

State-Federal Relations: Lost on the Campaign Trail

By John Kincaid

Federalism is again a silent note in the presidential campaign, although some candidates advanced platforms or policies relevant to state-local relations. Despite partisan gridlock, Congress finally reauthorized the highway and education programs, with the latter increasing state and local discretionary authority, but regulatory enactments and Supreme Court diminutions of state powers continue apace. Legalized marijuana still experiences intergovernmental impediments; a revival of the Sagebrush Rebellion was a publicity failure; the federal government is poised to demand states' compliance with REAL ID while also encroaching upon state regulation of the operation of autonomous motor vehicles.

The federal government is the main driver of state-federal relations. In today's polarized political environment, the nature and direction of state-federal relations are shaped significantly by the federal government's partisan composition. Consequently, the future course of state-federal relations hinges on the outcomes of the 2016 presidential and congressional elections and on who replaces the late Justice Antonin Scalia on the U.S. Supreme Court.

The 2016 Election Campaign

The otherwise unusual 2016 presidential election campaign shares one normal trait with recent campaigns. Federalism and state-federal relations are non-issues. Some candidates have mentioned federalism or included a federalism plank in their platform, but no candidate as of early April 2016 championed federalism in stump speeches or debate appearances. Presidential candidates see little political capital in federalism and intergovernmental relations. Although Americans trust their local and state governments much more than they trust the federal government,¹ they do not translate their trust in state and local governments into demands for restoring more powers to those governments. Proposals to restore balance in the federal system and to reform state-federal relations bog down in details that ultimately bore most people.

On the Democratic side, neither Hillary Clinton nor Sen. Bernie Sanders gave attention to state-federal relations, although both support the authority of states to legalize marijuana. Some of Clinton's policy proposals, such as those concerning criminal justice, implicate state powers in positive and negative ways. For example, she advocates national guidelines for

police uses of force and federal matching funds to buy body cameras for all police officers. She also would increase federal funding to states for pre-school education and some other programs.

Although Sanders is a former mayor, as a Democratic Socialist, his policies would substantially increase federal fiscal and regulatory powers. "Sanders would centralize power in Washington," wrote columnist David Brooks.² By some estimates, his proposals would increase the fiscal size of the federal government by more than 50 percent. His proposal to make public universities tuition-free would significantly reduce states' control of their state universities. Also, unable to compete with tuition-free institutions, hundreds of private colleges would close their doors. Sanders did say, however: "States should have the right to regulate marijuana the same way that state and local laws now govern the sale of alcohol and tobacco. ... It is time for the federal government to allow states to go forward as they best choose."

On the Republican side, Ben Carson, New Jersey Gov. Chris Christie and Sen. Marco Rubio were silent about federalism. Unlike most of his Republican competitors, Rubio did not even declare that the U.S. Supreme Court should have left decisions on same-sex marriage to the states. Christie proposed to cut off federal funds to sanctuary cities. Sen. Ted Cruz condemned "federal overreach" and defended the Tenth Amendment as leaving many matters, including gay marriage and marijuana legalization, to the states.

Donald Trump, who also advocated that same-sex marriage, as well as abortion policy, be decided by the states, did not highlight federalism on the campaign trail but proposed some significant fed-

STATE-FEDERAL RELATIONS

eralism-relevant policies. Trump proposed to repeal the Affordable Care Act and allow the sale of health insurance across state lines. As long as a plan complies with state requirements, any vendor could offer insurance in any state. He also would block-grant Medicaid, sharply limit the state and local tax deduction from upper income taxpayers' federal income-tax liability, support states' rights to legalize marijuana, and defund sanctuary cities.

Governors Jeb Bush and John Kasich presented more developed federalism platforms. Bush vowed to increase state flexibility to manage federally funded programs such as child welfare, Medicaid, K–12 education and senior programs, but would hold states more accountable for results. Bush proposed to:

- Adhere strictly to the Constitution's limits on federal power by vetoing legislation exceeding federal authority and nominating judges who would vigorously enforce constitutional limits on federal authority.
- Nominate and appoint agency officials committed to federalism, mainly by appointing former state officials.
- Reform the regulatory process by repealing and, where necessary, replacing regulations to restore state powers.
- Enhance state enforcement of federal immigration policies by authorizing states to enforce laws that promote the goals of federal immigration law without allowing states to create their own immigration regimes.
- Promote state-driven labor and employment policies by ensuring that federal labor regulations do not unduly restrict state flexibility in responding to economic change.

