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States and Federalism

Is the federal government usurping states' powers?

Arizona enacted Medicaid cuts early this year only to have the action countermanded by the Obama administration's recently passed health care law. Arizona is now one of 20 states challenging the new law as unconstitutional. Meanwhile, the state is also tangling with the federal government over national immigration policy. The cases highlight the recurrence of high-profile clashes over federal power and state prerogatives playing out against the backdrop of sharp political attacks on the administration and declining confidence in government at all levels. One federal judge has upheld the new health care law, but the states' suits challenging the law are advancing. Meanwhile, the Supreme Court is set to hear a challenge by business and civil rights groups to Arizona's tough law on hiring illegal aliens even as the state is appealing a lower court ruling that blocks its new measure requiring local law enforcement officers to check the immigration status of anyone arrested, detained or stopped for possible law violations.

Tea Party members and other supporters of Arizona's tough, new immigration law rally against illegal immigration in Phoenix on July 31. The Justice Department has sued to invalidate the law, arguing it conflicts with the federal government's power over immigration matters.

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States and Federalism

BY KENNETH JOST

THE ISSUES

Arizona Gov. Jan Brewer worked hard with the state's legislature to come up with $1.1 billion in spending cuts early this year to avoid a big budget deficit in 2011. A big chunk of savings came from eliminating health care coverage for 47,000 low-income children and 310,000 childless adults.

"This is the most significant streamlining of state government ever undertaken," the Republican chief executive said as she signed a series of budget bills on March 19.

Only a few days later, however, Arizona's budget-cutting effort ran headlong into President Obama's plan to cover most of the estimated 50 million Americans without health insurance. Under the health care overhaul that Congress passed and Obama signed into law on March 23, states are prohibited from reducing their current health care funding.

AFP/Getty Images/Saul Loeb

President Obama signs new health care reform legislation on March 23, 2010, providing insurance for some 30 million uninsured Americans. Twenty states have sued to invalidate the controversial legislation, claiming the added costs it requires amounts to an unconstitutional intrusion on the states' sovereignty.

"The short version is that states are locked into their existing programs at the moment the president signs the bill," Monica Coury, spokeswoman for the Arizona Health Care Cost Containment System, told the *Arizona Republic* on the eve of Obama's signing. The agency operates the state's Medicaid system, the federal-state health care program for low-income persons. [1]

Barely a month later, Brewer found herself in another power struggle with Washington as she signed a controversial immigration law on April 23 making it a state crime to be in the country illegally and requiring local police to enforce federal immigration law. Brewer said the law — passed by the GOP-controlled legislature — was necessary "to solve a crisis we did not create and the federal government has refused to fix — the crisis caused by illegal immigration and Arizona's porous border."

The very same day, Obama in Washington called the law "misguided" and pledged an administration review of its implications. The Justice Department followed through on July 6 by filing a federal court suit in Phoenix to invalidate the law as conflicting with the federal government's plenary power over immigration matters. "The Constitution and the federal immigration laws do not permit the development of a patchwork of state and local immigration policies throughout the country," the suit says. [2]

The two issues are as current as the upcoming 2010 midterm congressional elections. Republican candidates and activists in the diffuse Tea Party movement are depicting the health care overhaul as a massive power grab by the federal government at the expense of state prerogatives and individual rights. Along with immigration-control advocacy groups, they are also blaming Washington for the failure to seal U.S. borders from illegal immigrants and urging the feds to get out of the way of state and local governments wanting to adopt tougher policies. [3]

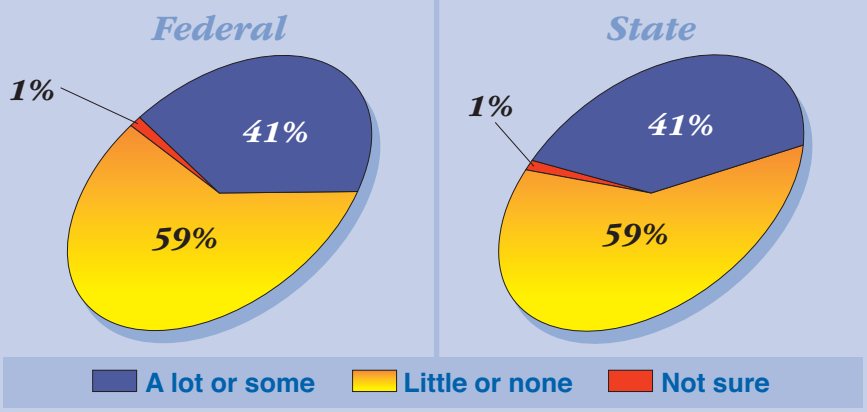
The conflicts over federal and state powers, however, are also as old as the Republic itself. The Constitution, drafted in the summer of 1787, called for replacing the weak national government created by the Articles of Confederation with a federal system of divided powers between the national and state governments, known as federalism. The new national government was to be stronger, but how much stronger was unclear. The issue was fiercely debated in the state-by-state battles that led up to ratification of the Constitution nine months later.

"From the beginning there was ambiguity in the Constitution," says Timothy Conlan, a professor of political science at George Mason University in Fairfax, Va., and author of two books and numerous articles on federalism, "And the scope of ambiguity has grown over time as we've been forced to adapt an 18th-century document to the realities of 20th-century government." [4]

Confidence in Government Lags

Fifty-nine percent of Americans have limited or no confidence in either the federal or their state government (top graph). In five economically stressed states — Arizona, California, Florida, Illinois and New York — a majority of voters say they can trust their state governments only some of the time (chart).

How much confidence do you have in federal/state government?



How much of the time do you think you can trust your state government to do what is right?

State	Just about always	Most of the time	Only some of the time	Never	Don't know
Arizona	4%	29%	60%	6%	1%
California	3	15	70	10	2
Florida	4	27	59	8	2
Illinois	2	17	71	9	1
New York	3	16	67	12	2

** Figures may not total 100 due to rounding.*

Sources: "Voter Confidence in Big Banks, Corporations & Wall Street Even Lower Than That of Government," Zogby, February 2010, www.zogby.com/news/ReadNews.cfm?ID=1817; "Facing Facts: Public Attitudes and Fiscal Realities in Five Stressed States," Pew Center on the States, October 2010, www.pewcenteronthestates.org/uploadedFiles/PCS_PPIC.pdf?n=4566

Federal powers have grown over time, particularly since the 1930s, when President Franklin D. Roosevelt put Washington into the economic-recovery and regulation business. The Supreme Court initially struck down some of FDR's legislative initiatives, but reversed course in 1937.

"The federal government clearly has grown in power since 1938," says Robert A. Schapiro, a professor of constitutional law at Emory University School of Law in Atlanta. "The scope of federal regulation has increased," Schapiro adds, "but the scope of state regulation has also increased."

Roosevelt set the pattern for Democratic presidents, including John F. Kennedy and Lyndon B. Johnson in the 1960s, of being associated with expanding the scope and size of the federal government. Two Republican successors, Richard M. Nixon and Ronald Reagan, countered with federalism reforms that purported to transfer power back to the states. Conlan notes, however, that both of the GOP chief executives also adopted some policies that centralized powers in Washington.

Today, Obama and his fellow Democrats in Congress are under fierce criticism for supposedly expanding federal powers and spending to unprecedented levels. "No government-controlled health care," read one commonly seen placard at a Tea Party rally in Washington on Sept. 12. Another: "The more the government takes, the le$$ we make. Cut taxes + spending now!"

Experts with differing political views say the attacks are overdrawn. "Like most administrations, [Obama's] is somewhat conflicted," says Jonathan Adler, a conservative law professor at Case Western Reserve University in Cleveland. "In some areas, the administration has sought to be responsive to the desire of the states to do their own thing. But in other areas, the administration has certainly been aggressive in maintaining federal supremacy to preempt state actions."

Doug Kendall, president of the consumer-oriented Constitutional Accountability Center in Washington, agrees. "The administration's record could be viewed as pointing in a couple of directions," Kendall says. He notes that the administration issued a policy statement early in 2009 generally pledging to minimize the use of the doctrine of federal preemption to supersede state laws. But he acknowledges that the

administration has vigorously claimed preemption to override some of the flurry of state and local immigration laws passed in the past few years. (*See "At Issue," p. 861.*)

Adler, Kendall and others also note that Obama's Republican predecessor, George W. Bush, pursued several power-centralizing policies despite the GOP's general association with favoring states' interests over Washington's. "There was a dramatic growth of federal mandates under Bush," Conlan says.

Whether overdrawn or not, discontent with Obama administration policies is fueling interest in ambitious but long-shot campaigns to rewrite the U.S. Constitution to limit federal power. Some conservatives are pressing a campaign to get the required number of states — 34 — to call on Congress to convene a constitutional convention, a procedure never before used to amend the nation's foundational document. Meanwhile, a libertarian-minded Georgetown University law professor is drawing attention for a proposed constitutional amendment to allow two-thirds of the states to repeal a federal law unless Congress reenacts it in the face of the states' opposition. (*See story, p. 850.*)

Federalism issues routinely end up in the courts, often at the Supreme Court. In the 1990s under Chief Justice William H. Rehnquist, the court breathed new life into federalism principles with several decisions that trimmed federal powers. The so-called federalism revolution began to peter out, however, at the turn of the century. After five years in office as Rehnquist's successor, Chief Justice John G. Roberts Jr. has shown little interest in the area.

The court does have several federalism-related cases on its calendar for the current term, however, including a closely watched challenge to Arizona's controversial law tightening prohibitions against employers' hiring illegal aliens. The federal appeals court in San Francisco upheld the law. The U.S. Chamber of Commerce, along with immigrant-rights groups and the U.S. government, is asking the justices to strike the law down. The case will be argued on Dec. 8.

