

# Bearing the Burden of the Beltway: Practical Realities of State Government and Federal-State Relations in the Twenty-First Century

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## INTRODUCTION

Throughout much of the twentieth century, progressives relied on a dominant federal government to ensure that their policies were successfully implemented in the more conservative states. President Franklin Roosevelt demanded a federal solution to the economic crisis of the 1930s and gave America the New Deal. Presidents Truman, Eisenhower, Kennedy, and Johnson each used the authority of the federal government to force states to accept suffrage for African Americans, the desegregation of public schools, and the slow, uphill march of the civil rights movement through the 1960s. In response, when the conservative agenda took over the Oval Office with the election of President Reagan in 1981, state governments were promised a New Federalism—a relationship defined by a smaller federal government, with reduced oversight and greater freedom for state innovation.<sup>1</sup> It was to be a new day for state initiative, free from federal meddling.

But two decades after President Reagan's promise, the conservative agenda today encourages an overbearing federal executive, which crushes state authority and freedom to govern. In his two terms as president, George W. Bush created a serious structural imbalance of power, consolidated overwhelmingly in the federal executive branch of government. The Bush Administration accumulated this power by imposing massive unfunded federal

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<sup>1</sup> See President Ronald Reagan, First Inaugural Address (Jan. 20, 1981) ("It is my intention to curb the size and influence of the federal establishment and to demand recognition of the distinction between the powers granted to the federal government and those reserved to the states or to the people. . . . [T]he federal government did not create the states; the states created the federal government.") (on file with the Harvard Law School Library), *available at* <http://www.reaganlibrary.com/reagan/speeches/first.asp>.

mandates on state governments and stifling state innovation even in areas of policy in which the federal government declined to act. The policy areas of the greatest importance to Americans and the progressive agenda—public education, health care, immigration, and global climate change—are those suffering most. Global climate change, for example, a progressive priority, failed to make its way onto the Bush Administration agenda, which substituted inaction for federal mandate as a way to block state innovation in this area.

The Bush Administration's early approach to federal-state relations included the promulgation of unfunded mandates, such as those included in No Child Left Behind<sup>2</sup> and the REAL ID program.<sup>3</sup> The relationship between federal and state governments is not all about money, but federal funds play a significant role in the implementation of successful state programs. When the federal government's demands outpace its dollars, states must cut corners to make ends meet, and essential services suffer. Unfunded mandates thus put a considerable strain on states' abilities to meet their citizens' needs.

The Bush Administration also consolidated its power by delivering executive mandates to bind the hands of creative, progressive local policymakers. Too often in recent years, federal initiatives have combined unfunded mandates with limitations on how a state may design solutions to address its particular citizenry and situation. Formerly, federal policies demanded base-level action from states by requiring them to implement a minimum level of regulation and reform with available program funds. In contrast, conservative federal policies of the last eight years placed upper limits on state initiatives to protect their citizens and stymied state efforts to adapt programs to fit local needs. In Bush's second term especially, federal control tightened as the Administration began establishing caps on progressive initiatives, even when no corresponding federal program existed. Ironically, in this way the Bush Administration fueled progressive state action, as states were forced to develop innovative solutions to compensate for a lack of federal funding and action.

Far too often policymakers in Washington, D.C., fail to appreciate the unique perspective of state officials who actually implement the federal government's broad and generic programs. Federal and state officials are not natural adversaries. They share common goals and constituencies. The beauty of a federalist system is that parochial concerns of any given state can blend and balance with the overall concerns of a united country. But when the federal government abuses its appropriating authority and creates an uneven relationship between local and national concerns, acrimony increases, and the American people suffer.

This Article seeks to draw readers' attention to the wide variety of policy areas in which the federal government under Bush simultaneously re-

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<sup>2</sup> No Child Left Behind Act of 2001, 20 U.S.C. §§ 6301–7941 (2006) (amended 2006, 2007, & 2008).