Kasich, who is one of the few Republican governors to expand Medicaid under the Affordable Care Act, proposed five federalism planks:

- Return most of the federal gas tax to the states, increase state program flexibility and devote most the U.S. Department of Transportation's work to research on behalf of the states;
- Consolidate the more than 100 education programs into four large grants giving states more flexibility, reduce waivers by giving states more flexibility, and shrink the U.S. Department Education and refocus it on researching and sharing innovations that raise student achievement;
- Streamline job-training programs into several block grants, require states to focus on more

useful outcome measures such as job placement and retention, and give states the ability to use existing federal training funds to help workers with jobs to upgrade their skills so as to stay employed;

- Allocate Medicaid funds to states on a per-member, per-month basis by eligibility category while allowing more flexibility around rate-setting and benefit design so as to avoid time-consuming waiver processes, and also increase the cost sharing of recipients above the poverty line and increase private-sector solutions; and
- Emphasize the case-work approach to tailoring benefits to specific low-income individuals in order to reduce dependence and remove federal obstacles to achieving positive outcomes.

Whoever is elected president is unlikely to make state-federal relations a high priority even though the 2015 lead-water crisis in Flint, Michigan, confirmed again that breakdowns in intergovernmental relations can have catastrophic consequences. Also, during this election year, Congress is unlikely to enact legislation having significant positive or negative impacts on state-federal relations. However, the Supreme Court will issue many important rulings affecting the balance of power in the federal system.

Two Congressional Achievements: Highways and Education

Surprisingly, Congress transcended partisan gridlock to enact two major intergovernmental program reauthorizations in 2015.

Congress approved a five-year, \$305 billion highway bill—the Fixing America's Surface Transportation, or FAST, Act—in December. Not since 1998 had Congress passed such a long-term bill. Since 2005, there had been 35 extensions of the highway program, thus making state and local long-term planning nearly impossible. To help pay for the program, Congress took money from the Federal Reserve's "rainy day fund." Additional funds will come from reducing the amount of dividends the Federal Reserve pays to banks and from selling millions of barrels of oil from the Strategic Petroleum Reserve. Most experts agree that this is a terrible way to finance surface transportation, but Congress refuses to raise the 18.4 cent-per-gallon gas tax, which was last raised in 1993. There is, moreover, no grand vision like the one that motivated creation of the interstate highway system in 1956 under President Dwight D. Eisenhower.

In December 2015, Congress also passed the Every Student Succeeds Act, or ESSA—a major reauthorization of the Elementary and Secondary Education Act that replaces No Child Left Behind, also known as NCLB. Reauthorization should have occurred in 2007. ESSA provides more than \$15 billion a year to states in formula funding and consolidates about 50 programs into a new \$1.6 billion block grant but retains a maintenance-of-effort requirement, though with some flexibility. However, ESSA is authorized for only four years rather than five, thus opening the law to reauthorization under the next president.

ESSA was supported by many liberals and conservatives who believed that NCLB gave the federal government too much control over local education. ESSA restores some state and local discretionary authority but retains many federal requirements. States must still conform their standards to multiple federal statutes and gain approval from the U.S. secretary of education.

ESSA aims to achieve a 90 percent high school graduation rate by 2020. States and school districts must continue calculating four-year graduation rates the same way nationwide, and they must report data by gender, race, ethnicity, income, disability, English language learners, migrant status and homelessness. ESSA modifies rules governing periodic standardized testing, though schools must still test students in reading and math in grades 3-8 and once in high school. They also must administer science tests three times between grades 3 and 12. ESSA provides funds for schools to streamline and audit their testing programs and permits states to limit the amount of instructional time devoted to testing.

ESSA ends the federal requirement that teacher evaluations be tied to student performance on state tests, prohibits the U.S. Department of Education from telling states how to assess teacher and school performance, prohibits the federal government from mandating or giving states financial incentives to adopt particular academic standards such as Common Core, ends President Barack Obama's NCLB waivers, and enhances the Charter Schools Program while eliminating NCLB's Public School Choice program and free after-school tutoring.

ESSA requires states to go beyond test scores to determine school accountability by also considering such factors as school climate, teacher engagement and students' success in advanced coursework. States are required to intervene in the lowest performing 5 percent of schools. As such, states have more discre-

tion over how they define school success and intervene in schools that do not demonstrate progress.

Proposed Legislation

Two bills being considered by Congress could have significant impacts on state and local governments.

One is the Voting Rights Act of 2015, which would apply the preclearance rule to every state.³ The bill would subject any state to preclearance if a court finds that the state discriminated against voters because of race five or more times during the most recent 15 years. State officials would be required to notify the public within 48 hours of certain voting changes being made 180 days before a federal election, and local governments would need valid reasons to change voting locations or resources to be spent on an election. Passage this year seems unlikely.

A bill that could pass this year would overturn a 2014 regulation that deems state and local bonds to be of insufficient quality for banks to hold against the possibility of a financial collapse. State and local officials along with many banks are lobbying for the legislation because they believe the new rule will reduce bond buying by banks and increase borrowing costs for state and local governments. Banks are the biggest bond buyers and own about \$500 billion of state and local securities. At the same time, President Obama's fiscal year 2017 budget proposed to cap the tax-free interest earned on state and local bonds for couples earning more than \$250,000.