Meanwhile, federal judges in two states are considering suits by states challenging the new health care law. The states say the Patient Protection and Affordable Care Act — sometimes referred to by the acronym PPACA or, pejoratively, as "Obamacare" — will cost states so much money that it infringes on their power to control their own affairs. The administration, along with health reform advocates, contends that any additional costs for states will be minimal and will be offset by other savings.

AFP/Getty Images/Mark Ralston

Demonstrators block a street in downtown Phoenix on July 30 to protest Arizona's tough new immigration law requiring local police to enforce federal immigration law. Gov. Jan Brewer said the law was necessary "to solve a crisis we did not create and the federal government has refused to fix — the crisis caused by illegal immigration and Arizona's porous border."

The administration's challenge to Arizona's newest immigration law is also advancing in the courts. U.S. District Judge Susan Bolton issued an injunction on July 28 blocking the law from going into effect as scheduled at 12:01 a.m. the next day. The federal appeals court in San Francisco is scheduled to hear the state's appeal Nov. 1. (*See box, p. 852.*)

As the court cases proceed and the congressional elections approach, here are some of the major questions being debated:

Is the federal government taking on too much power from the states?

Four weeks after an upset win in Alaska's Republican primary, U.S. Senate candidate Joe Miller used a nationwide television appearance on Sept. 19 to call for cutting back the size of the federal government. "The first thing that needs to be done," the Tea Party-backed candidate told host Chris Wallace on "Fox News Sunday," "is, again, restricting the growth and actually reversing the growth of government and, in the process, transferring power back to the states."

Anxiety about the size of the federal government had been growing since Obama's early months in office when

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States Look to Article V to Limit Federal Power

Conservative advocates push for a state-led convention to amend Constitution.

Conservative scholars and activists, frustrated with mounting federal debt and expansion of federal powers, are looking to an unused provision in the Constitution for a remedy. They want to convene a convention under Article V, which permits applications from two-thirds of the states (now 34) to force Congress to call a convention where state delegates would debate constitutional amendments. To ratify the proposed amendments, three-fourths of the state legislatures (38) would then have to approve them.

"This current debt is unconscionable," says Bill Fruth, an economist and founder of 10 Amendments for Freedom, a Florida-based advocacy group working to create a convention to propose a balanced budget amendment. "An amendment is necessary to force Congress to stop borrowing. They won't do it themselves, so we have to force them," Fruth says.

Randy Barnett, a law professor at Georgetown Law Center, agrees. "People are looking for levers to pressure Congress," says Barnett. "We can't rely on Congress to police themselves or for the courts to police Congress, so Article V provides an alternate way of reining in federal power."

Barnett, a prominent advocate of limiting federal power, is also pushing his own proposed constitutional amendment to allow two-thirds of the states to "repeal" a law passed by Congress. The repeal would take effect unless Congress decided to reenact the measure, with only a simple majority required. As Barnett explained in an op-ed in *The Wall Street Journal*, the amendment would effectively force Congress to take a second look at a new law if a solid majority of states opposed it. The op-ed was co-authored by William J. Howell, speaker of the Virginia House of Delegates, who said he would introduce the measure in a coming session. [1]

Paradoxically, efforts to block the proposed convention are being led by conservative groups that also want to limit federal power but worry about the risk of potentially damaging changes to the Constitution. Lobbying by the Eagle Forum and the far-right John Birch Society have prompted at least 13 states to withdraw their applications for conventions in the last decade.

"There is no provision in the Constitution for how a convention would run," says Republican New Hampshire state Rep. Tim Comerford, who sponsored a successful effort in the 2010 legislative session to rescind a pending convention application. Comerford began his efforts after learning about the dangers of a constitutional convention from a John Birch Society video, "Beware of Article V."

"The only constitutional convention we ever had was the original one, and that was a runaway convention because they set out to amend the Articles of Confederation and wound up creating a whole new document," says Comerford. "A new convention could put the First and Second Amendments — any of the Constitution — under fire."

Virginia Sloan, director of The Constitution Project, a nonpartisan group that fosters discussion of constitutional issues, is also critical of the convention process. "In the construction of the Constitution, the framers were trying to avoid people using the Constitution as a political tool," says Sloan. "Most people are reluctant to support an amendments convention because we could destroy what we have."

Calling for an amendments convention is nothing new. In the 1960s and again in the '80s, 32 of the 34 states needed sought to establish a convention, proposing, respectively, amendments on legislative reapportionment and balanced budgets. In both cases, the fear of a runaway, free-for-all convention motivated Congress to address the issues.

This time, experts are not convinced that the threat of a convention will compel Congress to act. "My prediction is no," says Robert G. Natelson, a senior fellow in constitutional jurisprudence at the Denver-based Independence Institute, which describes itself as a "free-market, pro-freedom" think tank. "I hear some people say, 'Maybe Congress will just cave,' but I think people who want to apply for a convention should be prepared for a convention."

Organizing a convention comes with many obstacles. "When you call a convention, you have to do a lot of organization beforehand, and you need a way of sharpening the issues," says Jack Balkin, a law professor at Yale University. "It's a very tall order."

Also, Balkin says, if a convention is held and actually sends proposed amendments to the states, they are very difficult to pass, as proven by the struggle and eventual failure to add the Equal Rights Amendment to the Constitution.

As of Sept. 1, 20 state legislatures have voted to force Congress to hold an amendments convention. Fruth's 10 Amendments for Freedom plans to have sponsors in all 50 state legislatures in January 2011 introduce the group's petition for a convention.

The ramifications of calling a convention could be huge. "The mere fact of having a convention would set all eyes on constitutional issues," says Balkin. "Even if the convention failed, those issues would be setting the political agenda. It would suck all the air out of the political room."

— Maggie Clark

[1] Randy Barnett and William J. Howell, "The Case for a 'Repeal Amendment,' " *The Wall Street Journal*, Sept. 16, 2010, p. A23.

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he proposed a $900 billion stimulus plan to try to lift the country out of the recession that began while Bush was president. Obama agreed to trim the request to gain Republican votes needed to pass the bill in the Senate. As enacted, the American Recovery and Reinvestment Act of 2009 provided $787 billion in stimulus — divided between tax breaks for individuals and businesses; funds for education, health care and entitlement programs, including unemployment benefits; and funds for federal contracts, grants and loans.

Meanwhile, the administration was also continuing the financial industry bailout — the Troubled Asset Relief Program or TARP — that had been enacted in the final months of the Bush administration. And with General Motors, the nation's largest automaker, on the verge of financial collapse, Obama decided in June 2009 effectively to force the company into a federal bankruptcy court for reorganization, with the government acquiring a 60 percent ownership stake.

The government had no shortage of interest from states for funds from the economic stimulus. Officials in the states most directly affected also generally backed the government's financial rescue plans for Wall Street (New York) and GM (Michigan). Emory law professor Schapiro finds the states' support for the expanded federal roles unsurprising. "Often what the federal government is trying to do is the same thing the state governments are trying to do," he says. "It's just that the federal government can do it more effectively."

On regulatory issues, Obama reversed the Bush administration's stance of invoking federal preemption to supersede state laws or state court rulings. "The Bush administration was completely hostile to regulation at the state level," says Kendall of the Constitutional Accountability Center. The administration signaled the shift toward what is sometimes called "progressive federalism" with a decision in January 2009 to allow California and other states to set their own standards on greenhouse gases from cars and trucks. Later, Obama cautioned agency and department heads against issuing regulations that preempted state laws without clear federal statutory authority. Obama's memo, issued in May 2009, favorably quoted Supreme Court Justice Louis Brandeis' observation that states can serve as a "laboratory" for "novel social and economic experiments." [5]

Obama also revised another Bush policy initiative that intruded on state prerogatives: the No Child Left Behind Act, with its combination of curriculum and testing mandates and financial penalties for non-performing schools. The act was challenged in court on states' rights grounds but upheld. Federalism expert Conlan calls the law "unquestionably the most intrusive federal policy on elementary and secondary education since the Great Society, and perhaps ever."

Instead of using mandates and penalties, the Obama administration is promoting education reform in the states through a $4.35 billion competitive grant program known as "Race to the Top." Eleven states and the District of Columbia have been selected to receive grants — two in March, the others in late August — based on detailed proposals that generally hewed to the administration's support for charter schools and performance-based pay for teachers. In all, 40 states and the District of Columbia submitted applications for the funds. [6]

Despite some states-minded shifts, the administration's reputation on federalism among Republicans and conservatives today appears to be uniformly negative, largely because of the state mandates in the health care law and the immigration policy stance. Writing in *The American Spectator* in July, Andrew Cline, editorial page editor of the conservative New Hampshire *Union Leader*, denounced what he calls the administration's "crazy quilt federalism." [7]

In similar vein, Gene Healy, a vice president at the libertarian Cato Institute and columnist for the *Washington Examiner*, accuses the administration of "fair-weather federalism." The administration "allows states license when they're pursuing policies that the Obama administration and its supporters favor and brings the hammer down when they're doing policies that [the administration opposes]."

Healy says the Obama administration is not unique in adopting an inconsistent attitude toward state-federal relations. "It's quite common for politicians to wave the 10th Amendment flag," he says. The Bush administration, Healy says, was "quite abysmal" on federalism. As examples, he notes the Bush policies of challenging state initiatives in California on medical marijuana and in Oregon on assisted suicide.

Emory law professor Schapiro says the policy shifts from one administration to another indicate that federalism provides no fixed answer on the respective powers of the federal and state governments. "Federalism debates have often been policy debates in constitutional language," he says. "To the extent that some states don't like what the federal government is doing, that's the issue."

Does the federal health care law infringe on the powers of the states?

On the day before President Obama was to sign the federal health care law, Florida Attorney General Bill McCollum promised to file a suit challenging the act as an infringement of states' rights immediately afterward. The legislation would cost the states "billions of dollars" and go "far beyond any unfunded mandate we've ever seen," McCollum said on March 22. "Anything that really manipulates the states like this," he continued, "is unconstitutional under the 10th

Arizona Law Blocked by Federal Judge

U.S. law preempts parts of tough anti-immigration law, judge says.

