

The Conservative Difference

GOP lawmakers have enjoyed remarkable success in the past two legislative sessions, but the long-term effects of some efforts rest in the courts' hands.

BY LOU CANNON

The wave of Republican successes that washed over statehouses and the U.S. House in the 2010 midterm elections brought with it a more conservative agenda. Republicans were empowered by picking up 740 legislative seats, winning both chambers in 26 states and one chamber in eight others. It was their best showing since 1928, and they were jubilant.

Many of the newly elected lawmakers were eager to address illegal immigration, abortion, voter ID and collective bargaining, to name a few.

Two years later, it's evident that the GOP takeover of the U.S. House accomplished little more than a morale boost for the party, with Congress in such gridlock it barely was able to raise the debt ceiling, much less face up to the nation's pressing economic problems.

In contrast, Republican-controlled statehouses found success on several issues, and in many states.

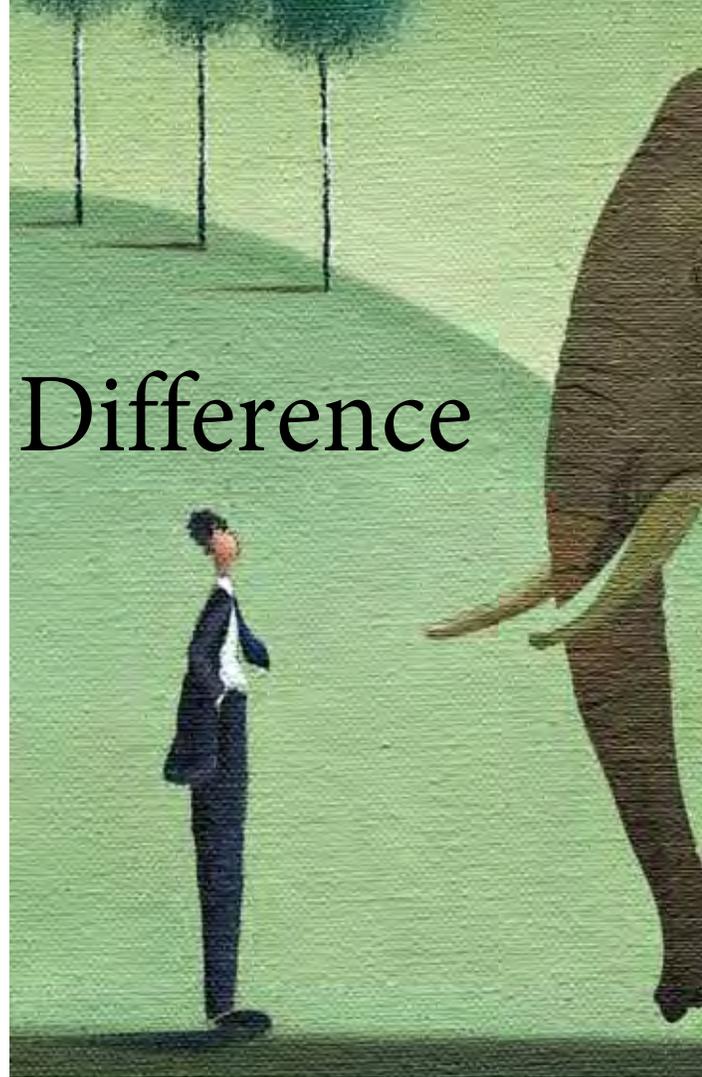
Lasting Effect

Will the measures have long-lasting effects? During the first half of 2012, states waited on the courts for the answers, as partisan opposition and legal challenges have thrown several laws into uncertainty.

A wait-and-see attitude prevailed while lawmakers looked to the U.S. Supreme Court to decide on the constitutionality of the Patient Protection and Affordable Care Act that President Obama pushed through Congress on a party-line vote, and Arizona's immigration law that, among other things, authorizes police to determine the legal status of people they lawfully detain.

The hot-button issue of same-sex marriage also is wending

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its way to the Supreme Court. In California, a divided federal appellate court affirmed an earlier decision invalidating a ballot measure that banned same-sex marriage. In Massachusetts, a federal appellate court found the 1996 Defense of Marriage Act discriminates against gays and lesbians.

Action Agendas

Midway through 2012, most legislatures have completed their legislative work, with thousands of measures considered. These are the key issues the new conservative majorities have focused on in the past year and a half.