Facets of Fiscal Federalism

President Obama presented a \$4.1 trillion budget to Congress for the 2017 fiscal year. The president's budget is usually dead on arrival in Congress, but for the first time in 40 years, the Republican chairs of the House and Senate budget committees refused to invite testimony from the president's budget director.

Federal aid to state and local governments will total about \$667 billion in 2016, a 6.8 percent increase over 2015. Aid is expected to rise to about \$694 billion in 2017, an increase of 4.1 percent. However, aid is not keeping up with inflation. Further, 73.9 percent of the aid in 2016 is for social welfare payments for individuals. Thus, the proportions of federal aid available for education, infrastructure, criminal justice, economic development and other non-welfare purposes continue to decline while states spend more on Medicaid and other mandatory social programs. In 2013, states spent 16.9 percent of all state own-source revenues on Medicaid compared to 12.2

STATE-FEDERAL RELATIONS

percent in 2000. One reason for the increase was that Medicaid enrollment increased by 70 percent.⁴

Congress appears to be poised, however, to provide federal funds to states wishing to implement needle-exchange programs as one part of a spreading state and local campaign to stem the growing abuse of opiates, prescription drugs and other drugs nationwide.

The Pew Charitable Trusts estimated that federal spending in the states amounted to \$3.3 trillion in 2014 and accounted for an average of 19 percent of state economic activity. The composition of this spending was 34 percent for retirement benefits, 28 percent for non-retirement benefits, 18 percent for grants, 11 percent for contracts, and 9 percent for salaries and wages.⁵

The Federal Funds Information for States advised states to try to increase their federal aid by ensuring that all residents get counted in the decennial census, identifying available grants and coordinating agency efforts to garner grants.

States are expected to spend more than \$790 billion from their general funds in 2016, a 4.1 percent increase over 2015. Medicaid and education will account for about two-thirds of that spending. State revenues will be about \$785 billion in 2016.

Many states could face tough economic times in 2016–17. By early 2016, Alaska, North Dakota, West Virginia and Wyoming were in recession. Louisiana, New Mexico and Oklahoma could also experience recession. Most vulnerable are states dependent on energy revenues and on manufacturers hurt by the rising dollar, as crude oil prices dropped by 72 percent from their June 2014 high. States that rely significantly on income-tax revenue from high-income residents might also experience shortfalls due to stock market volatility.

In an effort to increase revenues, Alabama and 12 other states are moving more aggressively to collect sales taxes on Internet purchases by their citizens. Alabama advanced the theory that if its residents buy more than \$250,000 per year from an out-of-state business, then the seller has an “economic presence” in the state equivalent to that of a brick-and-mortar store. In January 2016, the National Conference of State Legislatures approved model legislation for states seeking to require collection and remittance of their state sales tax by remote sellers.⁶ A federal appeals court upheld a Colorado law that requires out-of-state sellers that do not collect the state sales tax to send the state a list of their in-state customers. It is estimated that states lost \$23.2 billion in revenue in 2012 from untaxed remote sales.⁷

The states lost a potential source of revenue in February 2016 when President Obama signed a permanent extension of the Internet Tax Freedom Act, first enacted in 1998. The law prohibits state and local governments from levying taxes on email and Internet access services.

Meanwhile, the U.S. Department of the Interior withdrew plans to allow off-shore oil and natural gas leasing between Georgia and Virginia—a decision that will cost jobs and revenue in those states as well as in North Carolina and South Carolina.

The Obama administration might seek to cut off aid to states such as Mississippi and North Carolina that pass laws granting citizens’ rights to deny service to individuals requesting same-sex wedding ceremonies and related goods and laws prohibiting people from using public restrooms that do not match their birth sex. Some cities and states are boycotting such sister states by not allowing their employees to travel to them on public business. The Obama administration moved forcefully on rights of transgender people by issuing a directive to all public school systems in May 2016 that requires them to accommodate transgender students, including access to restrooms of the sex with which they identify.

Some congressional Republicans want to cut off federal funds to sanctuary cities and states that interfere with federal enforcement of immigration laws or decline to comply with U.S. Immigration and Customs Enforcement requests to detain illegal immigrants. The Obama administration also pushed back against sanctuary cities by directing the Federal Bureau of Prisons to transfer prisoners completing their sentences into immigration custody for deportation even if state or local officials who refuse to cooperate with Immigration and Customs Enforcement want the person for prosecution or incarceration.