<sup>3</sup> REAL ID Act of 2005, Pub. L. No. 109-13, div. B, § 106(a)(1)(B), 119 Stat. 302, 310 (codified at 49 U.S.C. § 30301 (Supp. V 2005) (amended 2007)).

stricted state innovation and access to resources, while mandating specific levels of performance in a variety of policy areas. State and local governments have been forced to do more with less—to raise proficiency levels in schools, to patrol for illegal immigrants, to provide a better health care system—all without additional funds. In policy areas such as public education, immigration, and health care, the Bush Administration imposed incredibly stringent mandates, refused to hear input from state and local officials regarding the development of policies, and consistently shortchanged state governments of funds required to implement federal programs. Looming on the horizon, the challenges of health care reform and global climate change demand immediate governmental action. Rather than undertaking these challenges itself, the Bush Administration sought to impede states' substantive progressive solutions.

This Article is not a theoretical commentary about where federalism's proper constitutional balance lies. Nor is it an attempt to claim that progressives have always established the correct role for federal and state governments. This Article explores challenging policy areas but does not give those areas exhaustive treatment or review. Instead, we hope to share some insight into the practical challenges facing state governments today, highlighting how federal policies crafted without state governments' input are hindering state efforts to develop sound public policies of their own.

In Part I, the Article examines the practical realities facing state governments today, including the exacerbating effects of the recent economic downturn. Nearly all state governments, unlike the federal government, must operate on budgets without deficit spending. Economic hardships that shrink tax bases intensify the burdens that unfunded federal mandates place on states.

In Part II, the Article describes particular policy areas—education, health care, and immigration—in which the federal government has constrained state innovation. Large federal programs often rely on considerable state resources for their implementation and enforcement. The absence of a central, collaborative forum for federal-state discussion about these policies over the last eight years has bred animosity and even litigation between the states and the federal government. As described in Part III, this relationship has grown particularly tense with regard to the subject of global climate change as some states have attempted to curb carbon emissions and raise awareness of the danger of continued federal indifference to the climate crisis.

The final section of this Article considers ways in which President Obama and the new Congress could improve federal-state collaboration, including the creation of a forum for federal-state dialogue through a Common Sense Commission. This Commission would be tasked with removing many of the barriers to federal-state cooperation that the Bush Administration erected. The Commission's goals would include the creation of a forum for the airing of grievances between state governments and federal executive agencies. Ideally, the legislation or order creating such a commission would in-

clude provisions to sunset its existence after it restores working relationships between states and regional executive offices during President Obama's first term.

An opportunity for redress and change in federal-state relations is upon us. From coast to coast on November 4, 2008, the American people elected and re-elected candidates who ran on platforms of collaboration and bipartisan cooperation. Elected under a campaign banner of "Change," Democrats will enjoy broader majorities in the House and the Senate, a greater number of governorships, and control of the White House under President Obama. With active wars in Afghanistan and Iraq, global financial turmoil, and any number of potential international crises on the horizon, the new Congress and the new President must work quickly to dismantle the barriers to state and federal cooperation erected over the last eight years.

## I. THE STATE OF THE STATES

The United States is facing a national economic downturn that will lower tax revenues, exacerbate current funding gaps, and increase the likelihood of budget shortfalls across the country. According to recent information released by states, of the forty-two states reporting third quarter 2008 tax revenues, thirty-one yielded lower revenues than in the third quarter of 2007.<sup>4</sup> In response to declining revenues, many states have been forced to reduce their budgets. The alternative of deficit spending is not an option because every state except Vermont is required to balance its budget.<sup>5</sup> Thus, by diminishing state governments' ability to raise funds, the economic downturn has also impaired their capacity to cover essential expenditures. "At least twenty-nine states plus the District of Columbia, including several of the nation's largest states, faced or are facing an estimated \$48 billion in combined shortfalls in their budgets for fiscal year 2009."<sup>6</sup> Although these figures were reported with an economic slowdown in mind, states' budget woes will only deepen as the economic downswing continues. The slowdown in the American economy offers little hope to state governments that

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<sup>4</sup> *Local Zeroes*, *ECONOMIST*, Nov. 15, 2008, at 37.

<sup>5</sup> See Nat'l Conference of State Legislatures, Budget Conditions, [http://www.ncsl.org/programs/fiscal/all\\_sfo.htm](http://www.ncsl.org/programs/fiscal/all_sfo.htm) (last visited Nov. 23, 2008) (on file with the Harvard Law School library).