Major provisions of Arizona's Support Our Law Enforcement and Safe Neighborhoods Act have been blocked from going into effect by a federal judge's ruling on July 28. U.S. District Judge Susan Bolton in Phoenix ruled that federal law preempts provisions in four sections of the controversial act that:

- Require law enforcement officers to make a reasonable attempt to determine the immigration status of a person stopped, detained or arrested if there is a reasonable suspicion that the person is unlawfully present in the United States; and require verification of the immigration status of any arrested person before release. The provision, Bolton said, is "likely to burden legally present aliens" and "to impermissibly burden federal resources and redirect federal agencies away from the priorities they have established."
- Create a crime for the failure to apply for or carry alien registration papers. The provision, Bolton ruled, "alters the penalties established by Congress under the federal registration scheme."
- Create a crime for an unauthorized alien to solicit, apply for or perform work. The provision, the judge said, "conflicts with a comprehensive federal scheme. . . ."
- Authorize the warrantless arrest of a person if there is probable cause to believe the person has committed a public offense that makes the person removable from the United States. Bolton found "a substantial likelihood that officers will wrongfully arrest legal resident aliens" under the provision.

The judge found two challenged provisions were not preempted and could be enforced. Those provisions:

- Create a separate crime to transport or harbor an unlawfully present alien or encourage or induce an unlawfully present alien to come to or live in Arizona.
- Permit impoundment of vehicles used in the transporting or harboring of unlawfully present aliens.

Many other provisions of the law remain enforceable because the government did not seek to enjoin them. They include a provision creating a new crime of stopping a motor vehicle to pick up day laborers if the action impedes normal traffic.

The state's appeal of the issuance of the preliminary injunction is to be heard by a panel of the Ninth U.S. Circuit Court of Appeals in San Francisco on Nov. 1.

— Kenneth Jost

Source: *United States v. Arizona*, CV10-1413-PHX-SRB, July 28, 2010, http://docs.justia.com/cases/federal/district-courts/arizona/azdce/2:2010cv01413/535000/87/.

Amendment, under the sovereignty of the states."

The Obama administration is vigorously defending against Florida's federal court suit, now joined by 19 other states, and a similar suit filed separately by Virginia. Supporters of the health care law and many legal experts voice doubts about the states'-rights challenge, though some experts see a stronger basis for attacking the law's individual-insurance mandate. In any event, the two federal judges hearing the cases — one in Pensacola, the other in Alexandria — have both signaled they are unlikely to dismiss the suits at an early stage. [8]

Supporters of the law sharply dispute the opponents' claims, including the claimed fiscal impact on the states. The law expands health insurance coverage by requiring participating states — and all do participate — to extend Medicaid eligibility beginning in 2014 to a new, nationwide standard: all adults with incomes up to 133 percent of the federal poverty level.

The new requirement is projected to add 16 million to 22 million people to Medicaid rolls nationwide. The federal government will pay 100 percent of the cost of new enrollees for the first three years, with the percentage declining gradually to 90 percent in 2020 and future years.

The change amounts to "a massive expansion of the states' Medicaid programs," according to Robert Alt, a senior legal fellow and deputy director of the Center for Legal Studies at the conservative Heritage Foundation. "Representatives of states are genuinely concerned about how much more this is going to cost," Alt says, "and whether or not it's simply going to bankrupt them."

John Holahan, director of the Health Policy Research Center at the liberal-oriented Urban Institute, calls the argument by the objecting states "grotesquely flawed." The new law, he says, would mean "a small increase" in state Medicaid spending but would also allow states to reduce current spending in several areas — notably, unreimbursed medical care for the uninsured. The savings, Holahan says, "will be more than enough to offset" the new spending under the law.

In their lawsuits, the states contend that the new law fundamentally changes the Medicaid program from "a voluntary federal-state partnership into a compulsory top-down federal program." In its reply, the government says the new law imposes valid conditions on the states' acceptance of federal aid comparable to changes in Medicaid rules enacted periodically since the program was created in 1965.

Health policy experts on both sides agree with the states' argument that

participation in Medicaid is, in practical terms, obligatory. "That's been true for a long time," says Holahan. "No state has ever seriously considered walking away from [the program]."

Two legal experts on federalism, however, say they doubt that the states' coercion argument will carry the day. "The legislation is a dramatic assertion and exercise of federal authority," says Adler, the conservative law professor at Case Western Reserve. Even so, Adler says, the states' spending arguments "are difficult to make."

Conlan, a more centrist-minded federalism expert, is also dubious. "There's no question that the law does entail new opportunities and responsibilities for the states," he says. But he calls the states' arguments "overdrawn." In its brief, the government says that the Supreme Court has never struck down a federal state-aid program on the grounds that a condition for receiving the assistance was coercive.

The states are also challenging provisions of the new law for the states to establish health-insurance exchanges to offer moderately priced insurance coverage for small businesses and individuals. The states depict the provisions as mandatory and, on that basis, as an impermissible command to operate a federal regulatory program. The government counters that the states in fact are free to decide whether or not to create the insurance exchanges.

The states are also attacking the most politically contentious aspect of the new law: the individual health insurance mandate. In their suit, the states call the provision "an unprecedented encroachment on the sovereignty of the Plaintiff States and the rights of their citizens." The government calls the claim premature and denies the states' legal standing to bring the claim. But on the law's merits the government says the mandate is a valid exercise of Congress' authority to regulate the market in health care.

The Heritage Foundation's Alt says the argument contradicts federalism principles. "If the Commerce Clause were read this broadly, then the federal government could do anything," he says. Emory law professor Schapiro calls it "surprising" for the states to raise a sovereignty-based argument against a regulation affecting individuals, not the states themselves. But he adds, "It's a little late in the day for states to say that health is a local matter."

Do state and local immigration laws infringe on federal powers?

When two illegal aliens were involved in a fatal shooting in the small town of Hazleton in northeastern Pennsylvania in 2006, Mayor Lou Barletta responded by proposing a local ordinance aimed at making his city "the toughest place in the United States" for illegal immigrants. As approved by the town council, the Illegal Immigration Relief Act provided for lifting the business license of any company that employed or the rental license for any landlord that rented housing to an illegal alien.

The ordinance was promptly challenged by Hispanic residents and immigrant-rights groups, blocked from going into effect and now has been struck down by a federal appeals court as conflicting with federal law. In a massive, 188-page decision on Sept. 9, a three-judge panel of the Third U.S. Circuit Court of Appeals said that it was "required to intervene when states and localities directly undermine the federal objectives embodied in statutes enacted by Congress." [9]

The appeals court ruling conforms to the general view, dating to the 19th century, that federal law is preeminent on immigration matters. But critics of the federal government's inability in recent years to stem the influx of undocumented aliens insist that states and localities are on sound ground in passing laws that they say will strengthen the enforcement of federal laws.

"The primary responsibility for immigration policy and immigration enforcement rests with the federal government," says Ira Mehlman, national media director for the Federation for American Immigration Reform (FAIR). "But Congress has made it clear over the years that they welcome state and local cooperation in enforcing immigration laws."

As one example, Cory Andrews, a senior litigation counsel with the conservative Washington Legal Foundation (WLF), points to an immigration law — passed in 1995 and known as section 287(g) — that authorizes state and local law enforcement officers to perform immigration law enforcement functions. WLF filed a friend-of-the-court brief supporting the Hazleton ordinance as well as the Arizona employer-sanctions law pending before the Supreme Court.

Immigrant-rights advocates say the states have far less power to deal with immigration-related matters. The federal government has "supreme" power over "anything that touches on who can enter the country and the conditions under which they may remain," says Karen Tumlin, managing attorney with the Los Angeles-based National Immigration Law Center. "State attempts to legislate in that area are strictly prohibited."

Tumlin acknowledges section 287(g) but notes that the provision permits agreements between the federal government and local law enforcement only if local officers receive specialized training from federal agents.

As with the health care issue, experts Conlan and Adler both doubt the states' arguments despite the differences in their political perspectives. Both scholars acknowledge the states' concerns about the impact of illegal immigration but question the states' authority to take on enforcement responsibilities themselves.

"The federal government is failing perhaps to adequately perform one of its constitutional responsibilities;" says

Conlan. "The corollary of that is not that [the states] get to address immigration. That does not follow constitutionally."

States may have "legitimate policy complaints" about federal enforcement, Adler says, but that does not mean that the states can enact their own policies. "If the federal government believes that the immigration laws are to be enforced in a particular way," he says, "the federal government has the ability to make that a national rule."

Despite the legal doubts, state and local governments have enacted well over 1,000 immigration-related laws in the past six years. Many but not all of the laws have been struck down or blocked from going into effect.

The Supreme Court will have its first chance to rule on the recent spate of laws during the current 2010-2011 term when the justices hear a challenge to Arizona's tough 2007 employer-sanctions law on Dec. 8. The case, *Chamber of Commerce v. Whiting*, pits business and civil rights groups challenging the law against Arizona and groups favoring a tougher stance against illegal immigration. The federal appeals court in San Francisco upheld the law.

Schapiro, the Emory law professor, acknowledges the federal government's argument for preempting state and local laws aimed at more stringent enforcement of federal laws may seem paradoxical. "It's a hard argument to make," he says. In briefs in the *Hazleton* case and the two cases challenging Arizona laws, the government argues that overenforcement by state and local governments risks burdening aliens legally in the United States, deterring employers or landlords from hiring or renting to legal aliens and overwhelming federal resources to enforce immigration laws.