There is continuing discussion, especially among congressional Republicans, about tax reforms that would eliminate the federal income-tax deduction for payments of state and local taxes. The deduction benefits mostly high-income people who itemize their deductions and blue states that are predominantly Democratic.⁸ Many state and local officials support this deduction but might be compelled to choose during negotiations over a comprehensive tax reform between retaining that deduction or the deduction for interest earned on state and local bonds.

Another sign of unrest is that during the past several years, 27 states have passed resolutions calling for a constitutional convention to consider a bal-

anced budget amendment. Republican presidential candidates Cruz, Kasich, and Rubio endorsed this campaign. There is a possibility that the necessary two-thirds of the states (34) will approve such resolutions by the end of this year. Constitutionally, this threshold would seem to require Congress to call a convention, but Congress will surely find a way not to do so.

Regulatory Federalism and Preemption

The Obama administration issued 82,036 pages of new and proposed regulations in the *Federal Register* in 2015 and will likely increase rulemaking as the president's tenure in office comes to a close.

The administration also has increased the use of letters of guidance, as is evident in the U.S. Department of Education's pressure on higher education institutions to enforce a "preponderance of the evidence" rule in cases arising under Title IX of the Education Amendments of 1972. While federal regulations must be issued according to the Administrative Procedure Act and must include time for "notice and comment," letters of guidance can be issued without notice and comment.

The U.S. Department of Justice issued a letter of guidance warning chief justices of state courts and their court administrators that excessive fines, arrests and imprisonment of poor people may violate the U.S. Constitution's civil rights provisions and, thus, trigger federal intervention.

This policy is closely related to the expansion of federal oversight of police departments, such as a February 2016 agreement providing federal oversight of the Miami, Florida, police force for the next four years. The 2014 police shooting of Michael Brown in Ferguson, Missouri; other police shootings of African Americans; and the rise of the Black Lives Matter movement have generated more calls for more federal oversight of local criminal justice systems.

The enactment of Vermont's genetically modified organisms, or GMO, labeling law—Act 120—due to take effect in July 2016, triggered considerable lobbying pressure on Congress to enact legislation called the Safe and Accurate Food Labeling Act of 2015, that would preempt such state labeling laws and establish standards for voluntary labeling nationwide. The principal partisan divide over the bill is that Democrats want mandatory labeling while Republicans want voluntary labeling. Meanwhile, the Grocery Manufacturers Association, along with three other trade associations, filed a lawsuit in

federal court challenging the constitutionality of Vermont's law.

The federal Consumer Financial Protection Bureau, or CFPB, is expected to issue the first national rules for the \$38.5 billion payday-lending industry. About 15 states have largely suppressed payday lending by placing caps on interest rates, but a few states such as Colorado regulate it and believe that their rules should be accommodated by the CFPB.

A provision in the proposed Aviation, Innovation, Reform and Reauthorization Act, which is supported by the American Trucking Association, would preempt laws in 20 states that limit truck drivers' hours, require truck drivers to be given paid meal breaks and require carriers that employ drivers to pay drivers "separate or additional compensation." This provision in the aviation bill would negate a 2014 ruling by the U.S. Court of Appeals for the 9th Circuit that carriers must comply with a California law that mandates paid meal and rest breaks for workers in the state.

A possible state-federal battle also may loom over regulation of self-driving vehicles. Although the federal government regulates car manufacturing, states regulate car operations. However, the U.S. Department of Transportation, wishing to develop operating rules, is seeking to craft a model state law governing autonomous vehicles. Some autonomous-vehicle makers such as Google dislike new state laws, including California's SB 1298, that require among other things a licensed driver to be at the wheel of a self-driving vehicle in order to correct a malfunction. Eventually, the industry will likely seek federal preemption of most or all state rules governing autonomous-vehicle operations.

Marijuana

The proliferation of state legalizations of medical and recreational marijuana continues to challenge the federal system.

Some members of Congress have responded by supporting a bill titled the Respect State Marijuana Laws Act introduced by Rep. Dana Rohrabacher (R-Calif.) in April 2015. The bill would make the federal ban on marijuana inapplicable in states that legalize the drug. Twenty-three states and the District of Columbia have legalized medical marijuana, and 13 others have legalized limited cannabis extracts for specific therapeutic use. Four states and D.C. have legalized recreational marijuana. Thus far, states that have legalized marijuana have relied on the U.S. attorney general's advice to federal prosecu-

STATE-FEDERAL RELATIONS

tors to refrain from targeting marijuana users and businesses acting legally under state laws.

Nonetheless, banking remains a significant problem for marijuana businesses because federal law prohibits banks from accepting marijuana money. Even though the federal government announced that it will not pursue financial institutions that accept legitimate marijuana money, most institutions do not wish to risk possible prosecution for inadvertently overlooking wrongdoing. The federal government will not allow states to create new financial institutions for marijuana businesses. Additionally, in 2015, the U.S. Postal Service warned newspapers that it is a crime to mail material containing marijuana advertising.