<sup>6</sup> ELIZABETH C. McNICHOL & IRIS J. LAV, *CTR. ON BUDGET & POLICY PRIORITIES*, 29 STATES FACED TOTAL BUDGET SHORTFALL OF AT LEAST \$48 BILLION IN 2009 2-3 (2008) (on file with the Harvard Law School Library), available at <http://www.cbpp.org/1-15-08sfp.pdf> ("The 29 states in which revenues were expected to fall short of the amount needed to support current services in fiscal year 2009 are Alabama, Arkansas, Arizona, California, Connecticut, Delaware, Florida, Georgia, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nevada, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, and Wisconsin.").

their tax revenues or state general funds will keep pace with expenditures in the near future.<sup>7</sup>

States' budget shortfalls are considerable in raw dollars, but they are even more worrisome when considered as a percentage of states' overall available funds. As a 2008 report from the Center on Budget and Policy Priorities points out: "The budget gaps total \$47.5 to \$49.3 billion, averaging 9.3 percent to 9.7 percent of these states' general fund budgets. . . . The shortfalls that states other than California face or faced average 6.2 percent to 6.7 percent of these states' general fund budgets."<sup>8</sup> These budgetary burdens were measured before the depth of the 2008 economic crisis was fully realized. Shortfalls will only become more burdensome as state revenues slide alongside property values, tax revenues, and jobs.

Exacerbating the financial crisis facing state governments, the federal government has imposed an onslaught of federal mandates on the states, requiring them to implement significant programs but offering insufficient funds to do so.<sup>9</sup> For the 2008 fiscal year, the cost of unfunded federal mandates has reached an estimated \$31.9 billion, the highest level since 1995.<sup>10</sup> The cumulative burden imposed on states by unfunded federal mandates over the last four fiscal years was over \$131 billion.<sup>11</sup> In 1995, Congress passed the Unfunded Mandates Reform Act of 1995<sup>12</sup> (UMRA), which was designed to force Congress to consider the significant financial burdens that federal legislation imposes on state budgets. Unfortunately, because the UMRA does not apply to reauthorizations, national security programs, and the cumulative financial impacts of legislation, it has been largely ineffective

<sup>7</sup> See NAT'L GOVERNORS' ASS'N & NAT'L ASS'N OF STATE BUDGET OFFICERS, *THE FISCAL SURVEY OF THE STATES* viii (2008) (on file with the Harvard Law School Library), available at <http://www.nasbo.org/Publications/PDFs/Fiscal%20Survey%20of%20the%20States%20June%202008.pdf>.

<sup>8</sup> McNICHOL & LAV, *supra* note 6, at 3.

<sup>9</sup> For instance, in Kansas, under the REAL ID Act, funds must be drawn from the state budget to transition dozens of Department of Motor Vehicle offices into ad hoc immigration checkpoints. The State also continues to fund eighty-three percent of educational initiatives for special needs students, even though the federal government promised to cover forty percent of those costs. During the last five years, the State of Kansas has also faced ongoing disputes with the U.S. Department of Health and Human Services over reimbursement formulas involving up to \$225 million that the Department had previously approved. Meanwhile, the federal government has placed a number of restrictions on how funds may be spent in the recovery efforts of the town of Greenburg, Kansas, which was severely damaged by a tornado.

<sup>10</sup> *The Impact of Implementation: A Review of the REAL ID Act and the Western Hemisphere Travel Initiative: Hearing Before the Subcomm. on Oversight of Government Management, the Federal Workforce, and the District of Columbia of the S. Comm. on Homeland Security and Governmental Affairs*, 110th Cong. 3 (2008) (written testimony of Rep. Donna Stone, Delaware General Assembly, on behalf of the National Conference of State Legislatures) (on file with the Harvard Law School Library), available at [http://hsgac.senate.gov/public/\\_files/StoneTestimony042908.pdf](http://hsgac.senate.gov/public/_files/StoneTestimony042908.pdf).

<sup>11</sup> MANDATE MONITOR (Nat'l Conference for State Legislatures Budgets & Revenue Comm., Wash. D.C.), Apr. 8, 2008, at 1 (on file with the Harvard Law School Library), available at <http://www.ncsl.org/print/standcomm/scbudg/MandateMonitorApril2008.pdf>.

<sup>12</sup> Pub. L. No. 104-4, 109 Stat. 48 (codified at 2 U.S.C. §§ 1501-1556, 1571).

in stemming the tide of unfunded federal mandates.<sup>13</sup> Furthermore, the use of a “rider” attached to a piece of legislation—such as the REAL ID Act of 2005,<sup>14</sup> which was attached to a larger anti-terrorism funding bill<sup>15</sup>—largely circumvents the spirit and effectiveness of the UMRA. Unfortunately for states, the only recourse for challenging the imposition of unfunded mandates through federal litigation is guided by a doctrine that heavily favors federal interests.

