

# FEDERALISM IN T

BY ALAN GREENBLATT

There's one thing both critics and supporters of the new Arizona immigration law can agree on. The state acted out of frustration at Washington's inability to address the issue.

This is a point President Barack Obama stressed during a speech calling on Republican Governor Jan Brewer to veto the measure. It's also a point Brewer made hours later at the signing ceremony for the bill, which calls on local police to check the proof of legal status for anyone they have reason to suspect might be in the country illegally.

"We in Arizona have been more than patient waiting for Washington to act," Brewer said. "But decades of inaction and misguided policy have created a dangerous and unacceptable situation."

In recent years, this has been a frequent complaint of state lawmakers across a whole range of issues. When Washington has been unable to resolve pressing issues, states have rushed to fill the policy void. And it's not just immigration.

During the presidency of George W. Bush, the federal government concentrated primarily on war and terrorism, with relatively little attention paid to domestic matters. That left plenty of running room for states to address a wide range of issues such as stem-cell research, securities regulation and minimum-wage increases.

Under Obama, that balance is starting to shift. He has clearly harbored ambitions of addressing nearly every major domestic issue. In many cases, that has meant calling on the states to implement policies he has pushed, in

areas such as education and health care.

Given the continuing financial constraints states are facing, they have turned frequently to Washington for help. Obama has not been shy about exploiting that need, imposing new requirements on states to prod them to pursue his policies.

On other matters, though, the action clearly remains most vibrant in the states—not just on immigration, but on other issues, such as climate change.

## CHANGING THE RULES

Oklahoma Representative Randy Terrill, sponsor of that state's stringent 2007 immigration law, sees "no greater example of federalism in action of late than on the immigration front. It's always been states that have stepped into policy voids left by the federal government."

Since 2007, when the last major push on immigration failed in the U.S. Senate, states have enacted hundreds of laws, mostly aimed at making life less comfortable for illegal immigrants and those who hire them.

As Terrill suggests, taking ownership of an issue has become a familiar role for state lawmakers. That dynamic is just as evident when it comes to climate change.

The U.S. Senate has frequently served as the undertaker for global warming bills over the past decade. Its most recent effort suffered a near-death experience when the sole Republican co-sponsor pulled his support a

couple of days before the bill's scheduled introduction in April.

Its remaining sponsors are forging ahead, and climate change may yet be revived in this Congress (although even its supporters are not optimistic at this point). It's clear, however, that the Senate will not support a cap-and-trade regimen as ambitious as the one passed by the House last year—or the cap-and-trade programs already in place in the Northeast or being planned among other regional consortiums of states.

"States have done an incredible job of working together," says California Senator Fran Pavley. "While Washington has been on hold, states have made many efforts to reduce energy use."

And even when Washington has acted, states have often provided the model. That's true of the vehicle gas mileage standards Obama imposed this spring, which were largely based on Pavley's pioneering 2002 law regulating greenhouse gas emissions from cars. And it's certainly true of Obama's primary legislative accomplishment, the health care law that was patterned in large degree on earlier efforts in Massachusetts and other states.

## POWER OF THE PURSE

So does this mean that even in the age of Obama, states will continue to lead the way toward innovative policymaking? The answer is complicated.



**REPRESENTATIVE**  
**RANDY TERRILL**  
**OKLAHOMA**



**SENATOR**  
**FRAN PAVLEY**  
**CALIFORNIA**

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# THE AGE OF OBAMA

For one thing, states are broke. It's hard to innovate on an empty wallet. You can't even get a pilot program off the ground. Instead, legislators have to expend a great deal more time and energy trying to protect existing programs from drastic cuts than developing new ideas.

States are left relying on Washington for an expanding share of their revenues. Federal money—dominated by Medicaid funds—made up just over 25 percent of state spending as recently as FY 2008 before jumping to 30 percent in FY 2009. The current fiscal year's share is likely to be even higher.

“One of the trends that we see—it's not really new in the Obama administration, but I think it's increased exponentially—is this push toward the carrot and the stick,” says Marcia Howard, executive director of Federal Funds Information for States, which tracks federal grant money for NCSL and the National Governors Association.

Most of the spending in last year's federal stimulus law passed through states and localities, helping states fill budget gaps, keep Medicaid patients enrolled and avoid laying off teachers. But as any legislator will tell you, most of that money came with significant strings attached.