The appeals court in the *Hazleton* case credited those arguments. The law's employment provisions created an "obstacle" to federal policy, the court said, by emphasizing enforcement but not the anti-discrimination protections included in the federal employer sanctions law. As for the housing provisions, the court said that regulation of the residency of immigrants was "clearly within the exclusive domain of the federal government."

In *Hazleton*, Mayor Barletta is vowing to appeal the decision. "I have said repeatedly over the years that the main line of defense against illegal immigration is to eliminate the availability of jobs to illegal aliens," Barletta said on the day of the decision. "If illegal aliens have no place to work, they will self-deport." ■

BACKGROUND

Dual Sovereigns

The Constitution established a national government with some powers defined specifically and others more generally, but it also preserved state governments with most but not all of their residual powers retained. Over the course of two centuries, the federal government has grown in size and scope, but so too state governments. Congress and presidents have naturally gravitated toward federal solutions to perceived national problems but with the ever-present constraint of political and public support for states' prerogatives. The Supreme Court at times limited federal powers somewhat, but since the 1930s has generally upheld the growing federal role exemplified in direct regulation and in conditions attached to federal aid to states. [10]

The Constitution sets forth in Article I Congress' so-called "enumerated powers," including most significantly the power to tax and spend and to regulate interstate and foreign commerce. Article I also includes some limitations on the states, including a prohibition on any "tax or duty" on exports from other states. In urging ratification of the Constitution, James Madison and Alexander Hamilton stressed in *The Federalist Papers* the continued importance of the states. In *Federalist 45*, Madison said the federal government's powers were "few and defined," while the states' were "numerous and indefinite." In *Federalist 51*, Hamilton argued that the federal structure would help preserve liberty. "The different governments will control each other," he wrote. [11]

Under Chief Justice John Marshall (1801-1835), the Supreme Court generally upheld federal powers, including an 1819 decision that gave a broad but not unlimited reading to Congress' authority to enact "all laws . . . necessary and proper for . . . the execution" of its enumerated powers and limited the states' ability to interfere with those powers. Under Chief Justice Roger Taney (1835-1864), the court tilted slightly toward the states. Taney's "dual federalism" is illustrated in a pair of immigration-related cases, a decade apart. One upheld as a proper exercise of a state's police powers a law requiring ship masters to provide the names and other information about disembarking passengers. The other struck down a state law imposing a tax on those beginning a voyage. [12]

The Civil War and the post-Civil War amendments established a national policy on an issue that the Constitution had left to the states: slavery. The 14th Amendment also laid the basis for expansion of federal powers by prohibiting the states from denying "to any person" equal protection or due process. The late-19th century Industrial Revolution also encouraged Congress to exercise its Commerce Clause powers, sometimes to protect nationwide enterprises such as the railroads and sometimes to safeguard workers or consumers from exploitative practices by business. The Supreme Court,

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Chronology

1970s-1980s

Federalism "reform" is persistent theme in Washington, state capitals.

1972
Congress passes and President Richard M. Nixon signs general revenue sharing for state, local governments.

1981
Budget Reconciliation Act signed by President Ronald Reagan consolidates federal grant programs, cuts overall state aid.

1987
Supreme Court says Congress can require states to set minimum drinking age at 21 as condition to receive highway construction funds.

1990s

"Federalism revolution" at Supreme Court limits federal power.

1995
Congress passes and President Bill Clinton signs Unfunded Mandates Act, limiting new federal mandates on states without federal funding (March 22).

1995-2000
Chief Justice William H. Rehnquist leads Supreme Court in limiting Congress' ability to force state governments to administer regulatory programs, protecting state governments from damage suits for violating federal law and limiting Congress' use of Commerce Clause power to regulate non-economic matters.

2000-Present

Presidents George W. Bush and Barack Obama push centralizing policies in Washington despite nods to state prerogatives; federalism revolution stalls at Supreme Court.

2001
President Bush wins congressional approval of No Child Left Behind Act; measure establishes national standards on curriculum, testing, school performance; Bush signs into law Jan. 8, 2002; act is challenged in court but upheld.

2002
Help America Vote Act establishes nationwide minimum election standards, provides funds to replace punch-card, lever-based voting systems (Oct. 22).

2005
Real ID Act, requiring states to adopt uniform procedures for driver's licenses as individual identification (May 11). . . . Supreme Court rules federal drug laws preempt state measures to legalize medical marijuana; ruling seen as retreat from Rehnquist's federalism revolution (June 6).

2006
Hazelton, Pa., enacts ordinance to punish employers for hiring or landlords for renting to illegal aliens; measure is one of hundreds enacted by state or local governments over several years to counter illegal immigration.

2007
Arizona's Legal Arizona Worker Act makes it a crime for illegal alien to seek employment in state and puts employer out of business for second offense of hiring illegal alien; act is challenged by business, civil rights groups but upheld by federal appeals court in September 2008.

2008
Democrat Barack Obama elected after presidential campaign with minimal attention to state-federalism issues.

2009
Obama makes health care overhaul a major domestic policy goal; works with Congress to craft bill to expand Medicaid eligibility with federal financing, use states to create health insurance exchanges to provide affordable coverage for individuals, small businesses.

2010
Obama signs Patient Protection and Affordable Care Act into law (March 23); Virginia files suit same day challenging law as violating state law barring individual health insurance mandate; Florida files suit next day, challenging act as unconstitutional because of fiscal impact on state. . . . Arizona's Support Our Law Enforcement and Safe Neighborhoods Act (SB 1070) requires police to determine immigration status of any person arrested or stopped (April 23); federal judge, ruling in suit by U.S. government, enjoins major provisions as preempted by federal immigration law (July 28). . . . *Hazelton* ordinance struck down on preemption grounds by federal appeals court (Sept. 9). . . . Federal judge in Detroit upholds health care law (Oct. 7); suits by states still pending. . . . Federal appeals court to hear appeal in SB 1070 case (Nov. 1). . . . Supreme Court to hear challenge to Arizona's employer sanctions law (Dec. 8).

Will Staggering New Medicaid Costs Hit the States?

Dueling studies examine impact of new health care reform law.

Nebraska spends about $742 million a year in its Medicaid program to provide health care to low-income persons. In August, Gov. Dave Heineman released an actuarial study claiming that the state's costs could increase by somewhere between $526 million and $766 million over the next 10 years under the new federal health care reform law enacted in March.

Heineman, a Republican, called the price tag from the state-commissioned study "staggering and shocking" and urged Congress to repeal or substantially modify the law. Heineman also supports Nebraska's participation with other states in a federal court suit in Florida challenging the constitutionality of the law.

A study by researchers at the liberal-oriented Urban Institute, however, estimates Nebraska's added costs much lower: $106 million to $155 million. And the report notes that Nebraska will receive more than $2 billion in new federal matching funds during the period under the law. [1]

The dueling cost studies are highly dependent on differing assumptions about new Medicaid enrollment and health care cost trends. The price tags figure not only in political debate but also in the federal court case. Florida, the lead plaintiff in the case, is claiming that it faces $4 billion in additional Medicaid costs from 2014 when the law is to take effect through 2019.

Florida's suit says the added cost — "a price the state simply cannot afford to pay" — represents an unconstitutional intrusion on the state's sovereignty. The Urban Institute researchers, however, estimate a substantially lower price tag: $1.2 billion to $2.5 billion. Overall, they estimate the states will pay about $21 billion for Medicaid expansion through 2019 — with the federal government picking up the lion's share: $444 billion.

With different but somewhat comparable projections, the nonpartisan Congressional Budget Office says the federal price tag for expanding Medicaid and the Children's Health Insurance Program (CHIP) — put at $434 billion — represents just under half of the estimated $938 billion increase in total health-care spending under the law. The other costs include $464 billion in subsidies for individuals and small businesses and $40 billion in small-employer tax credits. [2]

The Medicaid expansion costs represent the price for setting a national household income standard of Medicaid eligibility at 133 percent of the poverty level: $29,300 for a family of four or $14,400 for a single person. Currently, eligibility varies

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however, often set itself against economic regulation by either the federal or state governments in a laissez-faire period that extended into the 1930s. The court struck down or limited some federal laws by narrowly defining "commerce" as trade, not manufacturing. But it also struck down some state laws — notably, limits on working hours — as infringing on constitutionally protected property rights.

Federal powers were lastingly expanded in the 1930s as President Franklin D. Roosevelt pushed through Congress and later won Supreme Court approval of the now-familiar laws regulating the economy and creating some elements of a social safety net. In three critical decisions in 1937 that overturned prior rulings, the court upheld the National Labor Relations Act, a federal unemployment compensation law and the Social Security Act for old-age benefits. The court also upheld state wage-and-hour laws and, in 1941, similarly upheld the federal Fair Labor Standards Act. [13]

A year later, the court gave its most expansive construction to Congress' commerce power by enforcing a production quota on a farmer's cultivation of wheat solely for his own use with no intention of selling it. Congress' power, the court wrote in *Wickard v. Filburn*, extended to any activity that "exerts a substantial effect on interstate commerce." [14]

The New Deal and post-New Deal laws and programs did not, however, reduce the states to nonentities. Indeed, the unemployment compensation system upheld in 1937 was to be administered by the states. Instead, the federal government worked through the states in what has been called "cooperative federalism."

The federal government's revenue-raising powers allowed it to expand its role from providing technical assistance to state governments to bestowing financial grants aimed at furthering federal goals, typically with significant conditions attached. These programs grew in FDR's so-called "Second New Deal" (mid-1935 to 1939); under his Democratic successor, Harry S. Truman (1945-1953); and, despite his supposed conservatism, under the Republican president, Dwight D. Eisenhower (1953-1961). By 1960, historian David B. Walker counts some 132 grant-in-aid programs with total outlays to the states of $6.8 billion — nearly triple the amount at the start of Eisenhower's presidency. [15]

'New' Federalisms

Federalism reform became a persistent theme in Washington and state capitals in the second half of the

greatly between states. Many Southern states provide Medicaid only for persons well below the poverty level, while a few Northeastern states extend Medicaid to families with incomes as high as 150 percent of the poverty level.