The REAL ID Hammer

REAL ID, enacted in 2005, continues to be a state-federal bone of contention reinforced by privacy advocates who object to the law's provisions governing secure driver's licenses. To date, only 22 states are compliant. Now, however, after years of enforcement postponement in deference to various states' fiscal and privacy concerns, the U.S. Department of Homeland Security appears ready to insist that the 28 non-compliant states comply with REAL ID's requirements by Oct. 1, 2020. Starting then, every traveler will need a REAL ID-compliant driver's license or other acceptable identity document such as a passport in order to board airplanes and trains, open a bank account, and engage in various other activities.

Sagebrush Rebellion Resurrection

The growth of population in Western states, especially in the mountain west, in recent decades has increased pressures on land use and economic development; yet the federal government retains ownership of huge amounts of land including, for example, 84.9 percent of Nevada's land area, 64.9 percent of Utah, 52.9 percent of Oregon and 48.1 percent of Wyoming. Furthermore, the Federal Land Policy and Management Act of 1976 declared that the remaining public domain lands would stay in federal ownership. This declaration of permanent federal ownership was a major trigger of the so-called Sagebrush Rebellion, a movement of Western citizens and local governments that began in the late 1970s to advocate state or local control over federal land and management decisions.

Bills have been introduced in Congress since 1932 to transfer ownership of various federal lands

to states. In March 2015, Sen. Lisa Murkowski (R-Alaska) sponsored yet another bill to sell, trade and transfer federal lands to states. Sen. Ted Cruz sponsored a bill in 2014 to prohibit the United States from owning more than 50 percent of a state's land area. These bills are unlikely to pass, but they reflect the unrest present in parts of the West.

A highly publicized occupation by disgruntled ranchers and other citizens of Malheur National Wildlife Refuge in Oregon in 2015 highlighted the land controversy but produced little public sympathy nationwide. The occupation began to wind down after its leader was arrested in late January 2016 and police killed one of the occupiers. Oregon Gov. Kate Brown sought federal reimbursements for the estimated \$100,000 per week the state spent dealing with the occupation.

The American Lands Council, a private organization funded substantially by contributions from county governments, is seeking to require the federal government to hand over many federal lands to the states. Utah is so far the only state to pass a resolution insisting on such a land transfer. Some studies show that state takeovers of federal lands would increase costs for states. A study in Utah estimated a cost of \$280 million after takeover but concluded that "from a strictly financial perspective, it is likely the state of Utah could take ownership of the lands and cover the costs to manage them."⁹

Supreme Court Rulings

The U.S. Supreme Court plays a major role in state-federal relations. The direction of federalism rulings may change, however, following the 2016 death of Justice Antonin Scalia, who was an important member of the court's conservative majority. The Republican Senate, hoping a Republican will capture the White House, has vowed not to confirm a new justice until after the presidential election. There are precedents on both sides. In 1852, the Democratic Senate ignored Whig President Millard Fillmore's nominee, and in 1868, the Republican Senate ignored President Andrew Johnson's nominee. Since 1900, the Senate has confirmed six justices during a president's last year in office, although five of those confirmations occurred when the president's party controlled the Senate. The exception was the confirmation of Justice Anthony Kennedy in February 1988, but this precedent is ambiguous because Kennedy had been nominated by President Ronald Reagan in November 1987 after the Democratic Senate had

rejected his July 1987 nominee, Robert H. Bork, in a vicious confirmation process.

For now, the court is divided 4-4 between conservatives and liberals, although Justice Kennedy is an unreliable conservative. In the case of a tie vote, the justices can decide to hear the case again when a new justice joins them, or they can uphold the lower court's ruling without setting a nationwide rule. The justices often vote for re-argument when they expect a new justice to be appointed soon, but Scalia might not be replaced until 2017.

Interestingly, recent research suggests that laws enacted by more professionalized legislatures are more often struck down by the Supreme Court. The reason for this is unclear. Perhaps such legislatures push boundaries more often and also respond to citizen preferences in ways that test constitutional rules.¹⁰

Final Rulings

The Supreme Court issued a number of important rulings relevant to federalism during 2015 and early 2016.

Most momentous during the court's 2014–15 term was *Obergefell v. Hodges*, by which the 5-4 court struck down all state laws banning same-sex marriage or denying recognition to such marriages solemnized out of state. The majority held marriage to be a fundamental right and that same-sex marriage is protected by the Fourteenth Amendment's Due Process and Equal Protection clauses. In dissent, Chief Justice John Roberts declared: "Celebrate the availability of new benefits. But do not celebrate the Constitution. It had nothing to do with it."¹¹ However, the court has endorsed many rights not explicitly mentioned in the Constitution, such as rights to procreate, raise and retain custody of one's children, buy and use contraceptives, obtain an abortion, decline medical treatment, and engage in homosexual relations. Given that national public opinion had shifted in favor of gay marriage by 2015, the Supreme Court's ruling was not surprising.

