The State of American Federalism 2011–2012: A Fend for Yourself and Activist Form of Bottom-Up Federalism

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The signature developments in intergovernmental relations and federalism in 2011–2012 were generally found at the state and local levels. Strapped for funds to balance their budgets, states and local governments have made significant cutbacks, taken legal risks, renegotiated labor union contracts, and rejected federal aid. Conversely, subnational governments have created jobs and taken the lead in various policy areas. The U.S. Supreme Court showed strong support for state sovereignty claims, which could perhaps encourage further the bottom-up activism by state and local governments. The president and his administration made deft use of executive powers to influence public K–12 education reforms and energy and environmental policy, but much of the year was spent in budget wrangling over how to reduce the mounting federal debt.

With the return to divided party control of the federal government after the 2010 elections and the reappearance of policy gridlock between Congress and the President, the signature developments in intergovernmental relations and federalism in 2011–2012 were generally found at the state and local levels. To be sure, President Obama did not lack tools to advance his policy goals even in the face of Republican control of the U.S. House. The president used executive powers and at times gave states flexibility to adjust to federal directives regarding education, energy, and the environment continuing what Conlan and Posner (2011) have described as “nuanced federalism” (Gamkhar and Pickerill 2011, 388). In this essay, however, we highlight state and local developments and argue that political, economic, and judicial trends have strengthened the expression of a particular type of “bottom-up federalism,” characterized by states having to address pressing fiscal and social issues without federal assistance as well as state and local pushback against federal policy. This is evident, among other places, in the ways state officials have on a number of occasions declined to participate in federal
programs, including unemployment insurance, health insurance exchanges, education, and high-speed rail initiatives, even when this decision leads to a loss of valuable federal aid. States have also filed federal lawsuits challenging federal policy directives, most notably in a case that challenges the 2010 federal health care reform law that made it to the Supreme Court. Heading into 2012, the Roberts Court had not made waves in the same way the Rehnquist court did with its federalism decisions; nevertheless, the Court has remained committed to judicial enforcement of federalism principles and state sovereignty. The Court’s agenda in its 2011–2012 term included a number of cases involving federalism and state powers with the potential to continue to define federalism’s legal parameters.

In the first section, we discuss the patterns and peculiarities of the brand of bottom-up federalism that seems to have emerged. Next, we discuss key developments in the federal budget and their effects on state and local budgets as well as the tax and spending changes in state and local budgets. We then examine the federalism implications of policy developments in public education as well as energy and environmental policy. We also review key developments in U.S. courts, including an increasing number of U.S. Supreme Court cases involving constitutional federalism. Throughout the article, we address the effects of these key developments for intergovernmental relations.

**Bottom-Up Federalism in 2011–2012**

There are a variety of ways in which subnational governments might contribute to a bottom-up form of federalism. For example, state (or local) governments might take the lead in pursuing policy that, under certain conditions, results in a type of bottom-up policy diffusion that leads to adoption of those policies by the federal (or state) government (Mossberger 1999; Shipan and Volden 2006). However, this is not the type of bottom-up federalism that has been predominant in 2011–2012. Rather, many of the activities of and decisions by state and local actors in the past year are best characterized as “go it alone” or “pushback” tactics.

Scholars, including Alice Rivlin, writing in this issue, have described the last few years as extraordinary in terms of fiscal pressures at the national and subnational levels. Rivlin revisits, two decades later, the analysis of American federalism discussed in *Reviving the American Dream* (Rivlin 1991), reframing her analysis of federalism in the context of current political and economic circumstances. Rivlin raises a serious concern about the long-term fiscal sustainability of all levels of government. Her article cautions that federal deficit reduction, by simply shifting the federal spending burden to other levels of government, will intensify the funding problems at the subnational level. She recommends a new focus on deficit reduction in an intergovernmental context considering reforms in both domestic spending and taxation at the federal and subnational levels. State and local
governments, under a serious resource crunch, are also concerned about the burden of funding federal programs being shifted to them. In the past year, they have asserted their sovereign rights by rejecting and resisting federal policy intervention, at a risk of losing valuable federal aid when it comes with conditions attached, particularly where the conditions contradicted their own priorities.

As Lori Riverstone-Newell discusses in her contribution to this issue, local governments have increasingly engaged in certain types of activism, finding a variety of means for challenging or resisting policies imposed on them from above (see also Bulman-Pozen and Gerken (2009) for a discussion of state resistance to federal policy). Sean Nicholson-Crotty (2012), in his article included in this issue, examines the trend in the past two years of governors refusing to accept or seek federal funds and reminds us that it is not an entirely a new phenomenon. State activism against federal policy has also been particularly evident and visible in the area of immigration policy. In their article in this issue, Jay Barth and Gary Reich explain the political conditions that have led states to adopt “restrictionist policies” on immigration, in response to perceived—or alleged—failures by the federal government to control illegal immigration. As we discuss later in this article, a number of legal and constitutional controversies involving immigration and other policy issues have made it to the U.S. Supreme Court that further highlight the type of bottom-up federalism we describe here. We return to this theme in our conclusion, where we suggest the need for further systematic research to determine the true extent of bottom-up activism and its impact on the nature of U.S. federalism for the future.

Budgeting and Fiscal Policy

In this section, we discuss the effects of cutbacks on the state and local budgets and on intergovernmental relations. We first examine how the federal budget cuts affected state and local budgets, how the subnational governments adjusted to these cuts, and its effects on intergovernmental relations. We then turn to the developments in collective bargaining between public sector unions and states as well as how the outcome of these negotiations might affect long-term fiscal health of subnational governments.

Federal Budget and Its Effect on State and Local Government Revenues

The federal executive branch remained embroiled in political standoffs with Congress on debt and budget issues. The 2012 fiscal year budget was passed and the first in a string of federal government shutdowns avoided, in early April 2011. After weeks of wrangling, the House Speaker John Boehner (R-OH) and President Obama approved significant cuts in the existing 2012 budget (Muskal 2011). The next major federal budget battle came in August, when Congress and the President...
adopted a complicated piece of budget legislation, the Budget Control Act (BCA 2011), to increase the federal debt limit in exchange for additional budget cuts. The Act also established a supercommittee, comprised of members from both chambers of Congress and both political parties, charged with making recommendations to further reduce federal nonmandatory spending by December 2011. The supercommittee failed to reach consensus on spending cuts, triggering the BCA’s alternative requirement that all nonmandatory federal spending be sequestered (across the board cuts) by $1.2 trillion, below spending caps agreed to in the budget agreement earlier in the year, and phased in from 2013 to 2022 (Weisman 2012).