In the 1987 case *South Dakota v. Dole*, the Supreme Court upheld Congress’ authority to threaten reductions in federal highway funds given to states in order to encourage them to raise the alcohol purchasing age.<sup>16</sup> This decision established a wide berth for the federal government to impose restrictions and demands on state governments without breaking the limits of constitutional checks and balances. Under *Dole*, Congress may exercise its spending power by conditioning funding on state behavior, provided that the condition is in pursuit of the “general welfare,” is unambiguous, is related to the federal interest of the original legislation, and is otherwise constitutional.<sup>17</sup> In addition to outlining these vague restrictions, the Court also stated that a financial inducement offered by Congress may not be “so coercive as to pass the point at which ‘pressure turns into compulsion.’”<sup>18</sup> However, the Court held that the withholding of five percent of federal highway funds from South Dakota was merely “mild encouragement,” not unconstitutional coercion.<sup>19</sup> Put in context of real dollars in 2008, however, that mild encouragement, when considered alongside other similar policies, quickly adds up to what is effectively a policy of coercion. A withholding of five percent of total Fiscal Year 2009 federal highway dollars could cost a state between \$6.9 million (Delaware) and \$157 million (California).<sup>20</sup> This withholding could equal more than one-half of one percent of a state’s entire budget and could cause its budget gap to increase by twenty percent for Fiscal Year 2009.<sup>21</sup> Under the *Dole* test, each instance of federal encourage-

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<sup>13</sup> See, e.g., DEWITT JOHN ET AL., NAT’L ACAD. OF PUB. ADMIN., BEYOND PREEMPTION: INTERGOVERNMENTAL PARTNERSHIPS TO ENHANCE THE NEW ECONOMY 37 (2006) (on file with the Harvard Law School Library), available at [http://www.napawash.org/Beyond\\_Preemption.pdf](http://www.napawash.org/Beyond_Preemption.pdf).

<sup>14</sup> Pub. L. No. 109-13, div. B, § 106(a)(1)(B), 119 Stat. 302, 310 (codified at 49 U.S.C. § 30301 (Supp. V 2005) (amended 2007)).

<sup>15</sup> Emergency Supplemental Appropriations Act for Defense, The Global War on Terror, and Tsunami Relief Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005).

<sup>16</sup> 483 U.S. 203 (1987).

<sup>17</sup> *Id.* at 207–08.

<sup>18</sup> *Id.* at 211 (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)).

<sup>19</sup> *Dole*, 483 U.S. at 211.

<sup>20</sup> Notice from Fed. Highway Admin., U.S. Dep’t of Transp., Advance Notification of Federal-Aid Highway Funds To Be Apportioned on October 1, 2008 (June 30, 2008), <http://www.fhwa.dot.gov/legisregs/directives/notices/n4510682/n4510682.pdf> (on file with the Harvard Law School Library).

<sup>21</sup> Compare McNICHOL & LAV, *supra* note 6, at 2–3 tbl. 1, with Notice from Fed. Highway Admin., U.S. Dep’t. of Transp., *supra* note 20.

ment is challenged and considered individually.<sup>22</sup> But when unfunded mandates are considered as a whole, gentle encouragement becomes strong coercion.

This Article does not purport to offer a better judicial test for courts to use to root out federal coercion, nor does it give extensive consideration to the constitutional question of whether the Framers' intent is preserved under the current judicial standard. Instead, our aim has been to provide readers with an understanding of the substantial financial pressures facing state governments, given the balanced budget requirements of some state constitutions and the considerable margin given to federal authorities to impose unfunded mandates. With that understanding in mind, it is time to consider some individual policy areas, the challenges imposed on states by federal mandates, and federal preemption policies, which may make states' jobs even harder.