In another important case in which the National Conference of State Legislatures filed an amicus brief asking the Supreme Court to affirm the constitutional role of state legislatures in redistricting, the 5-4 court held to the contrary that an independent commission does not violate the Constitution's elections clause.¹²

In a challenge to the way governments have drawn electoral districts for 50 years, the Supreme Court ruled unanimously that states can apportion legislative seats according to total population rather than only citizens or eligible voters.¹³ The court had

heard arguments in December 2015 in a case from Texas on the meaning of "one person, one vote," which the court has said requires political districts to be equal in population. The plaintiffs contended that counting total population discriminates against rural areas because city populations include many immigrants and children not eligible to vote. Texas contended that states have the constitutional authority not to use total population in apportioning legislative seats; the Obama administration argued that the Constitution requires states to use total population. The court decided not to settle the issue, thus leaving open the possibility for states to use different population bases, though these would likely be challenged in court. Some states already make adjustments, including Hawaii, which does not count students from out of state or military personnel registered to vote elsewhere.

The Supreme Court, however, gave states substantial leeway to control messages on automobile license plates by ruling that Texas could refuse to issue a license plate displaying the Confederate battle flag. The justices opined that license plates are government speech.¹⁴ The court, by a 5-4 vote, also upheld a Florida law prohibiting candidates for elected judicial seats from soliciting or receiving funds personally.¹⁵

In *King v. Burwell*, the Supreme Court upheld, in a 6-3 decision, federal tax credits for health-insurance purchasers on exchanges established by the federal government in states that do not establish an exchange. At issue was whether the credits were limited by the Affordable Care Act to enrollments "through an Exchange established by the State under Section 1311." Writing for the majority, Chief Justice Roberts opined: "Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter."¹⁶

In the field of criminal justice, the Supreme Court ruled 5-4 that Oklahoma's use of midazolam, a sedative, as its first lethal-injection drug does not violate the cruel-and-unusual-punishment provision of the Eighth Amendment.¹⁷ In *Rodriguez v. United States*,¹⁸ however, the court ruled that a police officer cannot prolong a traffic stop for a canine sniff without reasonable cause.

Local governments were affected especially by two rulings. In one, the court struck down an ordinance that imposed more size and duration restrictions on church-event signs than on ideological and political signs.¹⁹ In *City of Los Angeles v. Patel*,²⁰ the

STATE-FEDERAL RELATIONS

court declared unconstitutional a city ordinance that required hotels to record and retain specific guest information onsite for 90 days and to show those records to any police officer on demand.

The Supreme Court again upheld, by a 5-4 decision, disparate-impact claims under the Fair Housing Act of 1968. This law includes a provision allowing claims not only for intentional discrimination but also for practices having a discriminatory effect, even if they were not prompted by an intent to discriminate.²¹

Overall, the 2014–15 term was a good one for the Supreme Court’s liberals. They voted together on most cases and attracted support from Justice Kennedy in eight of 13 5-4 cases and also Justice Roberts in *King v. Burwell*.

In December 2015, by a 6-3 vote, the Supreme Court reversed a California Court of Appeal decision that *DirecTV* consumers were not bound by an arbitration provision requiring individual arbitration. The Federal Arbitration Act preempts California’s treatment of the *DirecTV* case, and the California Court was bound by the mandate in *AT&T Mobility LLC v. Concepcion* (2011). “Lower court judges are certainly free to note their disagreement with a decision of this Court,” opined Justice Stephen Breyer for the majority, “but the ‘supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source.’”²²

In December 2015, the Supreme Court also upheld an ordinance enacted by Highland Park, Illinois, that bans semiautomatic weapons and high-capacity magazines.²³ This could be an important precedent allowing state and local governments more leeway to regulate firearms in the aftermath of *McDonald v. City of Chicago* (2010), which held that the U.S. Second Amendment applies to the states and that state and local governments cannot, therefore, infringe upon the fundamental constitutional right to “keep and bear arms.” However, in March 2016, the court unanimously struck down state laws and local ordinances that prohibit citizens from carrying stun guns.²⁴

In January 2016, the court ruled 6-3 that juveniles sentenced to life in prison without parole can seek parole.²⁵ About 2,500 such inmates might now seek parole. The court also held that the Sixth Amendment requires a jury rather than a judge to determine the aggravating facts needed to impose the death penalty.²⁶

The Supreme Court held by 6-2 in January 2016 that the Federal Power Act allows the Federal Energy Regulatory Commission to regulate wholesale market operators’ compensation of demand-response bids despite state arguments that such regulations encroach upon state authority.²⁷