In August 2011, for the first time in the country’s history, U.S. federal debt was downgraded from AAA to AA+ by Standard and Poor’s (S&P). Their argument for the downgrade was a lack of confidence in policymakers’ ability to leverage the budget agreements reached during the first part of 2011 to build a timely consensus around a broader fiscal consolidation plan that stabilizes the government’s debt (CBS News 2011). The downgrade had few repercussions in the financial markets as the markets also lacked any good alternatives to the relatively risk-free U.S. treasury bonds. Anticipated credit downgrades for state and local government bonds (referred to as municipal bonds) also did not materialize on a widespread scale, in part because the economy began to show signs of recovery (Gramlich 2012). However, the effects of mounting debt were seen in federal budget cuts and we now turn to the intergovernmental implications of the latter on state and local budgets.

There are several major sources of uncertainty for state budgets arising from the federal budgetary developments over the past year and we describe two that were prominent among these and then their effects on state–federal fiscal relations. First, the budget agreements in 2011 could mean across-the-board cuts in federal aid of unprecedented proportions, though the cuts exclude major entitlement programs (Goodman 2011a, 2011b). Second, Congressional action on key social policy and infrastructure bills pending for reauthorization, including education, welfare, and transportation, seem unlikely given the partisanship in Washington, D.C., especially in a presidential election year. In addition, federal assistance under the Patient Protection and Affordable Care Act (PPACA) hinges on the Supreme Court’s decision later this summer.

Federal aid to states for major programs has already been reduced by approximately 7 percent between fiscal years 2010 and 2012 (Prah 2012a). Estimates based on the Federal Funds Information from States (FFIS) indicate that sequestration measures agreed to in August 2011 could lead to approximately 9 percent additional reduction in federal aid for defense as well as other domestic nonmandatory programs (Prah 2012a). To put these cuts in perspective, from 1980 to 1985 during the Reagan Administration, cuts in federal spending were
approximately 15 percent (Edwards 2004). The effects of federal budget sequestration measures are likely to be distributed unevenly across subnational governments and it is difficult to predict these effects at this time.

Delays in reauthorization of various federal discretionary spending programs are however adding complexity to the administration of federal programs (illustrated by the waiver situation in federal K–12 education programs described later in this article). Federal assistance under the PPACA was expected to cover a substantial part of state incremental entitlement costs due to the program’s expansion of Medicaid enrollees (Gamkhar and Pickerill 2011), but federal support has not kept pace with enrollment growth (Vestal 2012). States have also been unable to reduce Medicaid costs through state innovations in cost reduction, partly due to a slow federal response to their request for waiver. Overall, the budget uncertainty created by PPACA and rising Medicaid costs at the state and local levels is more serious than discretionary budget cuts due to BCA and other budget uncertainties.

State and local governments are adjusting to this new era of federalism, where they are essentially required to fend for themselves fiscally, while being subject to federal mandates, preemptive statutes, and regulations. Some states have taken a constructive longer-term approach to budgeting and are planning for federal aid reductions. Utah Republican Representative Ken Ivory described his state, which is planning for 5–25 percent reductions in federal aid, as the “Best looking horse in a glue factory” (Prah 2012a). On the other hand, a number of states have expressed outrage by rejecting federal dollars that come with costly mandates and infringe on state sovereignty. In 2009, Tennessee’s Democratic (D) Governor Phil Bredesen, along with the nine Republican (R) governors expressed reservations about changing their states’ unemployment laws to get federal unemployment insurance dollars (Luo 2009). On the other hand, California Governor Arnold Schwarzenegger (R) said he would gladly take funds a fellow governor does not want (Prah 2009). Some state legislatures have used their power to overrule their governors and reinstate federal assistance, but their ability to do so typically depends on whether Congress has written its laws to allow this (Smith 2011).

Sean Nicholson-Crotty’s (2012) article in this issue examines the rejection of federal dollars by governors in a number of high profile cases, such as high-speed rail funding, health insurance exchanges, and K–12 education funding. He cautions us not to overstate the uniqueness of recent examples of governors refusing to accept or seek federal funds. However, he also acknowledges that from 2009 to 2011, more than 40 percent of Republican governors publicly turned down some federal funds made available by the Obama administration—a substantial increase over previous periods and somewhat unusual in the midst of a recession. He surmises that the increase is related to national hyperpartisanship and polarization. Moreover, the governors who have rejected or refused to apply for these federal funds seem to have made it a point to go public with their decision. There may be some payoff for the
states taking these actions after all; in the latest federal legislation to extend the payroll tax cut, as many as ten states may get flexibility to experiment with their unemployment insurance systems under a measure that is part of the negotiations on Capitol Hill to extend the federal payroll tax cut (Prah 2012b).

Good, Bad, and Ugly Measures Taken in Balancing State and Local Budgets

The good news is that there is evidence of a slow, but sustained recovery at the state level as real value of tax bases and revenues are above their peak before the recession in 2007, according to a study by the Nelson Rockefeller Institute of Government. This report finds that on an average, states saw their revenues increase in early 2012 by close to 4 percent over the same months in the previous year (Dadayan 2012). The assessment of the fiscal situation by state fiscal directors is also cautiously optimistic (NCSL 2012). However, there are vast differences in the current economic performance, state revenue growth, and the initial impact of the recession across states and regions in the United States (Dadayan 2012).

Although local tax collections had remained relatively strong, immediately after the recession, they declined by 1 percent in the last quarter of 2011, based on a moving average of inflation-adjusted local tax collections (Dadayan 2012). Property taxes that make up 85 percent of local tax receipts declined in real value in the fourth quarter of 2011, and the real value of local sales and income taxes also grew slower than in the previous year. In their article, included in this issue, Chernick et al. forecast the effects of the housing crises on revenues generation in 109 largest central cities in the United States for the 2009–2013 period. They find that the aggregate impact of declining property values on property tax revenues is negative for these cities and for the United States, but the impact varies significantly by state and by locality.

Most states had exhausted their rainy day funds by the start of the fiscal year 2012 (Prah 2011). Constrained by political and economic resistance to raising taxes as well as constitutional requirements to balance their budgets, states and localities have made deep cuts in public services. Some increased taxes, but most resorted to increasing nontax sources of revenue. Federal Reserve Chairman, Ben Bernanke, speaking about challenges for state and local governments, cautioned that budgetary adjustments at the state and local level are acting as headwinds for the nascent economic recovery (Bernanke 2011). We examine budget policy at the subnational level in the next few sections.