## II. FEDERAL REQUIREMENTS THAT MAKE A STATE'S JOB HARDER

In confronting the evidence we have presented regarding the aggregate budget gaps states will face in fiscal year 2009 and the total costs that unfunded federal mandates place on state services, one might assume that those costs are tied up in administrative shuttling and government-to-government budgeting that holds little importance in Americans' lives. When one hears complaints of "billions of dollars of shortfall" in state budgets, it is hard to comprehend the precise effect on the day-to-day functioning of a state government. However, unfunded federal mandates impose real costs on state governments and citizens. An examination of specific state policy priorities like public education, alongside federal mandates like No Child Left Behind, gives greater insight into how constraints on innovation and shortfalls of federal monies increase states' burdens.

### A. *Leaving Every School Board Behind*

Control over education policy and public education has traditionally been exercised by state and local bodies. Although the federal government has put significant policies in place either to force desegregation or to mandate that schools make modifications to accommodate disabled students, most federal educational policy in the last thirty years has been limited to the reauthorization of past spending measures and equality programs.<sup>23</sup> Over the last eight years, however, federal mandates on education spending and fed-

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<sup>22</sup> See generally Regina R. Umpstead, *The No Child Left Behind Act: Is It an Unfunded Mandate or a Promotion of Federal Educational Ideals?*, 37 J.L. & EDUC. 193, 219–21 (2008) (listing additional examples of federal unfunded mandates held by courts to be non-coercive and surviving the *Dole* test, each of which could cost a state tens or hundreds of millions of dollars for noncompliance).

<sup>23</sup> See *id.* at 201.

eral regulation of education policy have increased. Despite these mandates, which upset the traditional state-level control of education policy, the funding for public education is still derived in large measure from the state and local level. "In the 2004–05 school year, 83 cents out of every dollar spent on education is estimated to come from the state and local levels (45.6 percent from state funds and 37.1 percent from local governments). The federal government's share is 8.3 percent."<sup>24</sup> Indeed, since 2004, federal dollars towards public education have fallen, while implementation mandates and punishments for non-compliance have started to take their tolls. Today, public schools receive just ninety-one cents for every dollar of funding they received from the federal government in 2004.<sup>25</sup> If the states are going to be required to fund the lion's share of public education, then they should be granted the autonomy to do with the funding what they wish. Furthermore, if the federal government is serious about improving public education, then it should be willing to listen to states and learn from their expertise in education policy.

During his first address to a joint session of Congress, President Bush spoke of his deep commitment to local control of public education. He said, "I believe in local control of schools. We should not and we will not run public schools from Washington, D.C."<sup>26</sup> Yet policies passed in Washington during his watch have wrested control of education policy from local governments. During President Johnson's Administration, Congress passed the Elementary and Secondary Education Act of 1965 (ESEA) to target funding for students in low-income schools and to help overcome the disparities of segregated public education. The latest reauthorization of ESEA came in 2002 and is commonly known as No Child Left Behind (NCLB).<sup>27</sup> NCLB purports to combine a focus on underperforming schools and local flexibility with greater accountability for improved student performance; but, in fact, NCLB displaces state education decisions with a federal education policy. For instance, NCLB mandates that schools "administer annual tests in reading and mathematics for students in grades three through eight, requires that schools make adequate yearly progress towards improving student performance, establishes a series of required actions for schools that fail to meet such performance standards, and adds new requirements regarding teacher

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<sup>24</sup> U.S. DEP'T OF EDUC., 10 FACTS ABOUT K-12 FUNDING 2 (2005) (on file with the Harvard Law School Library), available at <http://www.ed.gov/about/overview/fed/10facts/10facts.pdf>. The remaining funds come from private sources, mostly for private schools. *Id.*

<sup>25</sup> SHARON PARROTT ET AL., CTR. ON BUDGET & POLICY PRIORITIES, BUSH BUDGET WOULD CUT DOMESTIC DISCRETIONARY SPENDING PROGRAMS BY \$20 BILLION IN 2009 6 (2008) (on file with the Harvard Law School Library), available at <http://www.cbpp.org/2-20-08bud.pdf>.

<sup>26</sup> President George W. Bush, First Address to Joint Session of Congress, (Feb. 27, 2001) (on file with the Harvard Law School Library), available at <http://www.washingtonpost.com/wp-srv/onpolitics/transcripts/bushtext022701.htm>.

<sup>27</sup> Pub. L. No. 89-10, 79 Stat. 27 (codified as amended at 20 U.S.C.S. §§ 6301-7941).

qualifications.”<sup>28</sup> The NCLB metrics also deny state officials the ability to adopt nuanced and customized approaches to improving education because they measure students’ improved performance in groups, not individually, and mandate that entire groups must improve if a school is to avoid sanction.