The federal government currently pays about half the costs of Medicaid in the wealthiest states and a larger fraction in less-wealthy states. Under the new law, the federal government will pick up 100 percent of the cost of newly eligible Medicaid participants for the first three years — 2014 to 2016 — with the percentage declining gradually to 90 percent in 2020 and subsequent years.

In a critical report, two health care experts at the conservative Heritage Foundation say the reimbursement provision amounts to an attempt "to appease state lawmakers." They put the total cost of Medicaid expansion for the states at $33 billion, including $12 billion in administrative costs. And while they acknowledge that state lawmakers may view the provision as "a relatively good fiscal deal," they also warn that state taxpayers "will face higher tax bills . . . not just for the state costs but for the federal costs as well." [3]

John Holahan, director of the Urban Institute's Health Policy Research Center, says, however, that states will save money by spending less on uncompensated care for uninsured individuals. State spending on health care for low-income children will also be reduced, he says, because many will gain coverage under the insurance exchanges to be established under the law. "I don't agree that states will be worse off financially," Holahan concludes.

— Kenneth Jost

[1] The eight-page report by Milliman, Inc., dated Aug. 16, 2010, is available at www.governor.nebraska.gov/news/2010/08/pdf/Nebraska%20Medicaid%20PPACA%20Fiscal%20Impact.pdf. The report by Urban Institute researchers John Holahan and Irene Headen, "Medicaid Coverage and Spending in Health Reform," Henry J. Kaiser Family Foundation, May 2010, www.kff.org/healthreform/upload/Medicaid-Coverage-and-Spending-in-Health-Reform-National-and-State-By-State-Results-for-Adults-at-or-Below-133-FPL.pdf. For coverage, see these stories by Nancy Hicks in the *Lincoln* (Neb.) *Journal Star*: "Medicaid expert says state's report flawed," Sept. 16, 2010, p. B1; "Nebraska Medicaid costs likely to soar," Aug. 19, 2010, p. A1.

[2] Congressional Budget Office figures cited in *Landmark: The Inside Story of America's New Health-Care Law and What It Means for Us All*, by The Staff of *The Washington Post* (2010), p. 173. Other background drawn from the chapter, "Medicaid's Expansion: The Impact on the States," pp. 163-168.

[3] Edmond F. Haismaier and Brian C. Blaise, "Obamacare: Impact on the States," Heritage Foundation, July 1, 2010, p. 3, http://thf_media.s3.amazonaws.com/2010/pdf/bg2433.pdf.

20th century. Officials at both levels endeavored to find the right balance between federal and state responsibilities and to manage federal-state programs more efficiently and more effectively. Two Republican presidents in particular, Nixon (1969-1974) and Reagan (1981-1989), adopted policies aimed at "returning" powers to the states. State governments became more influential with increased revenue and administrative modernization, but they remained subject to mandates from Washington established by Congress or the executive branch and generally upheld by the Supreme Court. [16]

The number and dollar amounts of federal aid programs grew, and their management became more complex, under the two Democratic presidents of the 1960s, Kennedy and. Johnson. The increased complexity of federal aid prompted proposals for intergovernmental reform under Johnson and that Nixon developed and adopted as a signature domestic policy goal. Initially, Nixon pushed to consolidate federal aid in block grants. He broadened the effort with a proposal for general revenue sharing with state and local governments that Congress cleared for his signature in October 1972. The five-year, $30 billion program gave broad discretion to state and local officials.

As George Mason professor Conlan notes, however, the Nixon presidency also saw "a dramatic increase in federal regulations aimed at state and local governments" — notably, in the areas of environmental protection, health planning and highway construction. [17]

Reagan opened his presidency by proposing a major federalism reform: a consolidation of scores of federal grant-in-aid programs into nine block grants. States were to get more discretion but also to suffer a significant cut in overall federal aid. After a contentious congressional debate, Reagan got most of what he asked for in the Omnibus Budget Reconciliation Act of 1981. But he failed in subsequent efforts to consolidate more categorical programs into block grants.

Reagan also failed with a bold plan announced in December 1981 for the federal government to take over Medicaid funding while giving the states responsibility for 43 other programs, including welfare and many other social services. The proposal fell under criticism from social service advocates and from many state officials who viewed it as requiring state tax increases. The administration also promised to ease regulatory restrictions on state governments.

Nevertheless, the administration supported spending mandates that effectively required states to raise limits on trucking weights and to adopt a uniform minimum drinking age of 21. By the end of the 1980s, Conlan says, the

Supreme Court to Consider Order to Reduce Prison Crowding

Hearing set on inmate-release order in California.

Can a federal court order the state to reduce its prison population? California prisons have been filled to nearly double their capacity over the past decade. Now the state is now facing a federal court order to reduce inmate population by around 40,000 within a two-year period.

California officials, however, are urging the Supreme Court to set aside the order as a misapplication of a law Congress passed specifically to make it difficult for federal judges to issue inmate-release decisions. Seventeen other states are backing California's appeal.

The order, issued by a special three-judge federal district court in August 2009, would require California to reduce its inmate population to 137.5 percent of the prisons' combined designed capacity of 84,000. The court found that the population cap — to be met through a combination of early releases and diversions of low-risk offenders at sentencing — was needed to ensure constitutionally adequate medical and mental health care for state prisoners. [1]

In appealing the decision, California contends that the three-judge court failed to follow the restrictions of the Prison Litigation Reform Act, which Congress passed in 1996 establishing new procedural and substantive restrictions on inmate-release orders by federal courts. Specifically, the law requires any inmate-release order to be issued by a three-judge court, not an individual judge, and only after any remedial order by a single judge has been given "reasonable time" to remedy any constitutional violations. The law also requires that overcrowding be found to be the "primary" cause of a constitutional violation and that "no other relief" will remedy the violation. [2]

Congress passed the law in response to lobbying by state attorneys general and district attorneys in the wake of a controversial federal court order requiring release of thousands of inmates from Philadelphia jails over a period of years. "What we were asking," explains Sarah Vandenbraak Hart, a deputy Philadelphia district attorney who helped draft the law, "was that they make a prison release order an absolute last resort remedy and only if absolutely necessary to remedy an ongoing constitutional violation."

Lawyers for the California inmates contend the three-judge court followed the law's requirements. Congress "succeeded in making it harder . . . but not impossible" for courts to issue release orders, says Donald Specter, director of the Prison Law Office, a Berkeley-based inmate rights organization. "They set the threshold, and our position is that we've met the threshold."

Federal court orders in so-called institutional litigation have long been a bane of the states. State governments can find

number of new intergovernmental regulatory provisions enacted at the federal level surpassed the number for any previous decade. [18]

The regulatory spike underlay the Clinton era's most important federalism reform: the Unfunded Mandates Reform Act of 1995. With some exceptions — notably, civil rights statutes — the act requires Congress to specify the cost of any new mandate on state and local governments and permits a point of order against any mandate unless fully funded in the bill. The act began with bipartisan cosponsorship when Democrats controlled the House and Senate in 1993; it won enactment in 1995 after Republicans had gained control of both chambers, but only after the GOP majorities had beaten back a string of weakening, Democratic-backed amendments. In signing the bill, President Bill Clinton called it historic, but Conlan says that — as in the Reagan era — Congress and the White House continued to establish new regulatory mandates despite the professed reform.

In the meantime, the Supreme Court had dealt two major blows to state prerogatives in federalism cases. In 1985, the court ruled that Congress could require state governments to follow minimum-wage and overtime requirements of federal labor law. The decision overturned a ruling favoring state governments on the issue a decade earlier. Then in 1987, the court upheld the federal law to withhold highway construction aid to any state that did not set the minimum drinking age at 21. In a 7-2 decision written by Chief Justice William H. Rehnquist, the court ruled the law a proper exercise of Congress' spending power even though Congress had no authority to regulate the drinking age directly. [19]

In the 1990s, however, Rehnquist led a revival of federalism principles to benefit states. In one line of decisions, the court prohibited Congress from requiring state or local governments to administer federal regulatory systems — notably, the background check for gun purchasers. In another, the court held state governments immune from money-damage suits for violating federal law, including the federal wage and hours act. And in a pair of decisions written by Rehnquist, the court limited Congress' power to use the Commerce Clause to regulate non-economic activity. One ruling struck down the federal Gun Free School Zones Act, which made it a crime to possess a gun within a minimum distance of a school. Another struck down a provision of the Violence Against Women Act that allowed victims of "gender-motivated" violence to sue their assailants in federal

themselves on the losing end of decisions that not only require wide-ranging and sometimes expensive changes in operation of programs and facilities but also expose them to six- or seven-figure attorney fee awards to lawyers on the other side. In a significant decision in April, the Supreme Court ordered a lower court to reconsider a $10.5 million fee award to public-interest lawyers for a case that forced broad changes in the state's foster care system. [3]

The court order in the California case came after more than a decade of litigation over medical care for state inmates in separate cases filed before single-judge courts in Sacramento and San Francisco. The two district courts decided in 2007 to convene a three-judge court as provided in the 1996 law after finding medical care still constitutionally deficient. The three-judge court presided over a trial from November 2008 to February 2009 before issuing its 185-page decision on Aug. 4, 2009.

The state says the order, which has been stayed pending the Supreme Court appeal, would require release of between 38,000 and 46,000 inmates. In its appeal, the state contends the requirements for a three-judge court were not met and the cases should be sent back to the separate district courts.

In accepting the appeal on June 14, the Supreme Court said it would consider the jurisdictional issue at the same time as the merits of the case. Oral arguments, now set for Nov. 30, will feature two highly regarded Supreme Court advocates: Carter Phillips for the state and Paul Clement, U.S. solicitor general under President George W. Bush, for the inmates.