In February 2016, the court, by a 5-4 vote, halted President Obama’s ambitious climate change initiative by temporarily blocking an Environmental Protection Agency rule, known as the Clean Power Plan, that would require states to reduce carbon emissions from coal-fired power plants by 32 percent by 2030 from a 2005 baseline.²⁸ The rule required states to submit compliance plans by September 2016 unless they requested a two-year extension. The rule was challenged by 27 states and many industry groups. In March, however, the court rejected a plea from 21 states to block the U.S. Environmental Protection Agency’s rule limiting emissions of mercury and other pollutants from coal-fired power plants.²⁹

In March 2016, the court unanimously remanded to the lower court a case in which national park officers prohibited a moose hunter from operating a hovercraft on a state river within a national preserve in Alaska. The lower court, opined the justices, must weigh the “vital issues of state sovereignty, on the one hand, and federal authority, on the other.”³⁰

In another March decision, the Supreme Court held unanimously that states must recognize adoptions by same-sex parents who move from one state to another.³¹

The Supreme Court ruled 5-3 in a Medicare fraud case that seizing “untainted” assets needed to retain a defendant’s chosen counsel violates the Sixth Amendment.³² This ruling will also constrain state asset freezing and forfeiture practices. Additionally, the U.S. Department of Justice announced in December 2015 that it will no longer make “equitable sharing payments” that share assets seized from private citizens with state and local law enforcers.

By a 6-2 vote, the court declined to hear a suit brought by Nebraska and Oklahoma arguing that Colorado’s legalization of marijuana violates federal law and increases drug crimes in their states. If Colorado were an entity south of the U.S. border, plaintiffs argued, the federal government would prosecute it as a drug cartel.

In March 2016, the U.S. Supreme Court struck down efforts by 18 states to track the cost and quality of health care by requiring that every health-care claim involving their residents be submitted to a statewide database. The court held, 6-2, that the Employee Retirement Income Security Act of 1974

preempts such state laws with respect to self-funded insurance plans.³³

The Supreme Court split 4-4 over a lawsuit on whether public-sector labor unions can collect fees from government workers who choose not to join the union.³⁴ The case affected more than five million workers in 23 states and Washington, D.C., and sought to overturn a nearly 40-year-old Supreme Court precedent. This case would surely have gone against the unions if Scalia was still alive, but the even split let stand the lower court ruling that unions can collect such fees.

The court ruled by 6-2 that the First Amendment prohibits a government from demoting a public employee based on a supervisor's perception that the employee supported a political candidate. The employee is entitled to challenge such a demotion as being unlawful. The State and Local Legal Center filed an *amicus* brief urging the court not to find that a constitutional claim exists when an employer misperceives that an employee has engaged in political speech.³⁵

Despite Scalia's death and the justices' 4-4 conservative-liberal split, the U.S. Supreme Court has been remarkably busy ruling on cases relevant to the balance of power between the states and the federal government. As of mid-April 2016, more than half of the relevant cases decided since Scalia's death preempted or otherwise altered state or local government laws or policies.

Pending Cases

A number of important cases were pending in early 2016.

For one, the Obama administration's plan to shield up to five million people from deportation was struck down by lower courts. A Supreme Court tie would leave that ruling in place.³⁶ The 26 states that sued to overturn the president's deportation policy argued that while the president has authority to adjust enforcement of immigration for individuals, he lacks authority to change the legal status of entire classes of illegal immigrants.

In a major abortion-rights case, the administration is backing a challenge to Texas' strict new regulations for abortion clinics.³⁷ A federal appeals court upheld the regulations. Thus, a tie would sustain the regulations.

The Supreme Court will decide whether a state must respect another state's sovereign immunity to the same extent as its own and whether it should overrule *Nevada v. Hall* (1979), which permits a sovereign state to be sued in the courts of another

state without its consent.³⁸ The court also will decide whether Puerto Rico is a sovereign state with powers that go beyond its status as a U.S. territory.³⁹

To be decided, as well, is whether, in the absence of a warrant, a state can criminalize a person's refusal to take a chemical test to detect alcohol in the person's blood.⁴⁰

The Supreme Court also will decide if the Federal Power Act field-preempts a state order requiring retail utilities to enter into a contract to generate and sell wholesale power on a fixed-rate basis and whether the Federal Energy Regulatory Commission's acceptance of an annual regional-capacity auction preempts states from requiring retail utilities to enter fixed-rate contracts with sellers willing to sell in the auction on a long-term basis.⁴¹

Finally, the Supreme Court faces a major affirmative action case involving public universities' admission policies.⁴² This case first reached the court in 2013 when it ruled that the use of race in admissions decisions must be framed narrowly to advance compelling government interests. Also, courts must examine evidence and not rely on schools' reports. The Supreme Court then remanded the case to the lower court to examine the evidence, but the result did not satisfy the Supreme Court majority. Justice Elena Kagan recused herself from the case, which means there could be a 4-3 vote to overturn affirmative action.

