

State-Federal Relations: States Still on the Defensive

By John Kincaid

Party polarization continues to sustain gridlock in Washington and produce state-federal tensions. States could reduce Washington's polarized gridlock by eliminating partisan gerrymandering and reforming primary elections, but states also are more polarized along red and blue lines. Polarization contributes to coercive federalism, and states are on the defensive in their relations with the federal government. State-federal conflicts over the Affordable Care Act, the Common Core State Standards Initiative, REAL ID and other issues marked 2013–14. Many observers tout state innovation as a counterbalance to Washington's gridlock, but many innovations are polarizing because they are produced by one-party states and thus lack bipartisan traction. The federal government also pre-empts some state innovations and nationalizes others. The U.S. Supreme Court decided eight federalism-relevant cases during its 2012–13 term and four in early 2014, with 10 to be decided as of April 2014.

A recent economic analysis of the rise and fall of great powers from ancient Rome to today concludes the United States needs a more limited national government, revived federalism, entitlement reform and honest budgeting in order to stem decline.¹ Yet the possibility of achieving any of these objectives is dim. Federal power still expands with little restraint and hobbles federalism by constraining state and local powers and penetrating deeply into state and local affairs with conditions of aid, mandates, pre-emptions and court orders. Agencies of the federal government, such as the Congressional Budget Office and Government Accountability Office, and many other observers have repeatedly warned that entitlement programs are unsustainable. The federal government's future obligations, mostly for social welfare and debt service, might exceed future revenue by about \$200 trillion, and unfunded liabilities of state and local governments stand at about \$38 trillion.² No one believes the federal budgeting process is rational or honest. Yet political leaders eschew reform.

At a March 2014 symposium on intergovernmental relations sponsored by the Section on Intergovernmental Administration and Management of the American Society for Public Administration, staff representatives of the National Governors Association, National League of Cities and International City/County Management Association described the intergovernmental system as broken, perhaps even dead. The intergovernmental system is much less cooperative than it was in the mid-20th

century, but it still lies at the heart of national policy implementation and program administration. The system, however, is more coercive in that the federal government makes major policy decisions almost unilaterally and sets the terms and conditions of state and local government implementation.³

The National Conference of State Legislatures set forth the following, mostly defensive, 2014 state-federal lobbying objectives:

- Protect state sovereignty against pre-emption;
- Guard against unfunded mandates generated by federal deficit reduction and tax reform;
- Maintain state flexibility in implementing the Patient Protection and Affordable Care Act;
- Improve transportation, water and wastewater infrastructure;
- Advocate a national energy plan that includes domestic energy production;
- Support passage of the Marketplace Fairness Act to allow state collection of sales taxes from out-of-state Internet purchases;
- Maintain state flexibility in reauthorization of the Elementary and Secondary Education Act;
- Preserve state regulation of insurance; and
- Support comprehensive immigration reform.⁴

Although specific issues change over time, the leading points on NCSL's list have been atop the lobbying agendas of state and local government associations for more than 30 years. The political climate in Washington, D.C., has made it increas-

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ingly difficult for these associations to influence the formulation of policies by Congress and the executive branch unless powerful nongovernmental interests also support their policy proposals, but state and local governments retain some ability to block objectionable policies.

The States Could Fix Washington

Retiring U.S. Sen. Tom Coburn of Oklahoma said in February he does not believe the federal government's problems can be solved "until you have a convention of the states."⁵ The likelihood Congress will call a convention is virtually zero, although the idea remains alive as reflected by a model statute enacted by Indiana in 2013 that establishes delegate selection and recall provisions intended to ensure a convention called under Article 5 of the U.S. Constitution could not become a runaway convention. State leaders held a bipartisan federalism summit in 1995, which made four recommendations to reform the federal system,⁶ but Congress did not adopt any of them even though many members of Congress are former state legislators. Forty-six percent of senators and 50 percent of representatives are former state legislators, and President Barack Obama served in the Illinois Senate.

The states, however, could substantially fix the federal government without a convention and without concurrent congressional action by (1) eliminating partisan gerrymandering of election districts to produce more competitive districts and (2) reforming primary elections to increase voter participation, allow blanket primaries, open primaries to independent voters and repeal sore-loser laws that prohibit primary election losers from running in the general election. Forty-four states have laws that keep the losers of primary elections off the general election ballot. In Connecticut, which lacks a sore-loser law, Joseph I. Lieberman lost the 2006 Democratic primary, but won the general election for U.S. Senate running as an independent.⁷ States with sore-loser laws tend to produce more polarized congressional candidates than states without such laws.⁸

Eliminating gerrymandering and reforming primaries would reduce the number of members of Congress who veer sharply to the left and right wings of the political spectrum and whose districts are so safe that they risk losing re-election if they cooperate with the opposite party. These reforms would not fix all of Washington's problems, but they would create a less polarized climate that is more conducive to bipartisan reforms that need to come from Washington.