Budget and Program Cuts

The largest discretionary budget item in state control is public education and therefore some budget cuts in this program were inevitable, but states responded very differently to the above mentioned budget pressures. States such as Pennsylvania attempted to avoid possible loss of competitiveness over time by
deciding not to cut education as much as initially proposed (Bumstead 2011). On the other hand, in one of the largest cuts in state history, Texas lawmakers cut more than $4 billion from state funding for K–12 education in 2011, but they left the state’s $5 billion rainy day fund intact. This resulted in Texas school districts eliminating more than 12,000 teacher and support staff positions, as well as eliminating some programs (Sanchez 2011). In New York City, Mayor Bloomberg’s attempt to balance the city’s budget by reducing the number of teachers, among other measures, led to strong opposition from the predominantly Democratic city council. The council instead voted to cut roughly $75 million from the New York City’s Department of Education budget to avert elimination of 6,100 teachers for the school year (Santos 2011a, 2011b). Michigan cut about $1 billion in state education funding (approximately $470 per pupil), forced teacher layoffs and reductions in other staff (Resmovits 2012). To offset the impact of these cuts, Michigan Governor Rick Snyder indicated that he will introduce incentive-based models to lower costs and improve student achievements (Dickson 2011).

In response to state K–12 education cuts, lawsuits were filed challenging program cuts. In January 2012, the Washington State Supreme Court ruled unanimously in favor of the plaintiff in *McCleary v. State of Washington*. The Washington court ruled that the state must amply fund education *first* before any other state programs or operations. In addition, the Court prohibited the legislature from cutting state funding, for reasons unrelated to education policy (McCleary 2012; Riley 2012; Finne 2012). The Colorado High Court upheld the claim that Colorado’s education system is underfunded (Hoover 2011). Suits were filed in: California to restore $2 billion in funding for California’s public schools required by a voter-approved proposition (Leal 2011a); in Texas, five lawsuits have been filed against the state, covering more than 500 school districts and three million students, claiming cuts in the state’s current budget cycle have exacerbated funding problems and made the school finance system unconstitutional (Smith 2012); and in Florida, a suit claims that state funding had compromised the state constitutional requirement of a “high quality system of free public schools” by pushing for charter schools, private schools, and online education (De La Cruz 2011). As a result of budget cuts, various localities across the country are also out of compliance with state education budgeting rules and legislation (Siedzik 2011).

States have also cut funding for higher education drastically. Some extreme examples in this regard are the state of Washington and New Hampshire. Since the 2007–2009 budget, the Washington legislature has pared higher education by 50 percent in the past four years—more than any other component of the Washington budget (Riley 2012). New Hampshire, which until last year had cut its budget only once in the prior fifty years, and then by only 1 percent, shaved more than $1 billion, or 11 percent, in 2011 (Gotbaum 2011). The New Hampshire state university system was hit the hardest with a record annual cut of 45 percent.
Even though welfare is not a big budget item for states, welfare programs also were hit by budget cuts across the country, undermining the national social safety net when it is most needed. Welfare spending was a target since states have more flexibility in making cuts to welfare compared to the other large human services program such as Medicaid (Prah 2011). In the current round of cuts, a number of states shortened the time limit for residents on welfare from the maximum permissible under federal law (sixty months or five years): For example, California and Michigan reduced their time limit to four years, while Arizona reduced it to two years (Prah 2011). Nationwide, the changes will affect approximately 700,000 poor families and 1.3 million children who are either dropped or will be dropped in the current year (Schott and Pavetti 2011).

**Tax and Other Revenue Changes**

A key issue for Republicans in the 2010 elections involved a commitment not to raise taxes and instead to lower taxes (Prah 2011). Among the taxes that were most widely cut were corporate taxes (Arizona, Florida, Indiana, Kansas, Michigan, and Missouri). A handful of states increased taxes (Illinois, California, Connecticut, Hawaii, Maryland, and Vermont), and most did so by plugging tax loopholes and repealing tax preferences. Overall, there were more cases of tax rate cuts than increases, and some states substituted one tax for another (Michigan and Nevada). Among the fee raises, the most controversial were the tuition increases in state universities in response to external funding cuts. However, some states have rolled back these tuition increases to counter declining enrollments that could potentially have occurred as a result of those increases. Other states are considering grandfathering students from tuition increases once they are enrolled in a degree program to provide stability in tuition costs from entry to graduation (Associated Press 2010).

State aid to localities constitutes approximately 30–40 percent of local revenue, on average, across the country. A number of states made drastic cuts in local aid besides the public school funding cuts. For example, Ohio cut aid to localities by one-half in one year and Nebraska eliminated state aid to cities and counties entirely (Gurwitt 2011). The legislators in these states claim they are balancing the cuts in aid by reforming state laws regarding collective bargaining to reduce costs at the local level and incentivizing cost savings at the local level by introducing targeted aid programs. There are also other ways in which states have restricted local government flexibility on the revenue side, such as capping local property taxes (Gurwitt 2011). States are also reorganizing local governments to save money (Stephens 2011). Local governments have responded to economic conditions and the loss of aid by reducing payrolls, closing public facilities and increasing taxes where they had the authority to do so.
Unions and Collective Bargaining

Collective bargaining rights of public sector labor unions, particularly teacher unions, were a major concern in a number of states—as an unprecedented number of states attempted to limit the power of their public employee unions (Wieder 2012). Much of the national attention was focused on Wisconsin where a Republican governor led the effort to limit collective bargaining to teachers’ salary and benefits and require that union negotiations are publicly carried out with a limited number of union participants and with predetermined time limits. In addition, this year, Idaho introduced measures to tie pay to performance, eliminate tenure for senior teachers, as well as lower employee retirement health and pension benefits while at the same time reducing state-provided share of the costs of pensions (Wieder 2012).

In the second half of 2011, unions aggressively fought back and even achieved a repeal of one of the most restrictive collective bargaining agreements in Ohio. States officials had hoped that the changes to their pension law made during 2011 would hold up in court, but the state courts are mostly rejecting these changes, particularly increases in employee contributions to their retirement plans as a measure for shoring up underfunded public pensions. Most recently, Arizona, New Hampshire, and Florida courts ruled the changes as unconstitutional (Weitzman and Bullock 2012). States are therefore looking for less confrontational ways to fix the unsustainability of their retirement benefits as well as maintain the reliability of their systems and some are turning to collective bargaining again. For instance, Vermont negotiated a deal with their unions in 2010, increasing employee contributions to pension benefits with some payoffs for employees, which may avoid legal challenges (Wieder 2012). Unions are unlikely to go unscathed from these developments. Indeed, union membership in some of the major public school teacher unions has declined in the past year, the National Education Association lost nearly 120,000 members in one year (a 3.6 percent drop), and in Wisconsin alone there was a 33.6 percent increase in retirement among public employees (Wieder 2012). Lowering pension benefits of employees provides some long-term relief to state budgets, but when making these decisions, states also have to be mindful of the competitiveness of the public sector in the labor market.

