty-eight states issue concealed-carry permits; Vermont requires no permit. More than half the states do not recognize other states’ permits, or do so only under certain conditions. Only about 12 states unconditionally recognize other states’ permits.

The bill’s opponents argue that it would override states’ rights and create “a locked-and-loaded race to the bottom in which states with strict requirements, like New York, would be forced to allow people with permits from states with lax screening to carry hidden loaded guns.”<sup>39</sup> For instance, about 38 states deny carry permits to people convicted of violent or sex crimes; 36 require individuals to be at least 21 years old to obtain a permit; and 35 states require gun-safety training.

Federal court orders continue to be significant factors in state and local governance. For example, by a 5-4 vote, the Supreme Court upheld, on Eighth Amendment grounds, a lower federal court order requiring California to relieve overcrowding in its prisons by releasing about 40,000 inmates.<sup>40</sup>

### Supreme Court Litigation

For a presidential election year, the Supreme Court has granted *certiorari* to some politically charged cases, especially the Affordable Care Act and Arizona’s immigration law,<sup>41</sup> which have substantial federalism implications. Here are some of the issues pending before the Supreme Court:

*Immigration.* Although illegal immigration has declined since 2008, states have pursued immigration legislation. According to NCSL, all 50 state legislatures and Puerto Rico considered 1,607 immigration bills in 2011. Forty-two states and Puerto Rico enacted 197 laws and 109 resolutions. The Obama administration has challenged immigration laws recently enacted by Alabama, Arizona, South Carolina and Utah.

The contested Arizona law contains four parts rejected by the Obama administration as conflicting with federal laws. These include:

- State law enforcement officials must determine the immigration status of anyone they stop or arrest when they believe the individual might be an illegal immigrant.
- The immigration status of arrestees must be determined before their release.
- Police may arrest individuals without a warrant if they have probable cause to believe they have committed acts subject to deportation under federal law.
- It is a crime under state law for an immigrant to fail to register under a federal law and for an illegal immigrant to work or seek work.

The U.S. Court of Appeals for the Ninth Circuit blocked all four provisions.

A major sore point is whether the federal government has exclusive authority to enforce immigration law. In enacting its law, Arizona relied, in part, on an April 2, 2002, memorandum to the U.S. attorney general from the U.S. Justice Department’s Office of Legal Counsel, which opined that states “have inherent power, subject to federal pre-emption, to make arrests for violation of federal law” and that federal law does not prohibit state police from arresting “aliens on the basis of civil deportability.”

*Voting Rights Act.* In early 2012, the Supreme Court rejected redistricting maps drawn by a federal district court in Texas that favored Democratic candidates after Democrats and minority groups had challenged the maps. The redistricting plan had not yet received preclearance from the federal court in Washington, D.C., under the federal Voting Rights Act. The justices opined that redistricting is primarily the responsibility of elected state officials and the court had not given due deference to the maps drawn by the Republican-controlled legislature.<sup>42</sup> The justices remanded the case, thereby prolonging uncertainty about the future of the Voting Rights Act. The Texas plan had pre-

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served 10 majority-minority districts and added a Latino “opportunity district.” The U.S. Department of Justice wants more minority districts.

The Voting Rights Act, especially Section 5—which covers only nine states, mostly in the South, and parts of seven other states, and requires federal preclearance of voting rule changes by those states—could return to the court through cases involving Alabama, Arizona or Texas because decennial redistricting has heightened Voting Rights Act matters. A key point of challenge is that Section 5 was intended to be temporary. For example, Arizona contends that discrimination against Spanish-speaking voters ended long ago and that the formula for determining which states are covered by Section 5 relies on conditions deemed prevalent in 1972. Arizona came under Section 5 when the Voting Rights Act was amended in 1975 to include any state having language minorities accounting for 5 percent or more of the population if it did not have bilingual ballots in 1972 and minority voter turnout fell below certain levels. Arizona came under the act even though it already had bilingual ballots and had elected the country’s second Hispanic governor in 1974. Objecting states, therefore, argue that Congress failed in 2006 to justify the extension of Section 5 for another 25 years.