Conclusion

The absence of federalism on the campaign trail is consistent with the post-1980 recession of federalism as a principle from the political arena. Although state-federal relations remain the vital sinews of the operation of the American federal system of government, intergovernmental relations remain invisible to voters and often misunderstood by elected officials. Consequently, changes in state-federal relations take place in a piecemeal partisan fashion unguided by any principle of federalism, and the Supreme Court will be the main federal actor in state-federal relations until a new Congress and president are installed in January 2017. The Democratic-Republican polarization of most of the states themselves contributes to centralization trends because states cannot unite around a coherent vision of state-federal relations.

Notes

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STATE-FEDERAL RELATIONS

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⁷Richard Rubin, “States Set Up Fight Over Web Sales Tax,” *Wall Street Journal*, February 24, 2016, A3.

⁸Richard Rubin, “Tax Break Under GOP Fire,” *Wall Street Journal*, January 30-31, 2016, p. A5.

⁹Stambro, Jan Elise, John C. Downen, Michael T. Hogue, Levi Pace, Paul M. Jakus, and Therese C. Grijalva, *An Analysis of a Transfer of Federal Lands to the State of Utah* (Salt Lake City: Bureau of Economic and Business Research, University of Utah, November 2014), p. xxvi.

¹⁰Susan M. Miller, Eve M. Ringsmuth, and Joshua M. Little, “Pushing Constitutional Limits in the U.S. States: Legislative Professionalism and Judicial Review of State Laws by the U.S. Supreme Court,” *State Politics & Policy Quarterly* 15 (4): 476-491.

¹¹576 U.S. ____ (2015), Docket No. 14-556.

¹²*Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. ____ (2015), Docket No. 13-1314.

¹³*Evenwel v. Abbott*, 576 U.S. ____ (2016), Docket No. 14-940.

¹⁴*Walker v. Texas Division, Sons of Confederate Veterans*, 576 U.S. ____ (2015), Docket No. 14-144.

¹⁵*Williams-Yulee v. Florida State Bar*, 575 U.S. ____ (2015), Docket No. 13-1499.

¹⁶576 U.S. ____ (2015), Docket No. 14-114.

¹⁷*Glossip v. Gross*, 576 U.S. ____ (2015), Docket No. 14-7955.

¹⁸575 U.S. ____ (2015), Docket No. 13-9972.

¹⁹*Reed v. Town of Gilbert*, 576 U.S. ____ (2015), Docket No. 13-502.

²⁰135 S. Ct. (2015).

²¹*Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.*, 576 U.S. ____ (2015), Docket No. 13-1371.

²²*DiracTV, Inc. v. Imburgia* 576 U.S. ____ (2015), Docket No. 14-462.

²³Adam Liptak, “Sign of Tacit Approval as Justices Turn Away Challenge to a Local Effort to Regulate Guns,” *New York Times*, December 8, 2015, p. A19.

²⁴*Jaime Caetano v. Massachusetts*, 576 U.S. ____ (2016), Docket No. 14-10078.

²⁵*Montgomery v. Louisiana*, 576 U.S. ____ (2016), Docket No. 14-280.

²⁶*Hurst v. Florida*, 577 U.S. ____ (2016), Docket No. 14-7505.

²⁷*Federal Energy Regulatory Commission v. Electric Power Supply Association*, U.S. 577 ____ (2016), Docket No. 14-840.

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³¹*V. L. v. E. L.*, 577 U.S. ____ (2016), Docket No. 15-648.

³²*Luis v. United States*, 578 U.S. ____ (2016), Docket No. 14-419.

³³*Gobeille v. Liberty Mutual Insurance Co.*, 576 U.S. ____ (2016), Docket No. 14-181.

³⁴*Friedrichs v. California Teachers Association*, 578 U.S. ____ (2016), Docket No. 14-915.

³⁵*Heffernan v. City of Paterson, New Jersey*, 578 U.S. ____ (2016), Docket No. 14-1280.

³⁶*United States v. Texas*, Docket No. 15-674.

³⁷*Whole Woman’s Health v. Hellerstedt*, Docket No. 15-274

³⁸*Franchise Tax Board of California v. Hyatt*, 578 U.S. ____ (2016), Docket No. 14-1175.

³⁹577 U.S. ____ (2016), Docket No. 15-108.

⁴⁰*Birchfield v. North Dakota*, 578 U.S. ____ (2016), Docket No. 14-1468.

⁴¹*Hughes v. Talen Energy Marketing*, 578 U.S. ____ (2016), Docket No. 14-614.

⁴²*Fisher v. University of Texas at Austin*, Docket No. 14-981.

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