Federalism Implications in Education and the Environmental Policy

Two policy areas saw notable intergovernmental activity in 2011–2012: education and energy/environment. In this section, we examine the major federal developments in these policy areas and their effect on state and local government policies and intergovernmental relations.
K–12 Education

When he took office in 2008, President Obama called for changing the nation’s main public education law, No Child Left Behind (NCLB). He endorsed the Race to the Top (RTTT) initiative under the aegis of the stimulus bill (Manna and Ryan 2011; Vergari 2010) which has allocated billions of dollars, in the three RTTT rounds, to eighteen states and the District of Columbia. RTTT competitively provides monetary incentives to selective states, if they propose to reform their education systems by adopting federally recommended goals, curriculum standards, and accountability systems where teacher evaluation is tied to student performance. This approach is in contrast with NCLB, which lets states set their own curriculum standards, tests, and performance criteria, but mandates strict yearly progress on achievement of these goals as a condition of receiving renewed federal Elementary and Secondary Education (ESEA) aid (McGuinn 2006; Wong and Sunderman 2007; Shelly 2008). In both programs, the federal role is expected to be both cooperative and coercive.

In 2011, the U.S. Congress deliberated the reauthorization of the Elementary and Secondary Education Act (ESEA), but the House and Senate could not reach an agreement. The key policy differences between the bills proposed by the two Chairpersons of the relevant committees in the House and the Senate respectively, Republican John Kline (R), Senator Tom Harkin (D), are on the extent of federal government’s role in education and whether the states should have more flexibility in pursuing education reforms and use of federal funds (Bornfreund 2012). Both the proposed Senate and the House bills undo many of the NCLB provisions such as the adequate yearly progress requirement that all students become proficient in reading and math by 2014 and these bills support charter schools (Klein 2012). The House bills provide more state flexibility than the Senate bill in how states and school districts use federal education dollars as well as in accountability and teacher quality restrictions (Bornfreund 2012). These bills set the stage for the reauthorization of ESEA, but their differences make it unlikely that the reauthorization will take place before the 2012 Presidential election.

Obama administration response: State waiver policy or education agenda?

Meanwhile, states are clamoring to get out of the performance mandates of the NCLB law as the 2014 federally mandated deadline for full proficiency in reading and math approaches (Chandler and Khan 2011). In June 2011, Secretary of Education Arne Duncan announced that unless Congress acted by the fall to overhaul NCLB, he would use executive authority to free the states from this mandate (Dillon 2011a, 2011b, 2011c). The stakes are high in this regard: About 80 percent of schools face a loss in federal funding in 2014 unless the NCLB Act is changed or waivers granted (Hechinger and Brower 2011). By December 2011,
thirty-nine states were scheduled to apply for waivers from some NCLB requirements and 48 percent of U.S. public schools did not meet the law’s requirements for yearly progress in student proficiency (Wieder 2011a).

Under the Duncan plan, states will be freed from key provisions such as the requirement to meet their adequate yearly progress goals in math and reading by 2014 (Kim 2011). In exchange, schools will be required to overhaul their education policies to meet federal waiver application requirements (Wieder 2011b). The federal standards that states need to adopt in order to qualify for waivers from NCLB are similar to the ones outlined in President Obama’s RTTT initiative (Leal 2011b; Wieder 2011a). School administrators are eagerly lining up for waivers from NCLB, though there is still dissatisfaction with the imposition of new federal requirements, particularly since it also comes with inadequate and more uncertain federal funding. Researchers, writing for this journal, have found that fiscal and institutional capacity constraints at the state and local levels have become real obstacles to sustaining meaningful reform (Manna and Ryan 2011, McGuinn 2012). In addition, the parallel streams of federal funding of K–12 public education using RTTT and NCLB, combined with federal waivers to NCLB, make the task of administering an already cumbersome program more difficult for all levels of government.

Local stakeholders resist RTTT conditions
RTTT has expanded federal involvement in state education policy, but its success still depends crucially on state and local implementation and these players have resisted the federal intrusion. Texas is a vocal representative of the states that did not apply for RTTT funding in opposition to national mandates, in this case the curriculum and evaluation standards. Texas Commissioner of Education Robert Scott views national curriculum standards as “a step toward a federal takeover of the nation’s public schools” (Thevenot 2009).

Although state applications for RTTT funding reflect their intention to comply with the accountability standards required by the federal program, local and statewide stakeholders continue to balk even after applications are submitted and the grant is awarded. New York (NY) teacher unions have been high-profile protestors against their state’s plan for RTTT funding; their main complaint was the use of student test scores to evaluate teacher and principal performance (Newsday 2011). This issue was resolved in 2012, but many critics of the compromise agreement, between NY teacher unions and the State, consider it unstable (Santos and Hu 2012). Hawaii became the most recent case where teacher unions rejected, by an overwhelming majority, the performance-based evaluation and compensation system required by their RTTT grant contract (Strauss 2012).
Research shows that teachers and administrators overwhelmingly support NCLB’s and RTTT’s underlying principles regarding accountability and their dissatisfaction is with the heavy reliance on federal intervention in these areas (Murnane and Papay 2010). The federal accountability mandates have created a one-size-fits-all framework focused on reading and math that could result in the loss of ground in other academic programs, as well as locally developed alternative accountability systems that might be more beneficial for improving student performance (Livingston 2011). Rivlin, in her article in this issue, goes further, to recommend that the federal government might “do more with less,” by ceding K–12 education to the states.

Energy and Environment

Overall, the growing partisan divide in the United States has profoundly influenced the U.S. climate debate, making it more polarized (Cohen 2012). Over the past few years, the Obama Administration used its executive authority and mandates from the U.S. Supreme Court to develop rules for regulation of greenhouse gases and other pollutants, but its efforts were stymied by a fresh round of lawsuits. States mostly continued to lead the developments in energy, climate, and natural resource policy, with limited intervention from the federal government.

Federal policy: Executive measures

A defining moment for environmental and energy policy this year was the June 2011 U.S. Supreme Court decision in a lawsuit brought by states against five of the country’s biggest polluters and greenhouse gas (GHG) emitters in 2004. The Supreme Court ratified its ruling in Massachusetts v. EPA (2007) that authorized the federal Environmental Protection Agency (EPA) to regulate GHGs under the Clean Air Act (CAA) (New York Times 2011a, 2011b). EPA for its part had proceeded after the Court’s 2007 ruling to make an “endangerment finding” and to regulate GHGs using executive measures: First establishing tailpipe standards for GHGs for new vehicles (2010); in 2011, the National Highway Traffic Safety Administration set new and higher fuel efficiency-Corporate Average Fuel Economy (CAFE) standards; and EPA issued “tailoring and timing” rules requiring large, new, and existing stationary sources to adopt GHG reduction measures (Kennedy 2011). However, new court challenges to EPA’s endangerment finding and the “tailpipe, tailoring, and timing” rules, in Coalition for Responsible Regulation v. EPA (dozens of lawsuits by the petitioners have been combined under this name in 2011) have led EPA to push the date for finalizing the rules to mid-2012 (McGowan 2012).