Growing Party Polarization

Party polarization in Congress is at its highest level since 1879, the year of its first measurement. Polarization, which was at its historic lowest during the 1932–1968 period of cooperative federalism, began increasing in the 1970s. Although both parties experienced pulls toward their respective wings of the political spectrum, the Republican Party moved more rightward than the Democratic Party moved leftward.

In recent years, however, many Democrats have moved more to the left as evident in the populist popularity of U.S. Sen. Elizabeth Warren, D-Mass., and New York City's new mayor, Bill de Blasio. MSNBC has moved in the same direction as a counterpoint to Fox News, and the left side of President Obama's base has become restive. For example, in early 2014, Senate Democrats torpedoed the president's consideration of Larry Summers to head the Federal Reserve Board, and the Occupy Wall Street movement continues to be a lodestar for the left. These Democrats focus on inequality, wage stagnation and underemployment, and advocate gun regulation, immigration reform, a higher minimum wage and higher Social Security benefits, among other policies. These activists pose a problem for the Democratic Party because they oppose the more centrist "new Democrats" who rose to power during Bill Clinton's presidency. At a December 2013 White House meeting with de Blasio and 15 other new big-city mayors, President Obama, recognizing pressure from the left side of his base, vowed to help the mayors fight inequality.

The Republican Party continues to experience rightward pressure, which has produced open conflict between so-called establishment Republicans, including some business groups, and Tea Party insurgents who want radical reductions of federal spending and limits on certain powers of the federal government, as well as state and local governments. Thus, the ideological conflicts in both parties could exacerbate polarization over the next several years.

Another factor accentuating polarization is the growing distance between predominantly Democratic and predominantly Republican states. Governors have become more polarized, as reflected in the increased activity of the Democratic and Republican governors' associations. Polarization also has become more evident in state legislatures and appears to be seeping into local governments too. The growing interventions of national interest groups in state and local politics also foster polarization.

Impacts of Polarization on Federalism

Polarization is widely blamed for the gridlock in Washington, D.C. Consequently, Congress does not fulfill responsibilities important to the states, such as rational budgeting, reauthorizing major programs such as the Elementary and Secondary Education Act, and fixing policy problems. Polarization led U.S. Senate Democrats in November 2013 to exercise the so-called nuclear option by prohibiting filibusters against nominees to federal agencies and federal district and appeals courts.⁹ This unlimited debate rule dated back to the republic's earliest days. The success rate for judicial nominees under George W. Bush was 91 percent; under Obama, it has been 76 percent. Sen. Carl Levin, D-Mich., who voted against the change, fears this precedent will be used "to change the rules on consideration of legislation, and down the road ... the hard-won protections and benefits for our people's health and welfare will be lost."¹⁰

Gridlock encourages presidents to become more imperial by circumventing Congress and altering and implementing policies affecting state and local governments through regulations, letters of guidance, funding reallocations and waivers. President Obama took an aggressive stand in his 2014 State of the Union address, pledging "a year of action" in which he will use executive powers to the fullest extent to achieve policy objectives stymied by the Congress. The president also is making bigger use of the bully pulpit to persuade state and local governments and the private sector to implement his preferred policies. For example, the White House is pressing states to restore felons' voting rights. Obama exempted some illegal immigrants from provisions of the Immigration and Nationality Act and waived welfare-to-work requirements for several states. The president proposes to establish Sustainable Shale Gas Growth Zones without legislation by offering funds and technical assistance to local governments. This would open the door for more federal regulation of fracking.

Polarization has increased policy uncertainty for the economy and state and local governments because people know that laws passed by one party in the Congress, such as the Patient Protection and Affordable Care Act, can be changed significantly when the opposition party gains control. Growth of government's role in the economy, expanded federal regulation and increased tax-code complexity add to uncertainty.¹¹ With polarization, an election that gives the opposition party control of Congress and/or the White House can generate a

flood of short-sighted legislation and executive actions having adverse consequences for state and local governments as the new majority rushes to institutionalize its agenda within its first two years, because the next election might unseat the new majority. Gridlock, however, may help states insofar as the federal government less actively intervenes and lets states experiment by default.