Health Care. No single issue has greater impact on the public and the states than escalating health care costs. Last year, those costs surpassed \$2.6 trillion, and a typical family spent more than \$15,000. Health care costs eat up more than a quarter of state budgets.

Conservative lawmakers found no solutions, however, in the federal health reform law. In all, 20 states have passed some type of binding measure to oppose aspects of the federal health law. Adding nonbinding resolutions increases the total to 23.

The measures have focused on refusing to comply with the mandates that require purchase of insurance and impose fines on those who do not do so, keeping health insurance optional, and challenging other provisions of the 2010 law.

On June 28, the much-anticipated Supreme Court decision



upheld the Patient Protection and Affordable Care Act, but limited the federal government's ability to penalize states that choose not to expand their Medicaid programs. The ruling leaves plenty of questions—and work—for state policymakers, who continue to face the challenges and opportunities of implementing the wide-sweeping law. (For a closer examination of the decision and its potential effects on states, see the article on page 46.)

Education. The partisan divide was less clear on education reform. With budgets tight, most states quieted their cries for “local control” and competed for federal funds in the Race to the Top, an Obama administration initiative. Similar to education efforts by the George W. Bush administration to improve lackluster education achievement, it emphasized performance, measured by test scores.

For newly elected conservative lawmakers, education reform included school choice, limits to the collective bargaining rights of teachers, and shifts in education spending from teachers salaries to performance-based bonuses. Eight states—Florida, Indiana, Louisiana, Ohio, Oklahoma, Pennsylvania, Tennessee and Washington—now base school-aid allocations on student performance rather than on the number of students enrolled. Another seven states are moving to that standard.

Immigration. Conservatives brought a renewed energy to the

immigration debate. Frustrated with Washington's lack of action and concerned that the waves of illegal immigrants were costing American jobs and over-running health care, education and social services budgets, conservative majorities passed bold challenges against illegal immigration in Arizona, Alabama, Georgia, Indiana, South Carolina and Utah.

The Obama administration challenged the spark plug of these new laws—Arizona's SB 1070—on the grounds that federal immigration law pre-empted the state's law. The U.S. Supreme Court on June 26 gave both sides a partial victory. The court unanimously upheld the most controversial provision of SB 1070, which empowers police officers to check the immigration status of people they stop for lawful reasons.

On a 5-3 decision written by Justice Anthony Kennedy, however, the court rejected three other provisions of the Arizona law and reasserted that the federal government has the primary responsibility for immigration. The rejected provisions would have made it a state crime for illegal immigrants to fail to register under a federal law or to work or try to find work, and also would have allowed police to arrest people without warrants if they had reason to believe they were deportable under federal law.

Lower courts have blocked laws patterned on SB 1070 in Alabama, Georgia, Indiana, South Carolina and Utah. Courts will now have to re-examine these laws in light of the Supreme Court decision.

“A wait-and-see attitude prevailed in the states this year with immigration bills dropping by half from the high of 1,600 bills, anticipating the Supreme Court ruling in *Arizona v. United States*,” says Ann Morse, Washington, D.C.-based director of the Immigrant Policy Project for NCSL. “With the provision upheld on checking immigration status during a lawful stop, states may view the ruling as a yellow flag to proceed—with caution—on immigration enforcement in the 2013 legislative sessions.”

Immigration reform—both to curtail illegal immigrants and address legal migration to fill labor shortages—will likely stay on top of legislative agendas, at least until the federal government determines a better way to deal with the issue.

Pension Reform. Conservatives enjoyed the support of many Democrats on this issue, a welcome development because unfunded pension liability is a runaway freight train bearing down on state and local governments. “Fiscal pressures have forced a degree of bipartisanship that belies the heated rhetoric,” says Ron Snell, NCSL's expert on pensions.

The pressures are immense. The Pew Center for the States estimates that a \$1.26 trillion gap exists between the promises states have to retirees, including health care, and the money set aside to pay for them. In addition, public pension managers are counting on a 7 percent to 8 percent return on the funds over the next two decades—well beyond the expectations of most economists. Even if the rosier estimates prove accurate, Snell says, the unfunded liability still would be about \$750 billion. This has

spurred states to act.