The Obama Administration also had several setbacks in its policies for pollutants already regulated under the CAA. It decided to delay the new rules for ozone until 2013 (US EPA 2012), in order to allow a scientific reconsideration of the ozone
standard currently underway. This decision was not popular with environmental groups, but the delayed implementation of the rules gives states and localities additional time to comply with the more stringent ozone standards. EPA moved forward with regulations to reduce other types of pollution from power plants and oil refineries (Aden and Bradbury 2011), including mercury from power plants, volatile organic compounds (a precursor for tropospheric ozone), and methane from the oil and natural gas industry (Ranganathan and Kennedy 2011).

**Enforcement federalism**

Enforcement of environmental regulations, primarily a state function, remains the weak link in the intergovernmental system of environmental policy in the major environmental quality regulations for air, water, and land. State enforcement programs are underperforming and not consistent with national goals according to EPA Inspector General’s report (US EPA 2011). The Government Accountability Office found that poor quality of data on facility compliance adversely affects the ability of state environmental agencies to enforce the Safe Drinking Water Act (SDWA) (GAO 2011a, 2011b). Researchers have for a long time pointed to the rising costs of compliance with the SDWA as a major problem, particularly for small public water systems, resulting in local governments calling for relief from federal unfunded mandates and straining the intricate structure of intergovernmental relations that puts safe water in taps across the country (Scheberle 2004). Both federal reports, mentioned above, find significant variations across states in enforcement actions and raise concerns about citizen exposure to health risks and environmental justice. Congress for its part this year focused mostly on trying to slow or stop actions by EPA and other federal agencies on environmental enforcement and climate measures. Most of these measures did not pass Congress and President Obama consistently signaled that he would veto these bills (Kennedy 2011).

**State energy and climate initiatives**

States and municipalities have considerable autonomy in many areas of environmental regulation, and some have demonstrated this by adopting aggressive measures to limit GHGs. They did this in spite of mixed signals from the federal government on energy and climate policy and the commercial sector regarding their investments in energy efficiency and renewable energy technology as well as steep cutbacks in environmental funding at the federal level. For example, though the federal government did not approve the Home Star or “Cash for Caulkers” program to incentivize home energy savings, some states adopted programs of their own and state spending on energy-efficient projects has increased steadily since 2009 (Malewitz 2011). Several states adopted improved building codes requiring new homes and commercial properties to be energy efficient. Progress in increasing
energy efficiency in states such as Michigan, among others, was spurred by the adoption of long-term energy-saving goals aimed at making the State an energy efficiency leader, for realizing efficiency savings, and for job creation potential (Malewitz 2011).

Regional cap and trade programs for reducing GHG emissions that remained reasonably vibrant through the recession, even funneling revenues to alleviate state deficits, experienced some setbacks due to the wave of conservatism in environmental and other policy areas that followed the 2010 midterm elections. On the other hand, the threat of preemption of such regional initiatives by a federal cap and trade program, a concern before the midterm election, has vanished for the time being (Rabe 2011; Conlan and Posner 2011). The Western Climate Initiative (WCI)—a regional cap and trade program of mostly western states, had difficulty in maintaining support among its U.S. members. By November 2011, six of the seven U.S. member states (Arizona, New Mexico, Utah, Washington, Oregon, and Montana) had formally withdrawn from the WCI (Hamilton 2011). California remains steadfast and will pursue emission trading with its Canadian partners in the WCI, most likely with British Columbia, Manitoba, Ontario, and Quebec starting in 2013 (Herrera 2011).

The Regional Greenhouse Gas Initiative (RGGI)—another regional GHG cap and trade program comprised of Northeast and Mid-Atlantic states, lost its key member New Jersey. Governor Chris Christie announced his intention to withdraw and the NJ legislature, after some resistance, approved the withdrawal, but the legislature is reconsidering its decision in response to a report that shows RGGI generated large economic benefits for the state. Meanwhile, the seven states remaining in RGGI have ratcheted up the emission caps by approximately 70 percent (Navarro 2012). Since actual emissions stayed well below the cap for the last few years—this new measure is likely to shore up the emission markets and state revenue gains from auctions of tradable emission rights.

Following a year of record drought in a number of southern states, there is bipartisan consensus on the need for water conservation, especially in states like Kansas and Texas, where crop and cattle losses in the last year due to the drought are close to $2 billion and $5 billion, respectively. In addition, population growth and development in these states is straining their common pool resources. Fewer than half the states in the United States have comprehensive water management and drought response plans and several states that have these plans have not updated them for years (Malewitz 2012). Interstate surface water conflicts have also been heightened by the pervasive drought conditions in the Western U.S. rivers. An article in this issue by Schlager et al. (2012) examines how water compacts, in the Western U.S. rivers, are used to share water resources and resolve conflicts among member states. The focus of their article is on the distribution of costs of conflict resolution between states participating in a compact and between local
jurisdictions within a state. Their research offers lessons for the use of compacts in other shared interstate natural resources and in regional climate agreements. Although regional agreements and compacts offer promising alternatives to a national natural resource, climate, and environmental policy, collaborative partnership between federal, state, and local groups is critical in building capacity for forecasting weather and availability of natural resources. Such data for state and local planning for natural resources, climate change and drought response is far short of needs (Malewitz 2012).

**Constitutional Federalism and Developments in the U.S. Supreme Court**

As Christopher Shortell notes in his contribution to this issue, the Roberts Court has been viewed as being relatively quiet in the area of federalism. Over the past several years, it has appeared to maintain a modest commitment to the federalism agenda of the so-called “federalism five” on the Rehnquist Court. However, developments on the Court in the past year suggest that the Court’s conservative members have not abandoned the federalism agenda of the Rehnquist Court at all. In particular, the Court’s consideration of challenges to the federal PPACA and two cases challenging two different Arizona laws on immigration have brought the Court to the fore in the debate over federal and state powers.

In 2011, the Court handed down two decisions that reaffirm some level of commitment to new federalism. Although not the most salient of federalism decisions the Supreme Court has delivered over the years, those two cases at the end of the 2010 term suggested that a majority of the Court remains committed to judicial enforcement of constitutional federalism principles regarding state sovereignty. But the Court has not always sided with the states: In a case handed down that received relatively little media coverage early in 2012, the Court ruled that federal law regulating meat inspections preempts a California statute intended to regulate the humane treatment of livestock at slaughterhouses in the state. The nature of these and earlier Roberts Court decisions might mean the court has been able to further the new federalism agenda in somewhat of a stealth but steady manner by staying under the radar, as Shortell suggests in this issue.