NCLB constricts the ability of state and local officials to move resources where they are most needed and coerces state officials into implementing educational policy preferences established by the federal government by creating conditional funding for Title I—the section of ESEA directed at improving schools in economically disadvantaged areas—based on census data and national standards. For example, NCLB led Kansas to abandon a successful statewide protocol in favor of additional national tests because of the fear of losing federal funding. Although state education officials would prefer technical assistance with incentives for improvement, the NCLB structure uses sanctions to push for increased test scores.

The text of NCLB explicitly states that “[n]othing in this Act shall be construed to . . . mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act.”<sup>29</sup> The Department of Education contends NCLB is federally funded at adequate levels, that state and local governments are expected to contribute additional funds as part of the agreement for accepting the federal NCLB funds, and that such an agreement is clear from the text of the legislation. The Secretary of Education under the Bush Administration, Margaret Spellings, “consistently maintained that school districts must comply with NCLB requirements even if they must spend non-federal funds to do so.”<sup>30</sup>

However, despite the funding conditioned on compliance with NCLB, the reality is that this legislation imposes incredible costs on states and local school boards, which must comply with standards for testing and annual progress goals on standardized tests or risk losing educational monies and having schools closed. These costs must be balanced alongside other considerations that state and local officials must address, such as dealing with local parent groups, collective bargaining agreements, and the demands of local businesses for qualified workforces.

The legislation further requires states to set aside for school improvements four percent of the Title I funds they receive, but it does not allow states to reduce from the previous year any school district’s Title I funds. As a result, states have had to contribute significantly greater state funds to implement the legislation.<sup>31</sup> Since 2002, states have put over \$2.6 billion of

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<sup>28</sup> JODY FEDER, CONG. RESEARCH SERV., THE NO CHILD LEFT BEHIND ACT AND “UNFUNDED MANDATES” (2008) (unpublished report, on file with the Harvard Law School Library).

<sup>29</sup> 20 U.S.C. § 7907(a) (2006).

<sup>30</sup> Sch. Dist. of Pontiac v. Sec’y of the U.S. Dep’t of Educ., 512 F.3d 252, 260 (6th Cir. 2008) (*vacated & en banc reh’g granted*).

<sup>31</sup> See GOV’T. ACCT. OFF., NO CHILD LEFT BEHIND ACT: EDUCATION ACTIONS COULD IMPROVE THE TARGETING OF SCHOOL IMPROVEMENT FUNDS TO SCHOOLS MOST IN NEED OF ASSISTANCE 4 (2008) (on file with the Harvard Law School Library), available at <http://gao.gov/new.items/d08380.pdf>.

state dollars towards school improvement, compared with \$1.3 billion from federal Title I funds over the same period.<sup>32</sup>

The cost of compliance with the conditional funding requirements of NCLB, particularly the testing and choice of school provisions, has been so onerous as to motivate one school district to sue the U.S. Department of Education, alleging that the threat of withholding Title I funds for non-compliance exceeded the Spending Power and violated the *Dole* test.<sup>33</sup> In January 2008, the Sixth Circuit overturned a district court opinion that dismissed the school district's case.<sup>34</sup> In May 2008, that decision was suspended as the Sixth Circuit decided to rehear the case *en banc*.<sup>35</sup>

Whatever the outcome of the litigation, what should be clear is how much time and effort has been wasted in inter-governmental battles over what should be common objectives. Federal, state, and local officials all want better schools and a better educational system. In attempting to excise the problems of low test scores and underperforming schools, however, the Department of Education under President Bush proceeded with the precision of a sledgehammer rather than a scalpel. By removing the flexibility for schools and states to allocate funds as they deem best, the Department of Education and the federal government have created a fight where none need exist. Local and federal officials need to engage in more constructive dialogue about how to create a better education policy. Federal and state education officials need a forum in which they can discuss education policy and funding priorities without resorting to litigation. Courtrooms should not be the only place in which federal and state officials are willing openly to discuss views on how to improve America's schools.