Thirty-two states passed pension-reform laws in 2011 and seven—Alabama, Kansas, New York, Ohio, South Carolina, Virginia and Wyoming—have done so this year. In all, since 2005, 48 states have approved pension reforms by increasing employee contributions, raising age and service requirements, and reducing the amount of benefits, among other changes.

Most states have made changes within their defined-benefit plans, the traditional pensions in which retirees receive a fixed monthly payment based on age and length of service. Six states—Kansas, Louisiana, Michigan, Rhode Island, Utah and Virginia—have moved either to hybrid plans or cash-balance alternatives to traditional plans.

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The willingness of states with Democratic majorities and powerful public employee unions such as Illinois and Rhode Island to act on pension reform reflects a changing mind-set. Even unions that previously resisted all reforms now accept the need for limited changes. Whether they will be sufficient remains to be seen.

Collective Bargaining. Two 20th century political icons—Democrat Franklin D. Roosevelt and Republican Ronald Reagan—would be surprised that collective bargaining has become such a partisan touchstone. As president, FDR questioned

whether public workers should be allowed to unionize. As California governor, Reagan signed a bill, uncontroversial at the time, allowing municipal workers to bargain collectively.

Now, however, with industrial unions in decline, public employee unions have become the vanguard of the labor movement. Democrats depend upon unions for contributions and support; Republicans are apt to see them as barriers to balanced budgets and sensible work rules.

The Republican-controlled Ohio legislature, in 2011, was the first to ban collective bargaining for public employees, including police officers and firefighters. Unions representing these employees united with teacher unions to back a voter referendum that overturned the collective-bargaining ban.

In Wisconsin, the birthplace of public employee unions, Governor Scott Walker’s proposal to limit collective bargaining for public employees incited a riot of sorts. After labor-backed activists stormed the Capitol and Democratic legislators left the state in protest, Walker and a Republican Legislature saw the budget through to passage and cheered when the state Supreme Court upheld the anti-union rules on a 4-3 vote.

The union struck back this year by trying to recall Walker. The fierce campaign that followed became a national test of resolve. Money flowed to organized labor and a conservative movement, for which Walker has become a poster child. Walker

survived the recall, but at a cost to him and his allies of \$31 million. Senate Democrats, in a consolation prize of sorts, won a recall election that gave them—at least until November—a one-seat majority. Whether this will encourage other states to endure the travails that come from trying to clip the wings of public employee unions remains to be seen.

In the wake of Walker’s victory and the decisions by voters in San Diego and San Jose, Calif., to restrict pensions, the flagship conservative magazine *National Review* predicted other states would move against public employee unions as well.

This expectation was echoed, with mounting concern, on the union side. Gary Chaison, professor of labor relations at Clark University in Worcester, Mass., says unions “gambled heavily and lost heavily” in Wisconsin and now face “a real problem” in trying to sustain collective bargaining.

Nonetheless, when the results of the Ohio referendum are factored in, it’s unclear how many states will charge into the contentious arena of collective bargaining. Conservatives heavily outspent the unions to win in Wisconsin, and it’s likely that efforts to undo collective bargaining in other states would also result in expensive political battles.

Voter Identification. Eight states passed voter ID laws last year, and three states followed this year, bringing the total to 32 states with voter ID laws. Most of the stricter voter ID laws require a government-issued photo identification. Individual plaintiffs, backed by civil rights groups, are challenging the laws in Pennsylvania and Wisconsin. The U.S. Department of Justice declined under the Voting Rights Act to pre-clear voter ID laws in South Carolina and Texas. These states are suing in the U.S. District Court in Washington, D.C., to win approval of their laws.

Republicans contend voter ID laws are needed to prevent impersonation at the polls, although most voter fraud allegations have instead involved alleged irregularities in mail or absentee voting, issues neither party has addressed.

Democrats say these laws are meant to discourage voter turnout, especially among students, minorities, the poor, elderly and disabled. There is little evidence, however, that voter ID laws depress turnout, which actually rose in Indiana in 2008 after the legislature adopted a voter ID requirement.

Abortion. Republican-controlled legislatures have seized the opportunity to rewrite state laws to restrict abortions: 24 states approved 92 restrictions in 2011, and 13 states approved 30 new restrictions in 2012. In nine of the 13 states, Republicans hold a majority in both legislative chambers.