Many observers argue that states have responded to Washington's gridlock by increasing innovative policymaking and reviving federalism insofar as states are laboratories of democracy. "The new federalist fervor is coming from both sides"¹² of the aisle, noted Adam Freedman. Indeed, if not for the remnants of reserved powers that allow states to innovate, government and political institutions nationwide would be gridlocked and stagnant. Nevertheless, the long-term effectiveness of state innovations is compromised by blue-state/red-state polarization because few state innovations are now bipartisan. Polarization among the states also intensifies coercive federalism because federal officials try to restrict state flexibility out of fear that states controlled by the opposition party will obstruct federal policy. For example, only 18 states participated in high-speed rail programs and the health exchanges and Medicaid expansion under the Affordable Care Act, while 14 states declined to participate in any of the three programs.¹³ As a result, parties in power in Washington, D.C., are motivated to pre-empt state innovations they dislike and nationalize state innovations they like so as to mandate them for all the states.

Fiscal Federalism

Commentators generally agree that President Obama's \$3.9 trillion fiscal year 2015 budget request, which is \$1 trillion more than fiscal year 2008 spending, was mainly a political document having no possibility of congressional acceptance.¹⁴ The president's budget dropped entitlement reforms, such as switching to a chained consumer price index to slow Social Security cost-of-living increases. Obama proposed instead to increase taxes on business and high-income people. The president's proposal to hike tobacco taxes in order to distribute \$76 billion over 10 years to states to provide preschool education to all 4-year-old children is unlikely to pass the Congress. Washington Sen. Patty Murray's Budget Committee is not expected to draft a fiscal year 2015 budget; consequently, there will be no congressional budget resolution. Even if Congress enacted all of the

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president's proposals to increase spending and taxes, the discretionary spending portion of the federal budget would occupy a 50-year low point. So, there will be less money for infrastructure, education and criminal justice.

Many Republicans have advocated increasing the Earned Income Tax Credit and some other anti-poverty programs and reforming taxes to pay for certain transportation projects—ideas supported by Democrats. Another area of bipartisan support seems to be the president's proposal to pay the costs of fighting large wildfires in the same way the federal government pays for disasters such as tornadoes and hurricanes. The proposal aligns with a bill already sponsored by Sens. Michael D. Crapo, R-Idaho, and Ron Wyden, D-Ore. Controversy surrounded President Obama's 2013 decision not to declare a federal disaster for a fire near Yarnell, Ariz., that killed 19 firefighters and destroyed 109 homes.

The \$85 billion sequester, which hit the federal budget March 1, 2013, caused reductions in a number of federal programs, such as low-income housing, but did not have the dire consequences predicted by the Obama administration.¹⁵ Despite sequestration, total federal aid to state and local governments increased from \$546 billion in 2013 to an estimated \$607 billion in 2014 and a projected \$641 billion in 2015—a 13 percent real-dollar increase from 2013 to 2015. Federal funds accounted for 30.9 percent of state spending in fiscal year 2013. In fiscal year 2012, federal aid as a percentage of state general revenue ranged from 24 percent in Alaska to 49 percent in Mississippi.

The three-week U.S. government shutdown that started Oct. 1, 2013, had modest impacts on state and local governments. Two months earlier, most Republican governors had urged their congressional delegations not to shut down the federal government. Most governors condemned the shutdown, and the Republican Governors Association distanced itself from congressional Republicans. Louisiana Gov. Bobby Jindal declared in an article in *The Wall Street Journal*, “there is only one place where conservative principles are really being applied, and it's in the states, not in Washington.”¹⁶

The long-term fiscal outlook, however, is bleak. The Government Accountability Office projects considerable fiscal stress for state and local governments during the next 60 years. For the short term, the Congressional Budget Office in February 2014 predicted the national debt will increase from 72.1 percent of GDP in 2013 to 79.2 percent by

2014; hence, debt will remain higher than anytime since 1950. Spending is expected to increase from 20.5 to 22.4 percent and revenue from 17.5 to 18.4 percent of GDP by 2024. These projections are substantially higher than the CBO's 2013 projections because the CBO now assumes much slower economic growth over the next 10 years. This will depress state and local government revenues. Yet many governors in early 2014 proposed tax cuts and increased spending on various things such as education because of an improving economy and 2014 gubernatorial elections.

State tax revenue increased 6.7 percent in the fiscal year that ended June 30, 2013. Even so, revenue growth in fiscal year 2014 is likely to be lower than in fiscal year 2013, and 28 states still had revenues below those of fiscal year 2008. Revenues may slow again in fiscal year 2015. Full state recovery from the 2007–09 recession will take several more years. The National League of Cities' 2013 annual report showed city revenues declined for the sixth consecutive year in fiscal year 2012; nevertheless, local government hiring of new teachers, police officers and firefighters increased in 2013. Meanwhile, the broken federal budget process adds to the difficulties of state and local budgeting.