States could not change their Medicaid eligibility laws. They had to follow so-called “maintenance of effort” rules on education as well, meaning they couldn't reduce their levels of existing spending once they accepted

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the federal help. And the entire package, from road construction to weatherization, was predicated on states meeting unprecedented transparency and accountability requirements.

It’s arguably in education that the Obama administration has pushed states the hardest. The criteria for its Race to the Top fund—a \$4.35 billion pot of grant money left largely to the discretion of U.S. Education Secretary Arne Duncan—led at least 10 states to change their laws in hopes of winning some of the money.

Last November, Obama and Duncan visited Madison to talk about education. Duncan was particularly harsh, calling Wisconsin’s laws antiquated, unacceptable and even “ridiculous.” Rather than take offense, both chambers of the Legislature the next day passed a package of four bills meant to appease him.

“There’s no question those of us in Wisconsin want to have as strong an application as we can to get at the \$4.35 billion,” Senator **John Lehman**, who chairs the Education Committee, said during floor debate. “It is true that a big carrot got people thinking.”

#### **HUGE ROLE FOR STATES**

The health care law was patterned on earlier state efforts, and Washington is relying heavily on states to carry it out. States will have to administer a vast expansion of Medicaid—estimated at 16 million more enrollees—as well as the system of exchanges that are meant to link individuals and small businesses with private insurance plans.

“I’m going through my mourning period of how much work there’s going to be,” says Alabama Medicaid Commissioner Carol Steckel.

She predicts the new law will bring

400,000 more people into her state’s Medicaid system by 2014, doubling its size. That means far greater costs for the state down the road in administration and patient care, despite increased federal subsidies. “I have no idea how my state is going to be able to afford this,” Steckel says.

States have been lining up with lawsuits meant to block the health care law, but few legal experts believe they have a chance to succeed. Assuming they don’t, that means a huge share of state budgets and administrative efforts will be devoted to federal priorities on health care.

That represents a major shift from recent years, when states were basically able to experiment on the federal dime. The Massachusetts health law, for example, would never have gotten off the ground without a heavy federal subsidy.

#### **A FINANCIAL BARREL**

Now states will have a lot less choice about how they spend their health care money—and certainly less choice about limiting their expenditures. Arizona Governor Brewer may have snubbed the president by signing the immigration bill the same day he decried it. But Obama already had played a similar turn-about on her.

In March, Brewer signed a budget reduction package that would have kicked 300,000 adults off the Medicaid rolls and—a first among states—eliminated funding for the Children’s Health Insurance Program. That was the plan, at least.

But Obama signed his health care law five days later, which had the effect of voiding Brewer’s effort. The federal health law bars states from lowering eligibility requirements for either CHIP or Medicaid over the next several years, at the risk of losing all Medicaid funding. Now, because Arizona’s cuts hadn’t officially taken effect, state legislators are scrambling to find funding to restore their budget reductions. All told, Arizona officials estimate the federal law will cost the state \$11.6 billion over the next 10 years, which Brewer calls “financially devastating.”

There’s not much she can do about it. Losing Medicaid funding altogether would be even more devastating.

Obama understands that he has states over a barrel financially. He has shown a great deal of interest in collaborating with states when he can, and he certainly is willing to feder-

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alize ideas that bubble up from them. But he also understands that their budget situations have diminished the ability of states to set their own courses.

The federal spigot may be about to shut off, as this spring’s struggles to find extra money for Medicaid and teachers demonstrated. And the White House and a Congress riven by partisanship may leave plenty for states to do on their own. Still, this is not an administration that will support a federalism that provides more money to states to focus on their own plans and initiatives.

“This is an administration that doesn’t take the states and locals as it finds them. It has an agenda,” says Paul Posner, a federalism expert at George Mason University in Virginia. “The focus will be on national goals. I can see this administration pursuing additional ways to put money down in the state and local sectors but tying it to strong national goals. It’s going to have to be a twofer.”

The result might be a kind of symbiotic federalism. Washington needs states to carry out its grand visions on the ground, but the administration also fully intends to give them numerous pushes in its preferred direction.

Most federal money goes out to states through set formulas. But the Obama administration is clearly interested in pursuing variations on its Race to the Top model, using competitive grants to get states to dance to its tune.