Late-term abortions were a popular target of much of the legislation. Eight state legislatures banned abortions after 20 weeks post-fertilization, while Arizona did so at 18 weeks. Arizona, Oklahoma and Wisconsin joined four states that ban abortion by medication. News laws in Mississippi and Tennessee require abortion providers to have admitting privileges at a nearby hos-

pital. Mississippi also requires the doctor to be a gynecologist.

Elizabeth Nash, state issues manager of the Washington, D.C.-based Guttmacher Institute, says these restrictions “push the envelope of legality.”

Pro-life groups intend to keep pushing for additional limitations.

“The pro-life movement will ensure that the protection of life is a central issue in the 2012 elections,” says Charmaine Yoest, president of Americans United for Life. “We will continue our work at the state level to enact common-sense and protective laws such as prohibitions on state funding of abortion and abortion providers, informed consent requirements and parental involvement mandates.”

In the most recent move aimed at Planned Parenthood, Arizona excluded abortion providers from receiving federal and state family planning funds, as Indiana, North Carolina and Texas had done in 2011. Kansas passed a similar law that excluded only federal funds.

The 2011 laws have yet to go into effect because all have been blocked by legal challenges.

Same-Sex Marriage. Voters nationwide may tell pollsters they favor same-sex marriage, but they don’t tend to vote that way. Thirty-eight states prohibit same-sex marriage, and 32 have done so by popular vote. In May, 61 percent of the voters in a North Carolina primary election voted to limit marriage to a union between a man and a woman.

On the other hand, legislatures have approved same-sex marriage in New Hampshire, Vermont and—dramatically—in New York, where in 2011 a handful of Republican senators broke with their party and joined Democrats to make same-sex marriage legal in the Empire State.

Same-sex marriage also is legal in Connecticut, Iowa and Massachusetts because of rulings by the highest courts in these states that their constitutions require equal treatment of all marriages. California’s same-sex marriage law, approved by the Legislature, remains on hold pending the U.S. Supreme Court’s decision whether to review the federal appellate court decision that overturned a ballot measure banning such marriages. The law would go into effect if the high court declines to take the case.

The discrepancy between poll findings and ballot results is less than it seems at first glance. A key reason is that voters under age 30 are most favorable toward same-sex marriage but least likely to vote, while those over 60 are disproportionately likely to vote and most opposed to same-sex marriage.

Even so, Jennie Bowser of NCSL observes that the “yes” vote for banning same-sex marriage peaked in 2005 and has declined in every vote since. The 61 percent support for the same-sex marriage ban in the May North Carolina vote was the lowest

favorable vote ever in the South, where opposition to same-sex marriage is stronger than in other regions. There will be a different twist when voters in Maine consider this issue in November. Previous ballot questions in other states asked voters if they wanted to ban same-sex marriage. In Maine, citizens will be asked if they want to legalize it.

What’s Ahead

Does the conservative agenda have staying power?

The answer depends to some degree on the specific issue. Republicans tend to be more comfortable than Democrats and their union backers in dealing with pension reform and collective bargaining, says Alan Rosenthal, a writer and professor of public policy at the Eagleton Institute of Politics at Rutgers University. He says this is also true of education, where a growing preference for a “business-style performance model” long favored by Republicans has been embraced even by the Obama administration.

“Democrats and the teacher unions are on the defensive,” Rosenthal says. On the other hand, Democrats and their constituent groups are energized on gay-rights issues, especially same-sex marriage, he says.

If history is a guide, the staying power of the conservative agenda in the states will also depend on the outcome of the November elections. In the past, states have played the lead role in policy development when one party has held a commanding majority in a significant number of states while divided government

prevailed in Washington, D.C., as was the situation in the last two years.

The most striking historical example occurred from 1930-1932 during the Great Depression when Republican Herbert Hoover was president. Democrats won key statehouses in the 1930 elections and tried to alleviate widespread joblessness and suffering with public works programs, unemployment insurance and bank deposit protection. Democrat Franklin D. Roosevelt was elected president in 1932 and, soon after his inauguration in 1933, launched the New Deal. From the outset, FDR freely acknowledged that many of the New Deal’s most transformational measures were based on what the states, particularly New York, had done in the two years before his election.

Whatever happens in November, states will continue to play a role, if only in every-day practical interpretations of Supreme Court decisions on health care, immigration and other issues. Justice Louis Brandeis famously celebrated the states as “laboratories of democracy.” They have now become, in Rosenthal’s words, “laboratories of conflict,” and these conflicts show no sign of abating. ■

