FEDERALISM

FILLING IN FOR THE FEDS

Congress’ inability to get things done leaves states carrying a heavy load.
Washington was broken long before impeachment got underway. The current Democratic House and Republican Senate have failed to reach agreement on almost any major policy change. During the first two years of Donald Trump’s presidency, when Republicans controlled everything, there were no notable enactments beyond the 2017 tax package and the 2018 criminal justice reform bill. Even the United States-Mexico-Canada Agreement, the White House’s replacement for the North America Free Trade Agreement, left much of NAFTA intact.

The same lack of legislative productivity characterized most of Barack Obama’s time as president. In fact, it’s been about a decade since any real, innovative or ambitious policy achievement has come out of our nation’s capital. The situation is unlikely to change for the foreseeable future. Either party could take both Congress and the White House this year, but the Senate is looking much more likely to end up tied than controlled by one party with a filibuster-proof, 60-seat majority.
Congressional gridlock opens up opportunities for states to experiment, and not everyone thinks that’s a bad thing. For most of American history, says Wisconsin Assembly Speaker Robin Vos (R), the president of NCSL, power has been shifting inexorably toward Washington, D.C., with groups preferring to deal with a single venue rather than 50 separate state capitols. He welcomes a reversal of that trend.

“My preference has been, and always will be, that states are where the bulk of public policy should occur,” he says. “I prefer to have that contest of ideas, where one state advances or falls behind because of the policies local officials are putting into place.”

**Perennial Time-Consumers**

In 2020 and beyond, legislators’ time will be monopolized, as it always has been, by traditional tasks such as budgeting and taxation, and education and health care funding. And, this year, with the census coming up, preparing for redistricting will be a front-of-mind matter in most legislatures.

Although there seems to be help available for new federal priorities such as opioid addiction and school safety, Trump’s budgets have proposed deep cuts to other domestic programs. These generally have not gotten traction in Congress, but state lawmakers recognize they can’t count on infusions of federal cash any more for longstanding programs. And that trend is likely to continue.

Legislators will face several perennial issues in the coming years that Washington has either failed to address or refused to fund:

- **Infrastructure Funding.** The federal Highway Trust Fund has been falling short by billions of dollars for years, yet the federal gas tax hasn’t been increased since 1993. Knowing they need a reliable source of increased revenue, 30 state legislatures have raised their own gas taxes since 2013. “People should not mistake the increase in investment at the state level as a substitute for increasing investment at the federal level,” says Jim Tymon, executive director of the American Association of State Highway and Transportation Officials.

  The federal highway funding bill is due for reauthorization this year and state lawmakers are hoping their regular source of transportation funding won’t be delayed for years, as happened the last time. There are reasons for optimism. A Senate committee approved a $287 billion package in July last year, and in November, Congress repealed a $7.6 billion rescission of highway dollars scheduled to take place this summer. “We’re moving in the right direction,” Tymon says.

- **Legal Marijuana.** Marijuana remains a Schedule I substance, making the possession and sale of marijuana illegal under federal law. However, 11 states, two territories and the District of Columbia have legalized its use by adults, and another 22 allow its use for medical reasons. This legal inconsistency will keep lawmakers busy unless Congress decides to remove marijuana from the controlled substances list or reclassify it as a Schedule II or III substance.

- **Medicaid Costs.** Federal efforts to overhaul this costly state/federal program have fallen short. Further changes in health policy may be in limbo for a while. Policymakers will have to wait to see the full ramifications of a federal court ruling in December that found the Affordable

**Federal Grants to States by Program**

Percentage change from federal fiscal years 2008-17, adjusted for inflation

<table>
<thead>
<tr>
<th>Program</th>
<th>Health</th>
<th>Non-health</th>
<th>Total grants</th>
<th>Health</th>
<th>Non-health</th>
<th>Total federal grants to states</th>
</tr>
</thead>
<tbody>
<tr>
<td>Medicaid</td>
<td>71%</td>
<td>87%</td>
<td>-3%</td>
<td>72%</td>
<td>40%</td>
<td>7%</td>
</tr>
<tr>
<td>Other health</td>
<td>6%</td>
<td>4%</td>
<td>-1%</td>
<td></td>
<td></td>
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</tr>
<tr>
<td>Transportation</td>
<td>-7%</td>
<td>-11%</td>
<td>-15%</td>
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</tr>
<tr>
<td>Education</td>
<td>-15%</td>
<td>-17%</td>
<td>-19%</td>
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<td></td>
</tr>
<tr>
<td>Everything else</td>
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Source: The Pew Charitable Trusts, 2017
Care Act’s individual mandate unconstitutional, putting the entire law’s future in doubt. Some 20 states have sought federal waivers to impose work requirements on Medicaid recipients. Those have largely been held up by the courts, but in December, South Carolina was the first state to receive federal approval to impose work requirements under traditional Medicaid, not just the ACA expansion. Ballot initiatives to expand Medicaid, which voters approved in 2018 in Idaho, Nebraska and Utah, are expected this year in Missouri and Oklahoma.