In his brief for the inmates, Specter discounts the potential impact of the case on other states, describing California's prison crisis as unique. But he also discounts the states' concerns about improper federal court intrusion into prison systems.

"Federalism is not a one-way street," Specter says. "It doesn't mean only that states have rights. It also means that federal courts have obligations to enforce constitutional rights against the states."

— Kenneth Jost

[1] The decision came in two consolidated cases: *Coleman v. Schwarzenegger* (medical care), *Plata v. Schwarzenegger* (mental health care), CIV S-90-0520 LKK JFM P, U.S. Dist. Ct., N.D./E.D. Calif., Aug. 4, 2009, www.caed.uscourts.gov/caed/Documents/90cv520o10804.pdf. For coverage, see Carol J. Williams, "State gets two years to cut 43,000 from prisons," *Los Angeles Times*, Sept. 5, 2009, p. A1. The appeal at the Supreme Court is *Schwarzenegger v. Plata*, 09-1233; background and briefs on SCOTUSBlog: www.scotusblog.com/case-files/cases/schwarzenegger-v-plata/?wpmp_switcher=desktop.

[2] The act is codified at 18 U.S.C. §3626. Background at http://en.wikipedia.org/wiki/Prison_Litigation_Reform_Act.

[3] The decision is *Perdue v. Kenny A.*, 559 U.S. — — (April 21, 2010), www.supremecourt.gov/opinions/09pdf/08-970.pdf.

court. In both cases, Rehnquist said Congress had infringed on the states' traditional police powers. [20]

Federal Powers

Federalism concerns have been given a low priority in Washington in the 21st century under two presidents of different parties: Republican George W. Bush and Democrat Barack Obama. Bush pursued centralizing policies on a range of issues despite his background as a former governor and the GOP's professed support for state prerogatives. The Supreme Court also appeared to step back from its resistance to expanding federal powers even after two appointments by Bush. Obama took office with some nods to the states, but he stirred strong opposition from many states to his health care reform and then set the administration against state and local laws aimed at strengthening immigration enforcement. [21]

Bush trampled on federalism concerns with his signature domestic policy initiative: education reform. The No Child Left Behind Act mandated student testing, imposed curriculum and teacher standards and threatened non-performing schools with penalties up to takeover by independent operators. Some states called the law unconstitutional, but court challenges failed to invalidate it. States also complained about the strictures in two other major laws: the Help America Vote Act, which set federal standards for voting and voter registration, and the Real ID Act, which established new requirements for state driver's licenses. All three laws provided some funds for the mandated changes, but education authorities in particular said federal aid fell short of the promised amounts.

The Bush administration overrode state interests in several other areas. Siding with business interests, the administration repeatedly interpreted federal laws or regulations to preempt state laws or court suits. On social issues, the administration won enactment of a nationwide ban on so-called "partial birth abortions" and pushed unsuccessfully for a constitutional amendment to ban same-sex marriages. The administration also attempted to use federal drug law to nullify Oregon's assisted-suicide initiative, but the Supreme Court in 2006 rejected the attempt. [22]

A year earlier, the high court had stepped back from its federalism stance of the 1990s with a decision upholding federal power to override a California initiative permitting medical use of marijuana. With Rehnquist and Justice Sandra Day O'Connor among three dissenters, the court in June 2005 held that the

government can ban private, noncommercial use of marijuana because of its potential impact on the admittedly illegal market in the drug. [23] O'Connor retired and Rehnquist died later that year. As their successors, Bush chose John G. Roberts Jr. as chief justice and Samuel A. Alito Jr. as O'Connor's replacement, two Eastern conservatives less identified with federalism issues than the two Westerners they followed.

Neither Obama nor his Republican opponent, Sen. John McCain of Arizona, made federalism a major issue as such in the 2008 presidential campaign. But both men professed support for states' interests in the area, according to an assessment by federalism experts John Dinan and Shama Gamkhar. McCain self-identified as a federalist to explain, for example, his opposition to a constitutional amendment to ban same-sex marriage. Obama identified himself with some of the states' criticisms of No Child Left Behind. And both men buttressed their health care proposals by citing state initiatives: Obama pointed to Massachusetts Gov. Mitt Romney's universal coverage plan, McCain to Indiana Gov. Mitch Daniels' market-oriented approach. [24]

Early in his presidency, Obama made gestures and took some concrete actions favorable to states' interests. In a meeting in February 2009, he promised the states' governors to try to make their lives "easier, not harder." As part of his economic-stimulus plan, Obama proposed — and eventually won congressional approval of — substantial aid to financially beleaguered states with few strings attached. Obama also reversed some Bush decisions to give states more discretion — significantly, to pursue liberal policies in such areas as children's health and air pollution control. And Attorney General Eric H. Holder Jr. announced in February 2009 that the Justice Department would discontinue raids on medical marijuana dispensaries in the 13 states that had legalized the practice.

The administration worked to accommodate the states' interests during the yearlong struggle that ended in March 2010 with enactment of the health care law. Broadening eligibility for Medicaid was always seen as the principal vehicle for expanding health insurance coverage, but from the outset the federal government was to bear most of the cost. Obama's proposal included a variety of mandates for health insurers, but states continued to have principal responsibility for insurance regulation. Republicans and conservatives opposed to the bill cited the fiscal impact on the states in their arguments, but the issue was overshadowed by the individual insurance mandate — and, at the end, by arguments over the potential for government-subsidized abortions under the law. [25]

Meanwhile, the administration was weighing a request made by the Supreme Court in November 2009 to state the government's view on the challenge to Arizona's employer-sanctions law. The government's brief, filed on May 28, marked the first time the government had weighed in against any of the flurry of state and local immigration laws enacted in the last few years. The brief pointed to the number of similar laws in urging the justices to hear the case. It went on to argue that Arizona's law "disrupt[s] a careful balance" that Congress struck between preventing employment of illegal aliens and preventing discrimination against racial or ethnic minorities. A month later, the court agreed to hear the case, setting the stage for arguments by year's end. [26] ■

CURRENT SITUATION

Health Suits Advancing

The Obama administration is applauding a federal judge's ruling upholding the new individual health insurance mandate even as it awaits pivotal developments in two similar suits by states that federal judges refused to dismiss at the earliest stage.

In a ruling on Oct. 7, U.S. District Judge George Caram Steeh in Detroit accepted the administration's basic legal argument that Congress could require individuals to purchase health insurance as part of its power to regulate interstate commerce. When "viewed in the aggregate," Steeh said, individual decisions to buy health insurance or go without "have clear and direct impacts on health care providers, taxpayers, and the insured population who ultimately pay for the care provided to those who go without insurance." [27]

Steeh's ruling came in a case filed by the conservative Thomas More Law Center and several Michigan residents, one of 15-20 cases challenging the health care law, according to a compilation by the Justice Department. The ruling came as two higher-profile challenges by state governments were proceeding in federal courts in Virginia and Florida.

U.S. District Judge Henry Hudson is scheduled to hear legal arguments in Richmond, Va., on Oct. 18 in competing motions for summary judgment by the state of Virginia and the federal government. Hudson had rejected the government's motion to dismiss the case in a 32-page opinion on Aug. 2 that called the applicable legal precedents "informative but inconclusive."

Meanwhile, U.S. District Judge Roger Vinson in Pensacola, Fla., was due to rule by his self-announced deadline of Oct. 14 on the government's similar motion to dismiss the suit by Florida and 19 other states challenging the health care law. In a hearing on Sept. 14, Vinson appeared sympathetic to the states' claim about their costs once the law takes full effect in 2014. "Doesn't this really put all 50 states on the short end of the stick?" Vinson asked the government's attorney at one point.

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Is the Obama administration taking on too much power from the states?

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WRITTEN FOR *CQ RESEARCHER*, OCTOBER 2010

The Obama administration has used federal authority in a schizophrenic fashion: making illegitimate claims of authority to achieve desired ends, while disavowing legitimate authority where doing so proved beneficial to favored special interests. From a constitutional and policy perspective, this is the worst of both worlds.

The most audacious claim of federal authority comes in the health care mandate, which requires all individuals to purchase health insurance or pay a penalty enforced through the tax code. Despite Speaker Nancy Pelosi's incredulity to a press question asking where Congress found the constitutional authority for the mandate — she responded, "Are you kidding?" — Congress is still subject to the requirements of the Constitution, which grants to Congress limited and enumerated legislative powers.

Where, then, does the Obama administration point to as its constitutional justification for this sweeping new authority? It claims that Congress has the authority to regulate individual "acts" of not purchasing a product (i.e., not entering into commerce) pursuant to Congress' authority to regulate — wait for it — interstate commerce.

The term "unprecedented" is thrown around lightly, but here I use the literal meaning — this assertion of authority has no precedent. There is simply no example in federal law which supports this usurpation. Indeed, the first federal court to hear a challenge noted that "[n]o reported case from any federal appellate court has extended the Commerce Clause or Tax Clause to include the regulation of a person's decision not to purchase a product."

While in health care the Obama administration suffers from delusions of grandeur, in the area of federal regulatory preemption — that is, the authority to set uniform regulations for products that actually are in interstate commerce to avoid a patchwork of 50 different regulations — the administration has an inferiority complex.

The administration has asserted a narrow view of preemption in a memorandum to the heads of all executive agencies and has disclaimed federal authority in court filings. This decision might seem difficult to understand in light of the previously bold assertions of federal authority — until one realizes that this position is advantageous to the trial lawyers (major donors to the Obama administration), who find it easier to win cases if courts and juries are not bound by blanket federal product-liability requirements.

As these examples suggest, the administration's assertions of federal authority are not circumscribed by the Constitution, but by political expediency.

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WRITTEN FOR *CQ RESEARCHER*, OCTOBER 2010

The charge that the Obama administration has concentrated too much power in the federal government is not only unsupportable, it is in important respects counter-factual.