States' Health Care Divergence

The biggest state-federal policy issue today is implementation of the Affordable Care Act. The botched rollout of the health care law by the federal government in 2013–14 hurt the president and Democrats. The Real Clear Politics average approval rating for President Obama in March 2014 was 43.1 percent, with 52.4 percent expressing disapproval.

States opposing the law have rejected federal funds to expand Medicaid, declined to operate an exchange—the health insurance marketplace—established licensing and other requirements for health care navigators or enrollment assistors, and declined to enforce state consumer-protection and insurance laws for consumers using the federal government's online exchange.

The health care law allows states to establish their own exchange, create one in partnership with the federal government or default to federal establishment of the exchange. By early 2014, 16 states had established their own exchange, seven created a partnership exchange and 27 left it up to the federal government to establish the exchange. States also can expand Medicaid under the act. In early 2014, 25 states had expanded Medicaid, 21 had not

and four were still debating the issue. Generally, Democratic states have established exchanges and expanded Medicaid while Republican states have not, although there are exceptions. Idaho and Kentucky are the only Romney-voting states that established a state exchange. Arizona is a Republican state that expanded Medicaid.

Some states opposed to Medicaid expansion want to use the federal money that would accompany expansion to subsidize eligible residents to purchase health insurance on their state exchange rather than enroll in Medicaid. By contrast, some states might try to establish a single-payer health care system. Vermont has approved such a system but will need a federal waiver to implement it in 2017.

The state-run health insurance exchanges generally performed better than the federal exchange. The exchanges run by Connecticut, Kentucky, Rhode Island and Washington were among those said to work the best; those run by Hawaii, Maryland, Massachusetts, Minnesota and Oregon experienced significant problems with unreliable software. The directors of five state exchanges resigned over faulty rollouts. Online enrollment for health insurance in Oregon became so difficult that the state switched to manual enrollments and considered defaulting to the federal exchange. The Massachusetts exchange, which previously worked well, broke down when the state had to conform it to the Affordable Care Act's requirements.

Attributes of successful exchanges seem to include (1) starting with a simple website with few bells and whistles, (2) allowing consumers to browse plans without first establishing a password-protected account, (3) ample pre-testing, (4) screening for Medicaid eligibility and linking to the state's extant Medicaid enrollment site, (5) using federal funds to hire outside expertise, and (6) using existing platforms and off-the-shelf rather than customized components.¹⁷

Even without expansion, states face additional Medicaid fees under the health care law that could equal \$8 billion in 2014 and \$14.3 billion by 2018. Private insurers will pay part of those fees, but the 36 states that contract with managed care institutions, especially for-profit companies, will pay part of the fees.

The Affordable Care Act allocates \$10 billion over 10 years for a State Innovation Models Initiative to help states develop innovative health care financing systems to contain costs. Thus far, half the states are developing such models. However, it also is possible that without federal pre-emption

establishing acceptable parameters for health reform, bad state policies "could crowd out good ones over time."¹⁸

Conflict arose over the president's 2013 request that insurers extend for another year health insurance policies cancelled for failure to meet standards of the health care law. In 2014, Obama extended this to two years, in part because the cancellation of about 4.7 million individual policies was politically damaging for him. About half the states' insurance commissioners allowed insurance companies to extend cancelled policies for a year under the original White House transition plan. On this issue, Republican states more readily accepted the president's original policy than did Democratic states.

A number of states, starting with Oklahoma, have mounted court challenges against the Obama administration's policy of offering federal subsidies to all eligible applicants for health insurance on both state-run and federally run exchanges because the health care law specifies that subsidies be made available only "through an Exchange established by the State." The subsidies are a large part of the law and are expected to amount to \$700 billion over the next decade. States also are challenging tax penalties levied on citizens who do not sign up. The act seems to say such penalties can be levied only in states with their own exchange. Eleven state attorneys general sent a letter to former HHS Secretary Kathleen Sebelius in 2014 contending the president's changes to the act are illegal.

In another response to the law, many local governments have begun limiting or reducing the work hours of part-time employees to avoid the act's requirement to provide health insurance to employees who work at least 30 hours per week.

The Not-So-Common Core?

Opposition is growing to the K-12 Common Core State Standards Initiative and the standardized testing connected to it. The National Governors Association and Council of Chief State School Officers coordinated creation of the standards. The Obama administration embraced the initiative, along with testing, in its \$4.35 billion Race to the Top grant program.