In 2009, the Supreme Court hinted that Section 5 may have outlived its rationale by opining that the act “imposes current burdens that must be justified by current needs.”<sup>43</sup>

Challengers also contest the disparate treatment of states whereby Wisconsin, but not South Carolina, can enact a voter ID law without federal interference. This might violate the constitutional principle of equal state sovereignty. In October 2011, however, the federal government ordered Milwaukee, Wis., to provide ballots and other voter information in Spanish. This was the first time a Wisconsin jurisdiction had come under the Voting Rights Act. The act’s language requirement now applies to about 248 jurisdictions in 30 states.

*Court Rulings.* In a potentially important federalism case, the Supreme Court unanimously ruled that a citizen had standing to argue that a federal statute enforcing the Chemical Weapons Convention violated state sovereignty because the convention had no link to interstate commerce and encroached upon Tenth Amendment police powers reserved to the states. Justice Anthony Kennedy contended that “an action that exceeds the National Government’s enumerated powers undermines the sovereign interests of states” and

that a litigant in a justiciable case can argue that her injury stems from disregard of our federal structure of government. “Fidelity to principles of federalism,” he added, “is not for the states alone to vindicate.”<sup>44</sup>

By contrast, the court held 6-2 that *Ex Parte Young* (1908) prohibits Virginia from invoking its sovereign immunity to prevent a state agency established to comply with a federal law, which funds states to care for people with disabilities, from suing for a federal court order to require state officials to comply with the federal law.<sup>45</sup>

Otherwise, the court issued an unusual number of First Amendment rulings affecting states during its 2010–11 term. In a very controversial 5-4 decision, the court struck down an Arizona matching funds law that provided additional campaign money to a publicly funded candidate when spending by a privately financed candidate and independent groups exceeded the funding allotted to the publicly financed candidate.<sup>46</sup>

The court struck down Vermont’s Prescription Confidentiality Law, which required that files containing a physician’s prescription records not be sold or used for marketing purposes without the doctor’s consent.<sup>47</sup> The Supreme Court also held that federal regulations of prescription drug labels pre-empt state law’s failure-to-warn claims against generic drug manufacturers. Hence, individuals harmed by mislabeled generics cannot recover damages under state law.<sup>48</sup>

The court struck down a 2005 California law that barred the sale of certain violent video games to children without parental supervision.<sup>49</sup> The court unanimously held, however, that the First Amendment does not protect an elected official from a state ethics charge for voting for a development project for which a friend and campaign manager was a paid consultant.<sup>50</sup>

The court also upheld the Legal Arizona Workers Act of 2007, which requires employers to check the immigration status of new employees through the federal E-Verify program. The state law, opined the five-justice majority, “falls well within the confines of the authority Congress chose to leave to the states.”<sup>51</sup>

### U.S. Constitutional Change Proposals

In developments reminiscent of the 1995 States’ Federalism Summit cosponsored by The Council of State Governments, proposals for constitutional change and even a constitutional convention<sup>52</sup> have garnered attention.

Some Tea Party supporters advocate a “Repeal Amendment” stating: “Any provision of law or regulation of the United States may be repealed by the several states, and such repeal shall be effective when the legislatures of two-thirds of the several states approve resolutions for this purpose that particularly describe the same provision or provisions of law or regulation to be repealed.”

Texas Gov. Rick Perry and some other conservatives want to repeal the 17th Amendment. Another proposal would allow two-thirds of the states to propose an amendment that would be ratified by conventions or referendums in states representing three-quarters of the Electoral College.<sup>53</sup>

Some Democrats support an amendment to overturn the Supreme Court’s 2010 *Citizens United* ruling,<sup>54</sup> which held that the First Amendment prohibits the government from restricting corporations or unions from spending their general treasury funds on independent political communications supporting or opposing candidates in elections.

Ironically, both the left and the right assailed the States’ Federalism Summit for plotting to trigger a constitutional convention, even though the summit’s leaders expressly disavowed that intention.<sup>55</sup>

The probability of constitutional change remains as small, but the flurry of amendment proposals illustrates the continuing salience of the issues addressed by the summit and the extent to which polarization has pushed activists on the left and the right toward constitutional change.

## Conclusion

Although the Supreme Court might roll back federal power in 2012, the rollback is likely to be modest and the political process, no matter who wins the presidential and congressional elections, will not likely alter the current balance of state-federal power significantly. Partisan polarization will continue to infect state-federal relations, although gridlock in Washington, D.C., could unlock if one party wins the presidency and sizable majorities in Congress.