If the effort at the federal level is successful, it will put a new twist on the old observation from Supreme Court Justice Louis D. Brandeis that states are the laboratories of democracy.

“Rather than states being the laboratories of democracy in and of themselves,” says Howard, of Federal Funds Information for States, “some of them will become the federal government’s laboratories of democracy.”

 **CHECK OUT** a Q and A with a federalism expert from George Mason University in Virginia at [www.ncsl.org/magazine](http://www.ncsl.org/magazine).

# An Observation of the State-Federal Relationship

BY WILLIAM T. POUND

Federalism always has been one of the most significant features of the American constitutional system. Its future will likely see both cooperation and conflict. That's nothing new. Federalism is, by its nature, a system of dynamic tension between levels of government and is constantly evolving into new relationships between states and the nation.

The American constitutional division of authority between nation and state has been emulated by many other countries since 1787, but in few as successfully as it has developed in the United States.

Before the Civil War, states generally dominated American federalism. But a stronger national government emerged after the war and grew with the advent of the income tax, World Wars I and II, and the Great Depression. A reinvigoration of state government began in the 1950s, however, with the formation of The Advisory Committee on Intergovernmental Relations to strengthen federal-state-local relationships. With the modernization of state legislatures in the 1960s and '70s, a new balance in our federal system emerged.

The 1960s saw the creation of Medicaid, a shared state-federal program, and in the '70s, general revenue sharing provided unrestricted federal financial assistance to states and localities. This experiment with "no-strings" and non-categorical sharing of federal revenues did not have a long life, however.

The last 30 years have been a period of more balanced federalism. State governments, for much of the period fiscally healthy, have become the country's creative laboratories and the initiators of most of the innovation in public policy. Creative environment and energy legislation, novel education reform and inventive health policy all flowed from the states.

The current economic recession, which began in December 2007, is one of the great-



est challenges to healthy federalism and to the ability of states to carry out their role as partners in the federal system. Fiscal shortfalls and constitutional requirements for balanced budgets restrain the capacity of the states to maintain their traditional priorities in K-12 and higher education, transportation and health care.

At the same time, the ability of the federal government to deficit spend, particularly as a counter to recession, allows it to expand its initiatives and, if it desires, direct states to act in particular ways at a time when it is very difficult for them to resist.

The Obama administration has expanded the use of the carrot in federal financial assistance to achieve its goals, particularly in education with the Race to the Top competition for funds. State and local governments still provide more than 90 percent of K-12 education funding, but the federal government has found an effective means of nationalizing goals through its much smaller share of the funding. Pushback has begun, however, with a number of states opting not to participate.

Whether this is a temporary change in the state-federal relationship or a more permanent one remains to be seen. There certainly

has been a growth in the percentage of federal funds in state budgets over the last 50 years, with Medicaid the big ticket item. Medicaid is now the primary vehicle for the expansion of health care to the uninsured. It currently accounts for 21 percent of state budgets and grows by the year. Under the vast new federal health reform, conflicts over the regulation of insurers, the operations of the exchange programs and risk pool funding are unavoidable.

The temporary stimulus of the American Recovery and Reinvestment Act funds soon will be over and their impact on cushioning state budgets from the downturn will be gone. What remains will be a large federal deficit. Future federal spending on domestic discretionary programs will be flat or declining. Reducing the deficit will require reduced spending or new revenues, or both. Either solution will affect state governments. The search for new revenues could have a major effect on traditional state revenue sources, particularly a national Value Added Tax on state sales taxes. It is easy to see considerable state-federal tension arising from this debate.

Many of the formal mechanisms of intergovernmental cooperation have been eliminated. The Advisory Committee on Intergovernmental Relations was abolished, a victim of rising partisanship in our politics. Intergovernmental concerns are not often prominent in congressional debate, though organizations like NCSL work to keep state concerns in the national dialogue.

Nearly all of our major domestic policy programs—Medicaid, family assistance, transportation and education—are managed by states or localities. This will only increase with health care expansion. In other policy areas the states have already prodded the federal government to act. The recent Arizona immigration law, state renewable energy standards, greenhouse gas standards, universal health coverage in several states, and education reform are examples.

The creative tension in federalism, however, can only be maintained by allowing a broad freedom of action in the states and avoiding over-reaching federal preemption and mandates.

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