On the other hand, the Court may be in the process of shedding its stealth cloak in the 2011–2012 term in a major way. The Court accepted more cases involving constitutional federalism than it had in previous terms under Chief Justice Roberts, most of which arguably involve more salient issues than the Court’s federalism decisions in recent years. Indeed, the Court’s review of the PPACA in *Florida v. Department of Health and Human Services* and its companion cases and its review of the Arizona immigration laws in *Chamber of Commerce of the United States*
v. Whiting and United States v. Arizona have thrust it in the federalism spotlight. Also notable about many of these cases reaching the Supreme Court is that they are significant examples of state and local pushback against or activism in response to federal policy. As we review below, the challenge to the PPACA was initiated by Florida and ultimately joined by twenty-five other states, a strong showing of bottom-up activism to undo federal law. And the Arizona immigration cases resulted in Arizona state laws passed to cure what Arizona legislators viewed as inadequate enforcement of immigration laws by the federal government. Although it is hard to know for certain, this year could mark as significant a role for the Court in the debate over the boundaries of federal and state powers as any period since or during the Rehnquist Court.

State Sovereignty: Sossamon v. United States and United States v. Bond

In 2011, the Court addressed the scope of state sovereign immunity in Sossamon v. Texas (No. 08-1438), and its ruling continued in the path of various Rehnquist Court decisions from the 1990s and early 2000s in protecting state sovereign immunity from federal damages suits. In this case, a Texas state inmate, Harvey Sossamon III, filed suit against Texas and state prison officials in federal court for violating his rights under the Religious Land Use and Institutionalized Persons Act (RLUIPA). Texas argued that the lawsuit was barred from the federal courts under the eleventh Amendment and principles of sovereign immunity. Sossaman argued that Congress passed the RLUIPA pursuant to its spending power, and because Texas accepted the relevant federal funds, the state had waived its sovereign immunity claim. In April 2011, the U.S. Supreme Court sided with the state in a 6-2 decision. Writing for the majority, Justice Thomas cited the Court’s decisions on sovereign immunity from recent years to establish that for a state to waive its right of sovereign immunity to be sued in federal courts, that waiver must be explicit and unequivocal. The Court reasoned that the mere acceptance of federal funds was not an explicit or unequivocal waiver, and therefore the suit against Texas under the RLUIPA could not proceed in federal courts.

A second case with implications for state sovereignty in 2011 involved an individual’s standing to bring constitutional claims on behalf of states. In United States v. Bond (No. 09-1227), Carol Anne Bond appealed her conviction for violating a federal statute that was passed to enforce the Chemical Weapons Convention (CWC), a treaty banning chemical weapons to which the United States was a party (18 U.S.C. 229). Bond argued that the federal government was banned by the Tenth Amendment and principles of state sovereignty from using an international treaty as the basis of a criminal prosecution in a matter that has traditionally been within the scope of state, not federal, power. In June 2011, the
Supreme Court supported Bond’s argument, holding that an individual may have standing to raise Tenth Amendment claims. Writing for the unanimous Court, Justice Kennedy distinguished a 1939 precedent, *Tennessee Electric Power Company v. TVA*, in which the Court held that individuals do not have standing to bring constitutional claims of state sovereignty on behalf of states as the basis for their cause of action. The Court concluded that Bond was not raising a constitutional claim as the underlying cause of action on behalf of a state, but rather raising the claim to “vindicate her own constitutional interests” (p. 8).

Kennedy provided a lengthy discussion regarding the purpose of a federal system. He observed that federalism is intended to serve multiple purposes, noting that “freedom is enhanced by the creation of two governments, not one” (quoting from *Alden v Maine*, 527 U.S. 706, at 758 [1999]). Acknowledging that federalism served to determine and preserve lines of authority between state and federal governments, he wrote that “Federalism has more than one dynamic” (p. 9). Quoting from two precedents, he continued, “State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power” (quoting *New York v. United States* 505 U.S. 144 at 181 [1992] and *Coleman v. Thompson* 501 U.S. 722 at 759 [1991]). He noted that individuals have been allowed to use separation of powers principles to vindicate their rights (citing for example, *INS v. Chadha* 462 U.S. 919 [1983] and *Clinton v. City of New York* 524 U.S. 417 [1998]). The decision, and especially Kennedy’s opinion, is significant insofar as the unanimous Court rested its ruling on a theory of federalism in which the boundaries between federal and state powers are maintained in part to protect individual liberty and those boundaries may be judicially enforced.

**Immigration and Federal Preemption**

Immigration issues made the headlines around the country throughout 2010 and 2011, as state legislators and voters considered a range of measures addressing illegal immigrants. Several issues made their way to the courts. In particular, two cases involving Arizona laws were considered by the U.S. Supreme Court during the past two terms. The first, decided in May 2011, was *Chamber of Commerce of the United States v. Whiting*. The second, granted *certiorari* in December 2011, is *Arizona v. United States*.

The issue in the *Whiting* case was whether federal immigration law preempted a state law that revoked licenses of businesses for hiring illegal immigrants. The Immigration Reform and Control Act (IRCA), passed by Congress in 1986, requires employers to take steps to verify employees’ legal status and eligibility for employment, and the law subjects employers who violate the law to civil or criminal sanctions. In addition, Congress established the “E-Verify” program,
which allows employers to check the legal status of aliens applying for work. The federal statute explicitly says that states may not impose additional criminal or civil sanctions for employing illegal aliens.

Arizona’s Legal Arizona Works Act (ALAWA—also known as the “Employer Sanctions Law” in Arizona) went into effect in 2008. The ALAWA authorizes the state to suspend or revoke licenses (including articles of incorporation, partnership certificates, and grants of authority for foreign firms to conduct business in the state) from businesses found to employ illegal aliens. It also requires employers to use the E-Verify system (the use of which is voluntary and not mandatory under the IRCA). As the Court noted in its opinion, a number of other states including Colorado, Mississippi, Missouri, Pennsylvania, Tennessee, Virginia, and West Virginia had recently enacted similar statutes at the time of the Supreme Court decision in Whiting.

The U.S. Chamber of Commerce and several business and civil rights organizations filed suit in federal court asking the Court to prevent Arizona from enforcing the ALAWA. With the support of the Obama Administration, the complainants argued that the federal law explicitly preempts “any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens” (§1324a(h)(2)). The district court held that because the ALAWA sanctioned employers by suspending or revoking licenses, it was not preempted by the IRCA, and the U.S. Court of Appeals for the Ninth Circuit affirmed.

In a 5–3 ruling, the U.S. Supreme Court affirmed the lower courts and held that the plain meaning of the text exempted from federal preemption the Arizona scheme of revoking or suspending business licenses. The Court also upheld the provisions of the ALAWA making it mandatory for employers to use E-Verify. Chief Justice John Roberts wrote the opinion for the Court arguing that the text of the federal law was clear in exempting business licenses from the preemption of civil and criminal penalties by states, and therefore, the state could, as it argued, supplement the federal law in the manner prescribed under the ALAWA.