Early in his presidency, President Obama issued a sweeping policy memorandum that reaffirmed the critical role that state and local governments play in protecting the health and safety of their citizens and directed executive branch officials to review every regulation adopted in the past 10 years to scrub them of language that inappropriately displaced states.

Obama's shift in policy has led to reversal of several Bush administration policies and has empowered states to take a lead in a whole host of areas where state-level innovation is most needed, from environmental regulation to drug laws to financial reform. In one prominent example, the Obama administration granted California its long-sought waiver of federal preemption, restoring this state to its historic role as a path-breaker in the regulation of auto emissions.

Even President Obama's health care reform law is an example of balancing the need for a national solution with the benefits that accompany state innovation. Learning from state experiences, such as the Massachusetts plan signed into law by then-Gov. Mitt Romney, the new health care law preserves the states' regulatory flexibility by (1) allowing states to form their own insurance exchange or join with a regional exchange; (2) giving states significant discretion over plan specifics like whether to cover abortion; and (3) permitting states to set up their own programs — with or without an individual mandate — so long as certain requirements are met.

Only when the Constitution explicitly places sole power with the national government — such as the provision that gives the federal government the power to make "uniform" rules for immigration and naturalization — has the Obama administration jealously guarded federal power and challenged the ability of states like Arizona to create their own system of immigration enforcement.

Reviewing these actions collectively, President Obama has appropriately balanced state-level innovation with national interests, viewing federalism as a structure for allocating government power in ways that improve how the government serves its citizens rather than as a zero-sum struggle between the national government and the states. Even when confronting issues of clear national concern, such as health care reform, the Obama administration has recognized the critical role states play in our federal system. The result is federalism at its best and a government that works better for everyone.

Continued from p. 860

In his opinion, Hudson, who was appointed to the federal bench by President George W. Bush in 2002, preliminarily upheld the state's standing to bring the case in order to give effect to its law, the Virginia Health Care Freedom Act, prohibiting any individual health insurance mandate. On the merits, Hudson said the government had failed at this stage to overcome the state's constitutional arguments against the law. "No reported case from any federal appellate court," the judge wrote, "has extended the Commerce Clause or the Tax Clause to include the regulation of a person's decision not to purchase a product, notwithstanding its effect on interstate commerce." [28]

The case, *Virginia ex rel. Cuccinelli v. Sebelius*, is being brought in the name of Virginia's conservative Republican attorney general, Ken Cuccinelli. He depicted Hudson's ruling as a significant setback for the Obama administration. In her comments, Health and Human Services (HHS) Secretary Kathleen Sebelius emphasized the preliminary nature of the ruling. The two sides recapitulated their arguments in parallel, competing motions for summary judgment filed with the court on Sept. 3 in advance of the Oct. 18 hearing.

The health care mandate issue also figured prominently in the Sept. 14 arguments in the Florida case before Judge Vinson, a Reagan appointee to the federal bench in 1983. [29] For the states, Washington attorney David Rivkin argued that Congress has no authority to regulate citizens' decisions not to buy health insurance. "Congress can regulate commerce," he said. "But Congress cannot create it." For the government, Ian Gershengorn, a deputy assistant United States attorney general, countered that uninsured individuals nevertheless use medical services. "This is not telling people you have to buy a product," he said. "It's saying this is how you have to pay for your health care."

On the fiscal issue, Blaine Winship, representing Florida, said the new law "transformed" Medicaid beyond its original purpose. "It's quite a budget buster for us," he said. Gershengorn countered that any state can opt out of Medicaid. The states' position, he added, would prevent Congress from making any changes in the program. Vinson, however, appeared sympathetic to the states. "The states are in a catch-22 situation," the judge said, "because the government dominates the ability to raise income."

Expectations that Vinson would reject the government's effort to dismiss the case were fed by his decision to schedule further arguments on Dec. 16. Vinson rejected an effort by four states to join the suit on the federal government's side but said he would reconsider the issue later.

The Florida and Virginia suits had been the most closely watched of the various challenges to the new health care law, including two previously dismissed on procedural grounds. In his ruling in the Michigan case, Judge Steeh rejected the administration's procedural arguments that the challengers lacked legal standing to bring the suit and that the suit was premature. He went on in a 20-page ruling, however, to say that Congress had "a rational basis to conclude that, in the aggregate, decisions to forego [sic] insurance coverage in preference to pay for health care out of pocket drive up the cost of insurance."

A Justice Department spokeswoman voiced satisfaction with the ruling. "We welcome the court's decision upholding the health care reform statute as constitutional," said spokeswoman Tracy Schmaler. Robert J. Muise, senior trial counsel for the Thomas More Law Center, told *The New York Times* the case was "set up nicely for appeal." [30]

Immigration Cases Set

Closely watched challenges to two Arizona statutes aimed at tougher enforcement of federal immigration laws are being readied for oral arguments soon before federal appellate courts.

The Ninth U.S. Circuit Court of Appeals, with jurisdiction over nine Western states, is set to hear arguments during the week of Nov. 1 in Arizona's effort to reinstate its law enacted in April making it a state crime to be in the country in violation of federal immigration laws.

Meanwhile, the Supreme Court is due to hear arguments on Dec. 8 from business and immigrants rights groups seeking to invalidate the 2007 law stiffening the penalties for employers who hire illegal aliens.

Both laws are being challenged under the doctrine known as preemption as intruding on the federal government's primacy over states on immigration-related matters. The justices are also hearing three other preemption cases this fall testing the relationship of state and federal laws in arbitration, auto safety and vaccine safety.

The Ninth Circuit will be reviewing the July 28 ruling by federal judge Bolton in Phoenix that blocked major provisions of the act from going into effect. In her ruling, Bolton, appointed to the bench by President Clinton in 2000, acknowledged the state's interest in "controlling illegal immigration and addressing the concurrent problems with crime." But, she continued, "it is not in the public interest for Arizona to enforce preempted laws." [31]

Bolton's ruling blocked the most controversial parts of the law, including a requirement that state and local law enforcement officers determine the immigration status of anyone arrested, detained or stopped that they reasonably suspect is "unlawfully present" in the country. The ruling also blocked the new state crime of failing to carry alien registration papers. And it enjoined the provision making it a crime for illegal immigrants to apply for a job.

Immigration rights advocates hailed the ruling. "It's a victory for the community," Lydia Guzman, president of

Somos America (We Are America), said. Gov. Brewer voiced disappointment but called the ruling "a bump in the road" and vowed a quick appeal. The Ninth Circuit set an expedited briefing schedule in the case with arguments to be heard by a three-judge panel on Nov. 1.

Earlier, a three-judge Ninth Circuit panel upheld Arizona's employer-sanctions law in a unanimous, 23-page opinion in September 2008. [32] The business and immigrant rights groups challenging the law argued that it created the risk of "conflict preemption" because state courts could rule differently on an alien's status than federal immigration authorities would. They also said that an "express preemption" clause precluded the state from revoking an employer's business license because the federal law prohibited any penalties other than those provided there.

Writing for the court, Judge Mary Schroeder, a Clinton appointee, rejected the challengers' arguments. She said the "speculative, hypothetical possibility" of a conflict with federal law was insufficient to invalidate the law in its entirety. As for the license-revocation provision, she said it fell within an exception in the federal law for "licensing" provisions. She also found no conflict with federal law in the state act's requirement that employers use the voluntary federal E-verify system to verify a job applicant's status.

The Supreme Court agreed to hear the case on June 28. The Chamber filed its opening brief on Sept. 1, followed a week later by friend-of-the-court briefs from the U.S. government, business groups, immigrant rights groups and a major labor union: the Service Employees International Union. The state's brief and any supporting briefs were to be filed in October.

In the other preemption cases, the high court will decide these issues being closely watched by business and consumer groups as well as state governments:

- Can the victim of a vaccine-related injury sue the manufacturer in state court for a "design defect" despite the no-fault, administrative system established by the National Vaccine Injury Compensation Act? (*Bruesewitz v. Wyeth*; argument: Oct. 12.)
- Does the Federal Arbitration Act prevent a state from requiring that any consumer arbitration agreement permit the use of classwide arbitration allowing the consolidation of claims by all similarly situated persons? (*AT&T Mobility v. Concepcion*; argument: Nov. 9.)
- Do federal auto safety laws block an accident victim from suing a manufacturer in state court for failing to install a lap/shoulder belt in the middle back seat when not required to do so by federal regulations? (*Williamson v. Mazda Motor of America*; argument: Nov. 3.) ■

OUTLOOK

Federalism's Meanings

The Framers of the Constitution created a government unlike any other before. "Federalism was our Nation's own discovery," Supreme Court Justice Anthony M. Kennedy has written. The Constitution, Kennedy said, "split the atom of sovereignty" between the national and state governments, with each "protected against incursion by the other." [33]

In their deliberations, the Framers strove to divide powers between a strong and stable federal government and states whose prerogatives were to be protected from incursion by the new national government. Writing in *Federalist No. 37*, James Madison described the process of partitioning the respective powers of the federal and state governments as "arduous."

Now more than two centuries later, federalism issues remain contentious, but the context is much changed. The "dual federalism" concept of the 19th century has been displaced by usages such as "cooperative" or "collaborative" federalism that describe powers and responsibilities intertwined among rather than partitioned between Washington and state capitals. In his book, *Polyphonic Federalism*, Emory law professor Schapiro sees this overlapping of power as promoting "the traditional federalism values of responsiveness, self-governance and liberty." [34]

Legislative debates and court challenges in today's major federalism controversies, however, still tend to be waged under the old zero-sum game concept of dividing rather than sharing power. State officials challenging the new health care law attack the fiscal impact of Medicaid expansion with little acknowledgment in their public comments of the joint federal-state structure of the program since its inception. From the opposite perspective, the business groups that press for federal preemption to supersede state law give no recognition to the states' role in the 20th century in promoting stronger protections for workers, consumers and the general public — ultimately to the benefit, not the detriment, of business itself.