An unexpected alliance has emerged to contest common core. The alliance includes conservative Tea Party activists who oppose common core and the tests adopted by 45 states since 2010, liberal teachers and parents who believe such testing regiments students at the cost of creativity, and teachers unions concerned about using the tests

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to evaluate and reward or punish teachers. State legislatures considered about 179 bills concerning K–12 testing in the 2014 sessions.

Alaska, Nebraska, Texas and Virginia voted not to participate in the initiative. South Carolina Gov. Nikki Haley said, “We don’t ever want to educate South Carolina children like they educate California children.”¹⁹ Florida changed the name to Next Generation Sunshine State Standards. In March 2014, Indiana, an early adopter, became the first state to withdraw from it.

Meanwhile, nearly all states have been granted federal waivers under the No Child Left Behind Act to establish accountability systems that do not rely mostly on standardized tests to measure the goal of all children reading and doing math at their grade level by 2014. The U.S. Department of Education also told states in mid-2013 they could delay incorporating test results into teacher evaluations—a requirement of the Race to the Top grant funding—until 2016–17.

On another education front, the U.S. Department of Justice is challenging the Louisiana school voucher program, which began in 2012 and provides full tuition vouchers to children residing in households with incomes below 250 percent of the federal poverty level and whose public schools are rated C, D or F by the state. Almost 5,000 children have received vouchers to attend private schools; 90 percent of the students are black. The DOJ argues the program violates federal desegregation orders issued decades ago.

In January 2014, a federal district court approved a settlement that will phase out a 1982 court order requiring millions of dollars of payments to the Little Rock, North Little Rock and Pulaski County school districts in Arkansas for desegregation.

REAL ID is Getting Real

After four compliance deadline extensions over nine years since REAL ID’s enactment in 2005, the U.S. Department of Homeland Security announced in 2013 it will phase in enforcement of the law by gradually expanding the types of facilities requiring a compliant driver’s license for access until 2016, when citizens will be denied access to commercial aircraft if they do not have a compliant license. As of February 2014, 21 states complied with REAL ID, 21 had deadline extensions, and 14 states and territories were not compliant. Under the law, states must require proof of U.S. citizenship or legal residence from driver’s license applicants, and licenses must comply with Homeland Security

specifications. Compliant licenses have a star on them. A key state complaint is that the Department of Homeland Security has not provided enough funding for states to comply. Some states remain hopeful Congress will change the law before 2016. Many civil rights groups see REAL ID as an invasion of privacy.

Other State-Federal Issues

A number of other issues animated state-federal relations in 2013–14.

Cybersecurity

Absent comprehensive federal cybersecurity legislation, the White House in 2013 directed the Department of Homeland Security to share more classified and sensitive threat information and work more closely with state and local governments and the private sector to protect critical infrastructure. A survey of state chief information security officers conducted by the National Association of State Chief Information Officers found only 24 percent being “very confident” state assets were shielded from external threats and 32 percent reporting that their staff had required cybersecurity competence.

Heating and Supplemental Nutrition Assistance

In early 2014, the Congress reduced spending on the Supplemental Nutrition Assistance Program in part by raising from \$1 to \$20 the annual state subsidy for heating assistance needed for a household to receive higher SNAP benefits. Shortly thereafter, however, some of the 17 states that have a “heat and eat” policy increased their benefit to \$20. Massachusetts estimates its \$20 policy will enable about 165,000 households to retain about \$142 million in federal food stamp money.²⁰ Opponents in Congress want to restrict such policies further.

Marijuana Legalization

Twenty-one states have legalized medical marijuana, and Colorado and Washington have legalized recreational marijuana, even though the federal Controlled Substances Act seems to bar states from regulating the possession, use, distribution and sale of marijuana. The U.S. Department of Justice sent a memo to U.S. attorneys saying the department will not seek to obstruct state laws legalizing marijuana so long as states employ “strong and effective regulatory and enforcement systems”²¹ to keep marijuana away from minors, prevent criminal organizations from getting money from marijuana sales, stop

marijuana from leaving legalized states, prevent drugged driving and the like. “I was expecting a yellow light from the White House,” said the executive director of the Drug Policy Alliance, Ethan Nadelmann, which supports marijuana legalization, “But this light looks a lot more greenish.”²² The director of the Drug Free America Foundation, Calvina Fay, termed it “a tsunami in the works.”²³ Federal officials, however, have raided a number of dispensaries in Colorado because of concerns about organized crime involvement.

Unemployment

The Middle Class Tax Relief and Job Creation Act of 2012 established a \$100 million fund for states to establish work-sharing programs that enable employers to reduce workers’ hours rather than laying them off. As of early 2014, 26 states—both Democratic and Republican—had created a program. The deadline for state action to receive funds is Dec. 31, 2014.