- **Immigration, Abortion and Gun Rights.** With little federal action on highly partisan and contentious social issues, red and blue states will continue charting their separate courses when it comes to sanctuary cities, abortion limits, gun control and other matters.

  But beyond the perennial issues listed above, there are important concerns—some high-profile, some not—that states will have to deal with in the coming years because federal lawmakers have failed to provide any new help with either policy direction or funding.

**Election Security**

In December, Congress agreed to provide $425 million more for election security. That represented a compromise between House Democrats who wanted $600 million, and Senate Republicans who had approved only $250 million. It came on top of $380 million Congress approved in 2018. At the time, voting security advocates worried that not only was that not enough, but that the money arrived too late, on the very eve of the election year.

“This money is wonderful but not enough to make the states capable of stepping up to foreign meddling,” says Wendy...
Underhill, director of NCSL’s elections and redistricting team.

States have already done an impressive job on their own of “hardening their cyber shells around elections,” Underhill says. Election officials have to perform a tight dance between addressing real vulnerabilities and not fostering panic, since undermining public confidence is at least as great a threat as actual hacking.

To better secure ballots, the number of states relying entirely on paperless machines is expected to fall to eight, six fewer than in 2016.

One other move states could consider making is rewriting the regulations that lead to long delays in certification of voting software and equipment, says Marc Lawrence-Apfelbaum, senior adviser on foreign interference and online threats at the Campaign Legal Center. Last year, states spent just 8% of the $380 million authorized by Congress ahead of the midterm elections, in large part due to the amount of time it takes to update equipment. (They’re expected to spend 85% of the sum in this year’s elections.)

“It takes a long time to get anything certified, which costs vendors time and money, and once you’ve deployed it, you have to start all over again,” Lawrence-Apfelbaum says. “It works the opposite of the way most technologies work, where you do updates all the time with your iPhone.”

Vaping and E-cigarettes

Originally touted as a healthy, easy way for adults to stop smoking (60% easier than drug-based methods, some studies suggest), the use of electronic cigarettes—or vaping—first drew concerns over the strong appeal flavored varieties had to young people, fueled, some argued, by aggressive youth-targeted marketing campaigns. Vaping devices—also called vapes, e-hookahs, vape pens, tank systems and mods—work by heating a liquid that, according to the Centers for Disease Control and Prevention, most commonly contains nicotine, THC or cannabinoid oils, but sometimes other additives, to produce a vapor that is inhaled.

Trump threatened to ban most forms of flavored e-cigarettes last fall, because, he said, “We can’t have our kids be so affected.” On Jan. 2, the administration announced a plan to ban most flavors, but not all. Health advocates warn that this left open a loophole that tobacco companies can exploit, marketing their products, perhaps misleadingly, under the flavor labels still allowed.

Although studies on the health effects of vaping have been inconclusive, 2,561 people in 50 states, the District of Columbia, Puerto Rico and the U.S. Virgin Islands have been hospitalized for lung injuries associated with vaping, as of Dec. 31, 2019. Fifty-five of them, ages 17 to 75 and from 27 states and the District of Columbia, have died, according to the CDC. Most patients reported using THC-containing products of unknown origin.

Massachusetts lawmakers were the first to pass a state ban on flavored vaping products. In at least nine other states, governors have used executive orders or state health departments have used emergency rules to establish bans.

Courts have been skeptical about these moves, but other state legislatures may debate the pros and cons this year of imposing bans that are stricter than the new federal regulations.

Regulatory restrictions, vaping device companies argue, would only impede adults who choose to vape.

Children and Youth

When it comes to children’s programs, “we have an imbalanced federal fiscal system,” says Timothy Conlan, a professor of government at George Mason University.
Federal spending currently is focused on defense and entitlements, which drives down spending on programs that benefit children and young people, leaving that job largely to the states, he says. That’s not a new dynamic, but the decline over the last five years is notable.

Since 2015, the share of federal spending on K-12 education has dropped by 12.1%, while nutrition assistance has fallen even more, according to First Focus on Children, a bipartisan organization that advocates for spending on children and families. At this point, federal programs aimed at the young make up just 7% of all federal spending. “The share of spending for kids is at an all-time low,” says Bruce Lesley, First Focus president.

That leads to some big disparities among states. Some are still below their pre-recession spending levels on K-12, while others spend nothing on early childhood education beyond what the federal government provides.