Less than seven months after handing down the Whiting decision, the Court granted certiorari in U.S. v. Arizona. That case also involves a preemption challenge to an Arizona state immigration law. The state law, known as S.B. 1070, gained national attention immediately when Governor Jan Brewer signed it into law in 2010. It made it a state crime to be an illegal alien unregistered with the federal government and a state crime for illegal immigrants to seek employment. The provisions that drew the most media attention and caused the most controversy required state and local law enforcement officers to check the status of anyone stopped or detained if they suspected the person might be in the country illegally and allowing them to arrest those individuals (without an arrest warrant) if they
had probable cause to believe they might be deportable under federal immigration law. A number of other states subsequently passed similar laws, including Alabama, Georgia, Indiana, South Carolina, and Utah.

Governor Brewer and other supporters of S.B. 1070 argued that the federal government was not adequately enforcing federal laws against illegal immigration and failing to secure the border between the United States and Mexico. When she signed the bill into law, Governor Brewer stated that the law was the state’s attempt to “solve a crisis we did not create and the federal government has refused to fix” (quoted in Barnes 2011). Shortly thereafter, the U.S. Justice Department filed suit against Arizona (and has similarly filed suits against other states with similar laws), arguing that federal immigration law preempts the state law and therefore the state does not have the authority to enforce S.B. 1070.

**Meat Inspection, Slaughterhouses, and Federal Preemption**

Another preemption case that received considerably less attention than the immigration appeals, but that holds some importance for federalism scholars, relates to meat inspection and slaughterhouses. In response to an uproar caused by an undercover video made and released in 2008 by the Humane Society of the United States that showed workers in a slaughterhouse in California dragging, kicking, and electroshocking disabled cows, the California legislature amended an existing state law to ban slaughterhouses from accepting, selling, or butchering “nonambulatory” animals (animals that cannot walk on their own). The National Meat Association, a trade group representing meatpackers and processors, filed suit asking federal courts to rule that the state law could not be enforced against swine slaughterhouses because it is preempted by the Federal Meat Inspection Act (FMIA), and the extensive regulations promulgated pursuant to the FMIA by the Department of Agriculture’s Food Safety and Inspection Service (FSIS).

In *National Meat Association v. Harris* (No. 10-22, 2012), the Court unanimously reversed the Ninth Circuit Court of Appeals and held that the state law was indeed preempted by the FMIA. Although the FMIA does allow states to regulate in ways that are consistent with the federal statute and to address matters not covered by the FMIA, Justice Elena Kagan concluded that the state’s proscriptions went further than the federal law and were largely inconsistent with the requirements of the federal law. The unanimous Court also rejected arguments that the state statute was different from the federal law because it was designed to address the humane treatment of pigs, the animal at issue in the case, and not the safety of meat. Justice Kagan wrote that the FMIA and the FSIS regulations were pervasive, covering the entire time the animal was at the facility and addressing the receipt and handling of the animals as well as meat safety.
Challenges to PPACA

One of the most (if not the most) anticipated Supreme Court decisions of the 2011–2012 term involves a challenge by Florida—joined by twenty-five other states—that key provisions of the PPACA are unconstitutional largely on federalism grounds. The PPACA was arguably the signature legislative achievement of the Obama administration during President Barack Obama’s first term. Although states availed themselves of opportunities to assert their interests in Congress during the drafting and consideration of the bill (Dinan 2011), a majority of states have joined a lawsuit challenging the constitutionality of key provisions of the law. The Supreme Court agreed to hear the challenge in Florida v. Department of Health and Human Services and in two related appeals, National Federation of Independent Business v. Sebelius and Department of Health and Human Services v. Florida (for a detailed discussion of the legal arguments in the case, see Joondeph 2011). The Court heard a total of six hours of oral argument instead of the usual one hour, indicating the Court’s recognition of the salience of the case.

The issue is whether the PPACA’s provision requiring individuals whose employer does not provide them with health insurance to purchase health insurance falls outside of Congress’s commerce powers, and if so whether the individual mandate provisions are severable from the remainder of the Act. The Eleventh Circuit Court of Appeals found that the individual mandate is unconstitutional because it exceeds Congress’s commerce powers, but the provision is severable from the rest of the PPACA, which may be implemented and enforced absent the individual mandate. Another issue relates to Medicaid and whether provisions of the PPACA that require states to expand Medicaid eligibility to cover all persons making less than 133 percent of the Federal Poverty Level as a condition of participating in the federal–state Medicaid program are so coercive as to violate the scope of Congress’s Article I spending power. Another question concerns whether application of PPACA provisions to the states as employers violate principles of state sovereignty.

Regardless of the outcome in the case, the Roberts Court’s consideration of the challenge to the PPACA seems to support the notion that this Court remains active in considering a wide range of federalism claims, and the cases themselves are further examples of recent bottom-up federalism in which states challenge federal policy.

Voting Rights and State Autonomy in Redistricting

As is often the case following the decennial census, the Supreme Court has handed down key rulings involving state redistricting or redrawing of congressional and state legislative seats to reflect shifts in population. In 2010, one such case involved Texas, which gained four seats in the U.S. House of Representatives. The Texas
legislature, which is dominated by Republicans, drew new electoral maps that seemed to many observers to favor Republican incumbents and candidates. Because Texas is a state with a history of past discrimination, the new districts must be approved by the U.S. Department of Justice or a three-judge panel in Washington, D.C., a process known as “preclearance,” pursuant to Section 5 of the Voting Rights Act of 1965. The state sought approval of the districts drawn by the state legislature from the special three-judge panel in Washington.

In the meantime, plaintiffs filed an action in the U.S. District Court in San Antonio, claiming that the state’s electoral plans for congressional districts and state legislative districts discriminated against African American and Latino voters by diluting their votes in violation of the Constitution and a Section 2 of the Voting Rights Act of 1965. The district court, also a three-judge panel, drew up its own interim plans for redistricting. The state objected to the plans and appealed to the U.S. Supreme Court.

The Supreme Court acted swiftly and handed down a decision in *Perry v. Perez* in January 2012, just eleven days after hearing oral arguments, in recognition of primary elections on the horizon. In a unanimous decision supported by a *per curiam* opinion, the Supreme Court vacated the District Court’s interim redistricting plans and ordered it to redraw the interim districts. The Supreme Court ordered the lower court to use the legislatively drawn districts as a “starting point” when drawing the interim districts. The Supreme Court reasoned that although the legislature’s plan had not received preclearance, courts should give significant deference to the “legitimate state policy judgments” of a state’s elected officials. The lower court is not obligated to accept the state’s plans as-is, but it must use it as a guideline when trying to draw interim maps that comply with the Constitution. In the opinion, the Court cited an earlier decision to note that “‘serious constitutional questions’ are raised by Section 5’s [of the Voting Rights Act] intrusion on state sovereignty” (citing *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U.S. 193, at 204 [2009]). Although it did not rule on the issue, the restatement of concern over the constitutionality of Section 5 of the Voting Rights Act might be read as a signal that the Court is open to consideration of the issue in future adjudication. Because the Court has avoided ruling on this issue more than once in just a few years, it is not at all clear there would be enough votes to strike the provision down. However, given the developments in the Court over the last year that we describe here and the Court’s conspicuous comment on the issue in a *per curiam* opinion, this could be further evidence that the Court is poised to continue and perhaps increase its surveillance over federalism and state sovereignty.