### *B. An Unhealthy Mandate—The CMS SCHIP Letter*

In education policy, the breakdown in communication between the federal and state levels came in the form of unfunded mandates and strict control over what state officials could and could not do to improve public education. In the health care arena, state officials must deal with a different federal burden, that of falling federal support and interest in the face of a mounting crisis. Health care costs are incurred at the local level—in the doctor's office, the emergency room, and the pharmacy—and federal programs exist that purport to reimburse these costs. The disconnect occurs when the federal government excessively disputes reimbursement expenses,

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<sup>32</sup> *Id.*

<sup>33</sup> *Schl. Dist. of Pontiac v. Sec'y of the U.S. Dep't of Educ.*, No. Civ. A. 05-CV-71535-D, 2005 WL 3149545 (E.D. Mich. Nov. 23, 2005), *rev'd*, 512 F.3d 252 (6th Cir. 2008), *vacated & en banc reh'g granted* No. 05-2708 (6th Cir. May 1, 2008), *available at* [http://www.edweek.org/media/ca6\\_order\\_granting\\_rehearing\\_en\\_banc.pdf](http://www.edweek.org/media/ca6_order_granting_rehearing_en_banc.pdf). *See also* FEDER, *supra* note 28.

<sup>34</sup> 512 F.3d at 273.

<sup>35</sup> *Schl. Dist. of Pontiac*, No. 05-2708. The case has yet to be reheard as this Article goes to print.

curtails coverage for groups like low-income children, or flatly refuses to reimburse costs.

The issue of universal health care has received considerable attention in the United States. The authors sincerely hope that a universal health care policy comes to fruition in the near future. In a short while, perhaps it will be unnecessary to consider how health policies to cover the underinsured should be designed or whether the federal or state governments should be responsible for funding the coverage. Until that time, however, health care and health insurance coverage in this country will remain one of the most important and contentious issues between federal and state governments. The size of government expenditures on health care, not to mention the vital importance that health care coverage plays in the daily life of every American, demands consideration and attention.

Medicaid,<sup>36</sup> designed and enacted during the Johnson Administration, is a health insurance program for low-income individuals with children, persons with disabilities, and older Americans who require care beyond what Medicare will cover. In 2001, 46 million Americans, fifty percent of whom were children, were given health insurance coverage under Medicaid.<sup>37</sup> Medicaid is jointly funded by state and federal funds and managed by each state government. On a national average, "Medicaid coverage . . . currently comprise[s] about 22 percent of state budgets."<sup>38</sup> The State Children's Health Insurance Program (SCHIP),<sup>39</sup> passed as part of the Balanced Budget Act of 1997, provides health care coverage for the children of families with incomes high enough to disqualify them from Medicaid coverage but insufficient to obtain private health insurance. Like Medicaid, each state has adopted its own approach to SCHIP, based on the needs of its citizens and the financial capabilities of its state coffers.

In the federal government, health care falls within the purview of the Department of Health and Human Services (HHS). Within HHS, SCHIP and Medicaid are administered by the Centers for Medicare & Medicaid Services (CMS). HHS has delegated statutory authority for the administration of the SCHIP program, including the approval of state plans and proposals, to the CMS Administrator.<sup>40</sup> This official has the ability to issue letters to State Health Officials advising them of changes in federal law, clarifying policies for approval of state plans, and keeping state officials aware of

<sup>36</sup> Social Security Act of 1965, Pub. L. No. 89-97, 79 Stat. 286 (codified at 42 U.S.C. 1396).

<sup>37</sup> Ctrs. for Medicare & Medicaid Servs., U.S. Dep't of Health & Human Servs., Medicaid Program—General Information, Technical Summary, [http://www.cms.hhs.gov/MedicaidGenInfo/03\\_TechnicalSummary.asp](http://www.cms.hhs.gov/MedicaidGenInfo/03_TechnicalSummary.asp) (last visited Nov. 23, 2008) (on file with the Harvard Law School Library).

<sup>38</sup> *Economic and Fiscal Conditions of the States: Hearing on State Economic Conditions Before the S. Comm. on Finance*, 110th Cong. 4 (2008) (written statement of Janet Napolitano, Governor of Arizona) (on file with the Harvard Law School Library), available at <http://finance.senate.gov/hearings/testimony/2008test/022608jntest.pdf>.

<sup>39</sup> Pub. L. No. 104-121, 110 Stat. 847 (1997) (codified at 42 U.S.C. §§ 1397aa-1397jj).