E-Cigarettes

Forty attorneys general petitioned the U.S. Food and Drug Administration in September 2013 to regulate the advertising, ingredients and sale of electronic cigarettes to prevent their use by minors. States have stepped up their own regulatory and educational actions.

Same-Sex Marriage

In an unusual move in February 2014, U.S. Attorney General Eric Holder said that state attorneys general are not obligated to defend state laws, in this case bans on same-sex marriage, that violate core constitutional values, such as equal protection. As of March 2014, federal courts had struck down gay-marriage bans in Michigan, Oklahoma, Virginia, Texas and Utah. In Kentucky, Ohio, and Tennessee, federal courts ordered state recognition of same-sex marriages performed out of state. It seems likely the U.S. Supreme Court will have to take up this issue again, and soon.

Voter Proof of Citizenship

In March 2014, a federal district court in Kansas ruled the federal Election Assistance Commission lacks authority to prohibit Arizona and Kansas from adding a requirement to the national voter registration form to require proof of citizenship in order to vote in state and local elections. The court held the 1993 National Voter Registration Act does not pre-empt state laws governing their

own elections and that the U.S. Supreme Court’s pre-emption ruling in *Arizona v. The Inter Tribal Council of Arizona* (2013) applies only to federal elections. This decision will likely lead more states to enact proof-of-citizenship requirements.

Immigration

Business groups continue to press for federal pre-emption of state immigration laws, such as South Carolina’s Illegal Aliens and Private Employment Act, which has become a model for many states. This law requires strict enforcement of laws prohibiting employment of illegal immigrants and requiring state-federal enforcement cooperation, verification of a person’s lawful residence, and reporting of immigration violations. Absent comprehensive federal immigration reform, states will remain active in this policy field, although state immigration law activity declined in 2013. The federal courts have limited certain state policies, and states enacting permitted policies cannot go much further. For example, many states have enacted laws to allow driver’s licenses for illegal immigrants and in-state tuition for their children but cannot go much further with such liberalization.

Congress cut the State Criminal Alien Assistance Program from \$238 million to \$180 million for fiscal year 2014. This program reimburses state and local governments for incarcerating illegal immigrants convicted of crimes. In 2013, New York City joined Chicago and some other cities in restricting cooperation with the federal government on foreign-born detainees in their custody.

Consumer Data Breaches

Business is pushing for a federal law on data breaches, such as the breaches that occurred at Target and other companies in 2013–14. Many state attorneys general want a partial pre-emption that would allow states to establish stricter standards than the federal baseline, which some fear will be set lower than standards already established by some states.

Detroit’s Bankruptcy Filing

In the Detroit bankruptcy case in July 2013, the federal bankruptcy judge froze all litigation against Detroit, its emergency manager and the state of Michigan during the bankruptcy process after a state judge ruled the city’s bankruptcy filing violated Michigan’s constitutional protection of public employee pensions. Meanwhile, neither Congress nor the president has provided significant fiscal aid to Detroit.

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Interstate Egg Battle

Six states are challenging California's 2010 law banning the sale of eggs from hens not raised in pens with enough space for the hens to stand, lie down, turn around and extend their limbs fully. As of March 2014, Alabama, Iowa, Kentucky, Missouri, Nebraska and Oklahoma had joined a federal lawsuit challenging California's law as imposing unconstitutional burdens on other states by, in effect, requiring their farmers to comply with California's hen-raising law in order to sell their eggs in the Golden State. This case reflects a larger concern of many states about California's ability to effect de facto pre-emptions of other states' policies because California's consumer market is so huge.

U.S. Supreme Court: Decided Cases

The high court decided eight cases in 2013 that will have significant relevance for state powers in the federal system.

In *Shelby County v. Holder*, the court voided the formula contained in Section 4(b) of the 1965 Voting Rights Act that determined which jurisdictions are subject to U.S. Department of Justice preclearance for election-law changes. The formula, opined the court, is out of date and "a drastic departure from basic principles of federalism" and a "dramatic departure from the principle that all states enjoy equal sovereignty."²⁴ The DOJ, however, quickly announced that it will oversee state election-law changes through Section 3 of the Voting Rights Act and other statutes. The department filed suits against several states.