## Notes

<sup>1</sup>For background, 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; John Kincaid, “State-Federal Relations: Civil War Redux?” *The Book of the States* (Lexington, KY: The Council of State Governments, 2011), 21–28; John Kincaid, “State-Federal

Relations: Cooperative Coercion,” *The Book of the States*. Lexington, KY: The Council of State Governments, 2010, pp. 21–30; and chapters in previous volumes of *The Book of the States*.

<sup>2</sup>*Florida v. United States Department of Health and Human Services* (2012).

<sup>3</sup>John Aloysius Farrell, “Divided We Stand,” *National Journal* 44 (February 25, 2012): 10.

<sup>4</sup>Interview, “State and local governments ought to be freed from constraints,” *State Legislatures* 38 (February 2012): 31.

<sup>5</sup>Available at [http://www.azgovernor.gov/Newsroom/Gov\\_PR.asp](http://www.azgovernor.gov/Newsroom/Gov_PR.asp).

<sup>6</sup>Quoted in Robert Gehrke, “Utah governor defiant of feds in election-year State of The State,” *The Salt Lake Tribune*, January 26, 2012, 1.

<sup>7</sup>Anon, “Rick Perry’s Air War,” *National Journal* (September 10, 2011): 45–46.

<sup>8</sup>New York: Little, Brown, 2010.

<sup>9</sup>With James Edwin Kee (Salt Lake City: Peregrine Smith Books, 1986).

<sup>10</sup>*Crawford v. Marion County Election Board*, 553 U.S. 181 (2008).

<sup>11</sup>A.G. Sulzberger, “Courts Put The Brakes On Agenda Of G.O.P.,” *New York Times*, September 6, 2011, A14.

<sup>12</sup>Quoted in Editorial, “Social Engineering in Suburbia,” *Wall Street Journal*, September 19, 2011, A16.

<sup>13</sup>St. Paul website: <http://www.stpaul.gov/index.aspx?NID=4874>.

<sup>14</sup>Gary Fields and John R. Emshwiller, “Criminal Case Glut Impedes Civil Suits,” *Wall Street Journal*, November 10, 2011, A21.

<sup>15</sup>Charlie Savage and Michael S. Schmidt, “An Alaska Senator Calls for Firing of Prosecutors in Botched Stevens Trial,” *New York Times*, March 17, 2012, A11.

<sup>16</sup>J. Kenneth Blackwell and Kenneth A. Klukowski, “Why the ObamaCare Tax Penalty Is Unconstitutional,” *Wall Street Journal*. July 22, 2010, A19.

<sup>17</sup>*United States v. Butler*, 297 U.S. 1 (1936).

<sup>18</sup>*South Dakota v. Dole*, 483 U.S. 203 (1987) and *Steward Machine Company v. Davis*, 301 U.S. 548 (1937).

<sup>19</sup>Frederic Blavin, Matthew Buettgens, and Jeremy Roth, *State Progress Toward Health Reform Implementation* (Washington, DC: Urban Institute, January 2012), 1–2.

<sup>20</sup>Robert Pear, “Health Care Law Will Let States Tailor Benefits,” *New York Times*, December 17, 2011, A1, A4, and Louise Radnofsky, “States Told They Can Decide on Coverage by Health Plans,” *Wall Street Journal*, December 17–18, 2011, A4.

<sup>21</sup>U.S. Government Accountability Office, *The Federal Government’s Long-Term Fiscal Outlook: Fall 2011 Update*. (Washington, DC: GAO-12-28SP, Fall 2011).

<sup>22</sup>Michael Cooper, “Mayors See End to Wars as Fix for Struggling Cities,” *New York Times*, June 18, 2011, A10.

<sup>23</sup>Michael Cooper, “Tough Choices for Cities as Federal Aid Shrinks,” *New York Times*, December 22, 2011, A16.

<sup>24</sup>John Kincaid, “The State of U.S. Federalism, 2000–2001: Continuity in Crisis,” *Publius: The Journal of Federalism* 31 (Summer 2001): 1–69.