Meanwhile, Americans are evincing middling confidence at best in government at all levels. For several years, polls have been detecting declining public confidence in the federal government generally. But a recent Zogby International poll found public trust in state governments no higher — with only a minority of respondents placing much trust in either Washington or their own state government. (*See graph, p. 848.*)

Health care and immigration illustrate reasons for the public's angst. The inability to stem the rising cost of health care or the continuing flow of illegal immigration test the public's belief in the power of government to deal with contemporary problems. Ironically, the loudest voices in the debates are complaining that the federal government is taking on too much power to try to confront them.

"This is a classic example of what seems to be a growing pace of volatility in our system," says George Mason professor Conlan. "This is like a case of whiplash. It was not that long ago when people were talking about this era of devolution," or returning power to the states.

The court cases on the health care law are proceeding against the backdrop of strong political criticism by Republican lawmakers, many of whom are campaigning for Congress by promising to repeal and replace it. Neither the GOP lawmakers nor the states in their lawsuits provide details on how they would replace the law if successful in their goal of knocking it out. If the law stays on the books, a definitive Supreme Court decision is likely to be at least two years away.

Meanwhile, immigrant rights groups that challenge tough-minded state and local laws acknowledge the problem of illegal immigration but look for a solution to the unlikely prospect of Congress and the president agreeing on some form of legalization as part of a broad overhaul of immigration law. For their part, the groups that support the states' initiatives take no note of the Obama administration's sharp increase in deportations — a record 392,000 during the year that ended Sept. 30, an increase of 81,000 over the number in President Bush's final year in office. [35]

In Schapiro's metaphor, however, these conflicts should be seen not as discordant, but euphonious — the arguments and power struggles apt to lead to better policies with broader support in the long run. The state of federalism today, Schapiro says, is good. "It's good when the question of allocation of power in the United States is debated." ■

Notes

[1] Quoted in Casey Newton, "End of Kids Care could cost state billions from feds," *The Arizona Republic* (Phoenix), March 23, 2010, p. A1; see also Casey Newton, "Budget for 2011 signed by Brewer," *ibid.*, March 19, 2010, p. B1.

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[6] For background, see Kenneth Jost, "Revising No Child Left Behind," *CQ Researcher*, April 16, 2010, pp. 337-360.

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[9] The case is *Lozano v. City of Hazleton*, 07-3531, 3d Circuit, Sept. 9, 2010, www.ca3.uscourts.gov/opinarch/073531p.pdf. Documents and updates can be found on the American Civil Liberties Union's website: www.aclu.org/immigrants-rights/anti-immigrant-ordinances-hazleton-pa. For coverage, see Julia Preston, "Court Rejects a City's Effort to Restrict Immigrants," *The New York Times*, Sept. 10, 2010, p. A12.

[10] Background drawn in part from David B. Walker, *The Rebirth of Federalism: Slouching toward Washington* (2d ed., 2000). See also Michael Greve, *Real Federalism: Why It Matters, How It Could Happen* (1999). For a succinct overview, see "Federalism" in Kenneth Jost, *Supreme Court from A to Z* (4th ed., 2007), pp. 189-190.

[11] *The Federalist Papers* are online at the Library of Congress' Thomas website: http://thomas.loc.gov/home/histdox/fedpapers.html.

[12] The cases are *McCulloch v. Maryland*, 17 U.S. 316 (1819); *New York v. Miln*, 36 U.S. 102 (1837); and *Passenger Cases* (*Smith v. Turner*, *Norris v. Boston*), 48 U.S. 283 (1849).

[13] The cases are *National Labor Relations Board v. Jones & Laughlin Steel Corp*, 301 U.S. 1 (1937); *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937) (unemployment compensation); *Helvering v. Davis*, 301 U.S. 619 (1937) (Social Security); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (state minimum wage); *United States v. Darby Lumber Co.*, 312 U.S. 100 (1941) (Fair Labor Standards Act). See individual entries in Melvin I. Urofsky and Paul Finkelman, *Landmark Decisions of the U.S. Supreme Court* (2d ed.), 2007.

[14] The case is *Wickard v. Filburn*, 317 U.S. 111 (1942).

[15] See Walker, *op. cit.*, p. 99.

About the Author

Associate Editor **Kenneth Jost** graduated from Harvard College and Georgetown University Law Center. He is the author of the *Supreme Court Yearbook* and editor of *The Supreme Court from A to Z* (both *CQ Press*). He was a member of the *CQ Researcher* team that won the American Bar Association's 2002 Silver Gavel Award. His previous reports include "Abortion Debates" and "Revising No Child Left Behind." He is also author of the blog *Jost on Justice* (http://jostonjustice.blogspot.com).

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[18] *Ibid.*, pp. 259-260.
[19] The cases are *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976); and *South Dakota v. Dole*, 483 U.S. 203 (1987).
[20] The decisions include *Printz v. United States*, 527 U.S. 598 (1999) (gun background checks); *Alden v. Maine*, 527 U.S. 706 (1999) (Fair Labor Standards Act); *United States v. Lopez*, 514 U.S. 549 (1995) (Gun-Free School Zones Act); *United States v. Morrison*, 529 U.S. 598 (2000) (Violence Against Women Act).
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[22] The decision is *Gonzales v. Oregon*, 546 U.S. 243 (2006).
[23] The decision is *Gonzales v. Raich*, 545 U.S. 1 (2005).
[24] John Dinan and Shama Gamkhar, "The State of American Federalism 2008-2009: the Presidential Election, the Economic Downturn, and the Consequences for Federalism," *Publius: The Journal of Federalism*, Vol. 39, No. 3 (winter 2009), pp. 369-407, http://publius.oxfordjournals.org. Dinan teaches at Wake Forest University, Gamkhar at the University of Texas-Austin.
[25] For a full account, see *Landmark: The Inside Story of America's New Health Care Law and What It Means for All of Us*, by the staff of *The Washington Post* (2010).
[26] The government's brief can be found on SCOTUSBlog: www.scotusblog.com/wp-content/uploads/2010/05/09-115_cvsg-grant-limited.pdf.
[27] The case is *Thomas More Law Center v. Obama*, 10-CV-11156, U.S. Dist. Ct. E.D. Mich., Oct. 7, 20910, www.mied.uscourts.gov/News/Docs/09714485866.pdf. For coverage, see Lyle Denniston, "Health insurance mandate upheld," SCOTUSBlog, Oct. 7, 2010, www.scotusblog.com/2010/10/health-insurance-mandate-upheld/.

FOR MORE INFORMATION

10 Amendments for Freedom, 2740 S.W. Martin Downs Blvd., Suite 235, Palm City, FL 34990; (772) 781-6112; 10amendments.org. Nonprofit working to amend the Constitution by proposing initiatives that will restrain the power of Congress.

Constitution Project, 1200 18th St., N.W., Suite 1000, Washington, DC 20036; (202) 580-6920; www.constitutionproject.org. Seeks consensus solutions to difficult legal and constitutional issues through dialogue across ideological and party lines.

Federation for American Immigration Reform, 25 Massachusetts Ave., N.W., Suite 330, Washington, DC 20001; (202) 328-7004; www.fairus.org. Promotes immigration reform through increased border security and limits on the number of immigrants allowed per year.

Heritage Foundation, 215 Massachusetts Ave., N.E., Washington, DC 20002; (202) 546-4400; www.heritage.org. Conservative think tank advocating for a smaller federal government role.

National Conference of State Legislatures, 7700 E. First Place, Denver, CO 80230; (303) 364-7700; www.ncsl.org. Provides research and technical assistance for policy makers to exchange ideas on pressing state issues.

National Immigration Law Center, 3435 Wilshire Blvd., Los Angeles, CA 90010; (213) 639-3900; www.nilc.org. Defends the rights and opportunities of low-income immigrants and their families.

Urban Institute, 2100 M St., N.W., Washington, DC 20037; (202) 833-7200; www.urban.org. Research and education think tank working for sound public policy and effective government.

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[32] The decision in what was then known as *Chicanos por la Causa, Inc. v. Napolitano* can be found at www.ca9.uscourts.gov/datastore/opinions/2008/09/17/0717272.pdf. Janet Napolitano, then governor of Arizona, is now U.S. secretary of Homeland Security. For materials on the Supreme Court case, now known as *Chamber of Commerce v. Whiting*, see www.scotusblog.com/case-files/cases/chamber-of-commerce-of-the-united-states-v-candelaria/?wpmp_switcher=desktop.
[33] *U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995) (Kennedy, J., concurring).
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[35] See Shankar Vedentam, "U.S. deportations reach record high," *The Washington Post*, Oct. 8, 2010, p. A10; Julia Preston, "Deportations From U.S. Reach a Record High," *The New York Times*, Oct. 8, 2010, p. A21.

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Conlan, Tim, and John Dinan, "Federalism, the Bush Administration, and the Transformation of American Conservatism," *Publius: The Journal of Federalism*, Vol. 37, No. 3 (winter 2007), pp. 279-303, http://publiusoxfordjournals.org (subscription required).

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Mannings, Ashley, and Brad Bumsted, "Public Integrity Panel Proposed to Restore Confidence in Pennsylvania," *Pittsburgh Tribune Review*, July 27, 2010.

A group of bipartisan legislators in Pennsylvania has proposed a Public Integrity Commission in order to restore confidence in the state's government after corruption charges were filed against two dozen lawmakers and staffers.

Robertson, William S., "High-Performance Government Essential to Restore Trust," *Federal Times*, May 10, 2010, p. 23.

Only 22 percent of citizens believe that the federal government can be trusted most of the time, according to a survey by the Pew Research Center.

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