In highly publicized cases, the court invalidated Section 3 of the 1996 federal Defense of Marriage Act because the "definition and regulation of marriage" falls under the states' "authority and realm." By enacting Section 3, argued the court, the Congress "interfered" with "state sovereign choices" by creating "two contradictory marriage regimes within the same State" and also treating same-sex marriage as "unequal" and "second-tier."²⁵ In a related case, the court ruled that private parties had no standing to contest a federal court ruling that struck down California's Proposition 8 banning gay marriage after state officials had refused to defend Proposition 8.²⁶

The court upheld laws in 29 states that require police to take DNA samples from arrested individuals. The court opined that "when officers make an arrest supported by probable cause to hold for a serious offense and bring the suspect to the station to be detained in custody, taking and analyzing a

cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment."²⁷

The court ruled in April 2013 that states can allow only their own residents to make requests under their freedom of information laws. Excluding non-residents, the court ruled, does not violate the U.S. Constitution's privileges and immunities clause, which protects only "fundamental" privileges and immunities.²⁸

In *Sprint Communications Company v. Jacobs*,²⁹ the court held that Sprint's lawsuit seeking a declaration that the Telecommunications Act of 1996 pre-empted a decision by the Iowa Utilities Board that intrastate fees applied to long-distance Voice over Internet Protocol calls does not require federal court *Younger* abstention merely because a simultaneous state court proceeding involves the same subject matter. The State and Local Legal Center had urged the court to uphold abstention.

A Fifth Amendment takings case found in favor of a developer who was told by a local water district that he could develop a wetland if he limited development or paid for improvements on district-owned property located several miles away. The court held that agencies imposing conditions on the issuance of development permits must comply with the "nexus" and "rough proportionality" standards of the court's previous takings rulings,³⁰ even if the conditions require monetary payment and even if the permit is denied for failure to agree to the conditions.³¹

In *Wos v. E.M.A.*,³² the court ruled that federal Medicaid law pre-empted a North Carolina law that allowed the state to place a lien on a \$2.8 million civil suit settlement against physicians won by a Medicaid recipient so the state could recover either the total amount Medicaid spent on the patient's care or one-third of the settlement, whichever is less. The court held that federal law limits such state claims to actual care.

In a win for state law in 2014, *Chadbourne & Parke LLP v. Troice*³³ held that the federal Securities Litigation Uniform Standards Act of 1988 did not prohibit the plaintiffs' state law class actions filed by people alleging that defendants helped perpetrate a Ponzi scheme by falsely claiming uncovered securities purchased by the plaintiffs were backed by covered securities.

In *McCutcheon v. Federal Election Commission* (2014), the court upheld limits on contributions to particular candidates, political parties, and political

action committees but struck down the \$123,200 aggregate limit on contributions to all candidates, parties, and political action committees during a two-year election cycle. This case also could invalidate similar contribution limits present in ten states. No states filed *amicus* briefs in *McCuthcheon*.

In a 6-2 ruling in *Schuette v. Coalition to Defend Affirmative Action*, the Supreme Court upheld a 2006 citizen-initiated amendment to Michigan's constitution that bans affirmative action in admissions to state institutions of higher education. "There is no authority in the Constitution of the United States or in this court's precedents," opined Justice Anthony M. Kennedy for the majority, "to set aside Michigan laws that commit this policy determination to the voters." Four states had filed an *amicus* brief in support of Michigan; six other states filed a brief opposing Michigan. Currently, eight states have ended affirmative action or preferential treatment based on race in public higher education. *Schuette* will likely lead more states to end affirmative action.

In another 6-2 ruling, *EPA v. EME Homer City Generation*, the court upheld the U.S. Environmental Protection Agency's Cross-State Air Pollution Rule. A federal appeals court had struck down the rule after 14 states and several private parties challenged the EPA's cost-based approach to enforcing this "good neighbor" policy. The rule, which covers 28 states, limits power-plant pollution that blows across state lines and requires less polluting states to clean up more than their measurable contribution to downwind air pollution. Consequently, consumers in less polluting upwind states can pay higher rates and fees than consumers in more polluting upwind states.³⁴

Supreme Court: Pending 2014 Cases

As of April 2014, 10 undecided cases relevant to federalism and state powers were on the high court's docket. One characteristic of contemporary litigation in the federal courts is the considerable interest of states, especially their attorneys general, to file *amicus* briefs urging courts to rule in certain ways. In many cases, however, ideological polarization and other differences among the states lead different states to support different sides in cases.

For example, 12 states filed an *amicus* brief in *McCullen v. Coakley*. These states oppose Massachusetts' "buffer zone" law, which is being challenged in this case. The law prohibits abortion protesters from moving closer than 35 feet from a reproductive-health facility. Thirteen states and a number of

big cities support the law. The State and Local Legal Center also supports the buffer-zone law on the ground that such zones are common and also important for the ability of state and local governments to regulate speech to protect public safety, such as buffer zones to protect funeral mourners and prevent congestion at crowded events.