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<sup>25</sup> U.S. Government Accountability Office, *Federal Grants: Improvements Needed in Oversight and Accountability Processes* (Washington, DC: GAO-11-773T, June 23, 2011).

<sup>26</sup> Criminal Justice Committee, Senate of the State of Texas, Interim Report (Austin: Senate, December 15, 2010), 14.

<sup>27</sup> Joanne Kenen, “Fifty Ways to Run Your Program,” *CQ Weekly* 69 (June 27, 2011): 1362–1364.

<sup>28</sup> Nansen Malin, “Liberal Washington State Tries to Kiss Medicaid Goodbye,” *Wall Street Journal*, June 4–5, 2012, A13.

<sup>29</sup> “We Say No to Medicaid Block Grants,” *Wall Street Journal*, June 11, 2011, A12.

<sup>30</sup> Kincaid, “The State of U.S. Federalism, 2000–2001,” 21–22.

<sup>31</sup> Lauren Smith, “‘Race’ Hits Obstacles,” *CQ Weekly* 70 (January 20, 2012): 84.

<sup>32</sup> Ronald D. Utt, “‘Turn Back’ Transportation to the States,” *Backgrounder* No. 2651 (Washington, DC: Heritage Foundation, February 6, 2012). See also U.S. Advisory Commission on Intergovernmental Relations, *Devolving Selected Federal-Aid Highway Programs and Revenue Bases: A Critical Appraisal* (Washington, DC: ACIR, September 1987).

<sup>33</sup> *American Electric Power Co., Inc. v. Connecticut*, 564 U.S. \_\_\_\_ (2011).

<sup>34</sup> William Yardley, “New Federal Crackdown Confounds States That Allow Medical Marijuana,” *New York Times*, May 8, 2011, 13.

<sup>35</sup> Ethan Nadelmann, “Reefer Madness,” *New York Times*, November 7, 2011, A25.

<sup>36</sup> Ashby Jones and Joe Palazzolo, “States Target Foreign Law,” *Wall Street Journal*, February 7, 2012, A3.

<sup>37</sup> *National Meat Association v. Harris*, 565 U.S. \_\_\_\_ (2012).

<sup>38</sup> *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

<sup>39</sup> Editorial, “Packing Heat Everywhere,” *New York Times*, September 9, 2011, A26.

<sup>40</sup> *Brown v. Plata*, 131 S. Ct. 1910 (2011).

<sup>41</sup> *Arizona v. United States*, No. 11-182 (2012).

<sup>42</sup> *Perry v. Perez*, 565 U.S. \_\_\_\_ (2012).

<sup>43</sup> *Northwest Austin Municipal Utility District No. 1 v. Holder*, 557 U.S. 193 (2009).

<sup>44</sup> *Bond v. United States*, 564 U.S. \_\_\_\_ (2011).

<sup>45</sup> *Virginia Office for Protection and Advocacy v. Stewart*, 563 U.S. \_\_\_\_ (2011).

<sup>46</sup> *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*, 564 U.S. \_\_\_\_ (2011).

<sup>47</sup> *Sorrell v. IMS Health Inc.*, 564 U.S. \_\_\_\_ (2011).

<sup>48</sup> *PLIVA v. Mensing*, 131 S. Ct. 2567 (2011).

<sup>49</sup> *Brown v. Entertainment Merchants Association*, 564 U.S. \_\_\_\_ (2011).

<sup>50</sup> *Nevada Commission on Ethics v. Carrigan*, 564 U.S. \_\_\_\_ (2011).

<sup>51</sup> *Chamber of Commerce of the United States v. Whiting* 131 S. Ct. 1968 (2011).

<sup>52</sup> Christopher Shea, “Unconventional Meeting of Minds: Scholars and Tea Partiers gather to consider changing the Constitution,” *The Chronicle of Higher Education*, September 23, 2011, A1, A4, A6.

<sup>53</sup> Michael B. Rappaport, “Renewing Federalism by Reforming Article V Defects in the Constitutional Amendment

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<sup>54</sup> *Citizens United v. Federal Election Commission*, 558 U.S. \_\_\_\_ (2010).

<sup>55</sup> The Council of State Governments, *Restoring Balance to the American Federal System* (Lexington, KY: CSG, 1996), 75.

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