The Supreme Court’s activity in 2010–2011 indicates that it is still actively entertaining challenges to federal power for violating constitutional federalism principles. This is a court whose majority unequivocally believes in judicial
enforcement of constitutional federalism and state sovereignty. Up until now, it has not been seen as being as aggressive as the Rehnquist Court was in the 1990s, and most of the federalism cases it has decided have not been of a high-profile or controversial nature. Nonetheless, the Court has affirmed and extended a number of Rehnquist Court’s state sovereignty decisions. It seems to support state authority under state sovereignty claims, but its record is more mixed in cases involving federal preemption as Shortell discusses in more detail in this issue. Still, the Court’s decisions and its docket in 2011 and 2012 give reason to believe that the Court could be at a turning point at which its commitment to enforcing constitutional federalism could equal or exceed that of the Rehnquist Court. Many of these cases also highlight the bottom-up nature of federal–state relations, whether through direct legal action taken by the states to challenge the constitutionality of the PPACA by Florida and twenty-five other states or through the activism of Arizona and other states to pass tough laws on immigration as a result of dissatisfaction with federal enforcement of federal immigration law.

**Conclusion**

Mounting concern about federal debt, partisan politics, and legislative gridlock at the federal level has also contributed to the need for state and local governments to step up and take matters into their own hands. Much of this is the culmination of the budgetary and fiscal conditions faced by all levels of government over the last several years. As our examination of fiscal issues makes clear, the federal and state budget situation is best characterized as one of uncertainty. Although the economy appears to be improving, governments at all levels face serious fiscal challenges, particularly at the local level where government tax revenues have declined in the past year.

The recession, American Recovery and Reinvestment Act, and other federal aid flows had given the federal government unprecedented fiscal leverage in influencing state and local policies. In the past year the federal government has relied more on executive powers—using waivers, rulemaking, conditional grants to select winners among states and rewarding them through competitive grants. President Obama has also adopted some state initiatives in federal policy. For instance, the Obama Administration adopted the National Governor’s Association K–12 education standards initiative—Common Core standards—in RTTT, which was supported by the National Governor’s Association and it adopted California’s vehicle emission and fuel efficiency standards. In other cases, the Administration has offered states some flexibility, as it did in approving California’s CAA waivers for more stringent vehicle emission standards than the pre-existing federal standards. The concern among scholars and practitioners is whether and when the President’s reforms will pay off in terms of improved outcomes or whether budgetary constraints limit state and local government capacity and appetite for federally driven reforms.
Not only have states had to fend for themselves in terms of fiscal matters, but many have also gone further and responded to federal policy with acts of resistance or defiance. Policies such as RTTT, in this case heavy on mandates and light on funding, may be designed to operate in a mode of cooperative federalism. However, when they appear to be coercive because they are leveraging support for federal rather than states and local priorities, partisans at the state level have any number of incentives to resist such federal government policies. State governments, especially those with Republican governors and/or Republican legislative majorities, challenged federal policies in education, health care, environment, energy, immigration, and others by refusing federal grants, filing lawsuits and enacting and implementing policy at the state level to supplant federal policy. The same has been true of local governments as well, as Lori Riverstone-Newell discusses in some detail in her contribution to this issue. State pushback against federal policies could also be seen in the increased number of cases heard in the U.S. Supreme Court involving constitutional federalism and state sovereignty issues. There are signs that the Court will continue or even increase its strong support for state sovereignty claims, which could perhaps encourage further bottom-up activism by state and local governments.

There are other strains appearing in the federal system that are likely to engage scholars and which point to areas ripe for further research. For example, it is plausible that the state budget conditions might have weakened the social safety net considerably. It is also questionable as to whether states are still playing the role of laboratories of democracy when servicing welfare programs or have their fiscal and budget crises stymied innovation? On the other hand, states have taken the economic challenges and found new and improved ways to generate economic growth and jobs, as in the areas of energy efficiency and clean energy initiatives. More research also needs to be conducted to determine the broader effects of these recent budgetary and political developments on policy innovations at the state and local levels. Given the political, legal, and economic uncertainties contributing to the current state of affairs, it is impossible to know how long-lasting these effects will be. But at least in the short term, American federalism is taking much of its shape from bottom-up forces.

Notes

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1. Colorado, however, is feeling direct consequences from the S&P downgrade. Municipalities in Colorado are forgoing roughly $60 million in investment income a year because of a one-of-its-kind state law that prevents some 3,700 municipalities in Colorado from investing money in federally backed securities that are not rated at the top, AAA level (Gramlich 2012).
2. The lawsuit was filed by six states, New York City and several land trusts against four private power plant operating companies and the Tennessee Valley Authority. The plaintiffs argued that the GHG pollution from the power plants owned by these companies was a public nuisance under federal common law. The suit asked a federal court in New York to order the defendants to reduce their emissions (Liptak 2011).

3. This finding, a scientific determination by the EPA that carbon dioxide and other “GHG” pollutants are a threat to human health and welfare, allows U.S. EPA to regulate GHG pollution under the Clean Air Act provisions.

4. New and higher CAFE standards were set for automobiles for model years 2012–2016 and a CAFE standard of 54.5 miles per gallon for the year 2025. EPA has also issued the first ever CAFE standards for medium and heavy duty vehicles such as tractor trailers and buses (Kennedy 2011).

5. GHG regulations cover new polluting sources emitting at least 100,000 tons or more of GHGs per year, as well as, existing sources (emitting 75,000 tons or more of GHGs per year). EPA estimates 1,600 of the largest sources would be covered annually under this program, of which 700 sources would have been required to get new source permits for other pollutants (Kennedy 2011).

6. On January 17, New York, Connecticut, Delaware, Massachusetts, Rhode Island, and Vermont announced that they were permanently eliminating 72 percent of the unsold carbon allowances, or a total of sixty-seven million. (Each allowance amounts to one ton of carbon dioxide emissions.) Maryland has also said it intends to retire some unsold allowances, raising the percentage of the unsold permits retired to 93 percent.

7. Two other states, Virginia and Oklahoma, filed their own separate lawsuits.

References