Another protest speech case, *Wood v. Moss*, asks the court to decide whether Secret Service agents engaged in unconstitutional viewpoint discrimination when they required anti-George W. Bush protesters to move about one block farther away from the president than pro-Bush demonstrators. The State and Local Legal Center's *amicus* brief argues there was ample justification for this action and police should be permitted to consider the content of speech when the president's safety is at stake.

In *Utility Air Regulatory Group v. EPA*, 18 states filed briefs supporting the EPA's authority to require power plants, factories and other pollution sources to obtain permits for greenhouse gas emissions. Another 14 states oppose such EPA power. If the court upholds the EPA's authority, states are expected to set some permit standards.

Fifteen states support Illinois in *Harris v. Quinn* in which home health care workers paid by Illinois's Medicaid program contend they should not have been forced by the state to join the Service Employees International Union and pay union dues.

Bond v. United States addresses the extent to which a treaty can override state police powers. Carol A. Bond placed toxic chemicals on the car, mailbox and doorknob of a woman who had a child from an affair with Bond's husband. The woman experienced minor injury, and local police did not pursue serious criminal charges. Federal officials, however, charged Bond with criminal violation of a federal statute that enforces the Chemical Weapons Convention treaty ratified by the U.S. Senate in 1997. A key question is whether Bond's prosecution is permitted by the court's broad interpretation of the treaty power in 1920.³⁵ Eleven states filed an *amicus* brief urging the court to vacate the federal prosecution in deference to state law.

Petitioners in *Sebelius v. Hobby Lobby Stores and Conestoga Wood Specialties Corp. v. Sebelius* ask the court to decide whether the Religious Freedom Restoration Act applies to secular, privately held for-profit corporations. If so, then the Religious Land Use and Institutionalized Persons Act also may apply to corporations. The Religious Land Use and Institutionalized Persons Act prohibits state and local governments from enforcing land-use

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regulations and prison rules that impose a substantial burden on “the religious exercise of a person” without a compelling governmental interest. The State and Local Legal Center has urged the court not to permit secular for-profit corporations to invoke the act because doing so would allow a wide range of groups to challenge generally applicable local zoning ordinances and planning codes, thereby imposing a heavy burden on local governments. In addition, 15 states filed *amicus* briefs asking the court to rule against Hobby Lobby and Conestoga Wood, while 21 states filed briefs supporting these corporations’ religious freedom claims.

Mississippi ex rel. Jim Hood, Attorney General v. AU Optronics Corp. deals with whether a state court lawsuit filed by Mississippi’s attorney general as the only “named plaintiff” on behalf of thousands of purchasers of LCDs from Optronics violates the federal Class Action Fairness Act of 2005, which requires suits involving 100 or more people to be moved to federal court. Forty-six states filed an *amicus* brief supporting Mississippi. Similarly, in 2005, 46 state attorneys general supported an amendment to the class action law that would have exempted attorneys general suits, but the amendment failed 60-39 in the Senate. The Fifth Circuit Court of Appeals ruled against Hood, but three other circuits endorsed such suits.

In *Plumhoff v. Rickard*, the Supreme Court will decide whether police officers are entitled to qualified immunity for using deadly force in a high-speed chase. The State and Local Legal Center filed an *amicus* brief supporting officers’ qualified immunity so long as the force was reasonable.

Town of Greece v. Galloway may determine whether state legislatures and other government bodies can open their sessions with prayer. Twenty-four states filed briefs supporting Greece.

In *Madigan v. Levin*, the court will decide whether government employees who claim age discrimination can sue their former employer directly in federal court rather than going first to the Equal Employment Opportunity Commission as required by the federal Age Discrimination in Employment Act. Twenty-one states filed an *amicus* brief asking the court to preclude such employee lawsuits. State and local governments are concerned that circumventing the EEOC will increase the costs of such cases.

Conclusion

No fundamental changes in state-federal relations are on the horizon. The 2014 midterm elections will intensify gridlock as both parties stand fast on

their policy preferences for campaign purposes. Republicans may do well in the elections because of President Obama’s unpopularity and problems with the Affordable Care Act. With the exception of Bill Clinton, the party of the president serving his sixth year has suffered significant election losses in such elections since 1901. Consequently, divided government will persist in Washington until 2017.

With 36 gubernatorial elections in fall 2014, as well as state legislative elections, blue-state/red-state polarization also could intensify unless voters revolt against one-party states. Party turnovers in governor’s mansions and state legislatures will, in turn, change state responses to federal policies such as the Affordable Care Act and Medicaid and the federally supported Common Core State Standards Initiative.

Notes

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