Children lack political clout, but the politics around children’s programs might be changing as the demographics of legislatures evolve. Older women are much more likely than older men to support efforts such as Head Start and the Children’s Health Insurance Program. But that gender gap does not exist among younger adults. Finding ways to pay for universal programs remains a struggle, but it’s becoming more of a priority in many states. Colorado and Rhode Island have ramped up their spending on early childhood and pre-K programs, and New Mexico has just created an Early Childhood Education Department.

Child care came up repeatedly as an issue of concern in gubernatorial races in 2019. And even the feds are spending more on child care and early childhood programs in general. “We are seeing states starting to increase funding and leveraging these federal dollars with more savvy,” says Ed Stierli, director of state campaigns for Save the Children Action Network.

Affordable Housing

Traditionally, legislators haven’t had to think much about housing. The federal government has provided funding for low-income housing, while localities have set nearly all the rules. But the days when states could stand idly by appear to be over. “Traditionally, this has been the purview of the federal government and localities,” says Oregon Representative Julie Fahey (D). “From our point of view in Oregon, it was very clear the status quo isn’t working.”

Fahey co-sponsored a law last year that effectively bans single-family zoning in the state. Oregon’s law was especially ambitious, but states from Massachusetts to Hawaii have enacted laws aimed at pushing localities to change zoning regulations to encourage more building. “We’ve viewed it as a local issue, but this absolutely is a state-
wide issue, every bit as much as education or health care,” says California Senator Scott Wiener (D), who has sponsored legislation to prod local governments to build more housing near public transit routes.

Wiener’s bill was unsuccessful last year, but California did enact a statewide rent-control measure, along with other tenant protections. Inland states as well will increasingly find themselves called on to confront housing questions, says Mark Treskon, a senior research associate at the Urban Institute. “There’s going to be more active discussion in states where there are cities with really profound housing-cost issues,” he says.

Climate Concerns

Engaged attention to climate policy has switched from the states during George W. Bush’s presidency, to Washington, D.C., under Obama, and back to the states under Trump. It’s an example of the “whiplash effect” some aspects of federalism are experiencing, says Conlan, the George Mason University professor. At a time of profound polarization, the policy course an issue takes can change rapidly with swings in partisan control. “Federalism has become polarized in a way that we haven’t seen in a very long time, and maybe ever,” he says.

Much of the climate action in the states is taking place at the executive level. Democratic attorneys general are routinely suing the Trump administration over climate questions and other environmental issues as part of their record-shattering docket of lawsuits against Washington. Half the nation’s governors have joined the U.S. Climate Alliance, pledging their states to abide by the terms of the Paris climate agreement, even as Trump moves to withdraw the nation from the accord altogether.

Lawmakers in a handful of states have gone further. Hawaii was the first state, in 2017, to enact laws adhering to the Paris goals, with measures reducing greenhouse gas emissions and promoting carbon sequestration. In Washington, lawmakers passed five climate-change bills mandating renewable power, subsidizing electric vehicles and requiring some buildings to be remodeled, among other strategies. Lawmakers in Arizona, Montana, New Jersey and New York have produced climate-related letters or resolutions.

GOP lawmakers support alternative energy sources, such as wind, for their economic development potential but remain skeptical about the extent to which human activity is contributing to climate change. That doubt is keeping most of them from actively supporting any climate change effort, says Barry Rabe, a public policy professor at the University of Michigan. “As states think about their economic future, their ability to tap fossil fuels in their states becomes a bigger force in state politics than it was 10 or 15 years ago,” he says.

Inaction on climate change at the federal level “has created a desire for policy certainty, whether you’re a state government or a private company,” says Janet Peace, vice president of the Center for Climate and Energy Solutions. “Most big companies see that we’re going to have some climate policy in the future. If you’re not going to get it from the federal level, they’re turning to the states.”

Power to States

The list of these difficult, federally neglected issues goes on. States are being encouraged to take on more of the costs of responding to natural disasters, for example. The threat of trade wars has prompted some states to drum up their own international deals. And workforce training concerns have legislators seeking better alignment between their education and economic development agencies to address skills gaps that leave millions of jobs unfilled.

In 2020, states will have to find their own way on these and still other issues, with little help expected from Washington.

That’s a challenge Vos is willing to take on: “I think that’s in essence what the founders intended, having power resting in the states.”

Alan Greenblatt is a senior staff writer with Governing.

State Alliance in Lieu of Paris Agreement

Nearly half of the states will remain committed to meeting the goals of the global compact to reduce greenhouse gas emissions.

Committed to climate goals

Source: The Pew Charitable Trusts, 2019