<sup>40</sup> Implementing Regulations for the State Children's Health Insurance Program, 64 Fed. Reg. 60,882 (proposed Nov. 8, 1999).

changes in coverage. In the ten years since its passage in 1997, SCHIP was often the example highlighted by supporters of a constructive federal-state relationship.<sup>41</sup> Although there were standards that states had to meet to obtain approval for their plans, HHS and CMS seemed willing to listen to input from state officials and to give states the freedom and flexibility to adapt their plans to best meet the needs of children lacking health care. The success of that relationship, and the future of health care collaboration between federal and state governments in general, took a dramatic turn for the worse late in the summer of 2007.

On August 17, 2007, CMS sent a letter to State Health Officials, notifying them that no state plans could cover children whose families had incomes exceeding 250% of the Federal Poverty Level (FPL), unless that state had covered at least ninety-five percent of the children whose families' incomes were below 200% of the FPL.<sup>42</sup> Under this policy, even if a state had met the ninety-five percent level of coverage, CMS would have required that state to impose a twelve month waiting period before extending coverage to children in families earning over 250% of the FPL.<sup>43</sup> To date, no state has reached a level of ninety-five percent coverage for children in families earning under 200% of the FPL. The letter described five policies that states were to use to prevent "crowding-out" by low-income families choosing to use SCHIP insurance instead of privately offered insurance, which they otherwise would have purchased. Essentially, the August 17 letter encouraged State Health Officials to make it more difficult for those low-income families earning over 250% of the FPL level to get public health insurance for their children.

At the time the letter was issued, eighteen states and the District of Columbia had in place SCHIP eligibility thresholds above 250% of the FPL, while another eight states had adopted such eligibility requirements but had

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<sup>41</sup> See *Concerning Health Insurance for Children and Reauthorization of the State Children's Health Insurance Program: Hearing Before the Subcomm. on Health of the H. Comm. on Energy and Commerce*, 110th Cong. 7 (2007) (statement of Alan R. Weil, Exec. Director, National Academy of State Health Policy).

<sup>42</sup> Letter from Dennis G. Smith, Dir., Ctr. for Medicaid and State Operations, to State Health Officials, SHO #07-001 (Aug. 17, 2007), <http://www.cms.hhs.gov/smdl/downloads/SHO081707.pdf> (on file with the Harvard Law School Library). On May 7, 2008, CMS released a second letter clarifying the August 17 letter and substantially qualifying its terms. NATIONAL COUNCIL FOR COMMUNITY BEHAVIORAL HEALTHCARE, POLICY RESOURCES: CMS LETTER CLARIFYING 2007 SCHIP DIRECTIVE, [http://www.thenationalcouncil.org/cs/cms\\_letter\\_clarifying\\_2007\\_schip\\_directive](http://www.thenationalcouncil.org/cs/cms_letter_clarifying_2007_schip_directive) (last visited Nov. 24, 2008); see also Letter from U.S. Government Accountability Office to Sen. John D. Rockefeller and Sen. Olympia Snowe, GAO # B-316048, (Apr. 17, 2008), <http://www.gao.gov/decisions/other/316048.pdf>; Robert Pear, *President is Rebuffed on Program for Children*, N.Y. TIMES, Apr. 19, 2008, at A10. Nonetheless, we discuss the August 17 letter and the policies it sought to implement because they are illustrative of the damaging approach to federalism taken by the federal government in recent years.

<sup>43</sup> See CTR. FOR CHILDREN & FAMILIES, GEORGETOWN UNIV. HEALTH POLICY INST., CMS AUGUST 17TH DIRECTIVE FACT SHEET (2008) (on file with the Harvard Law School Library), available at <http://ccf.georgetown.edu/index/cmsdirective> (follow "CCF Fact Sheet on the directive" hyperlink).

not yet implemented them.<sup>44</sup> To comply with the new guidelines, some states might have been forced to refuse coverage to otherwise eligible children.<sup>45</sup> In response, several states including New Jersey, New York, Illinois, Maryland, and Washington filed lawsuits against HHS, challenging the validity of the CMS letter on procedural grounds.<sup>46</sup> The Government Accountability Office and the Congressional Research Service sided with the states, concluding that the CMS letter represented a new rule and should have been submitted to Congress for review.<sup>47</sup> In the end, the Bush administration relented, first softening the terms of the August 17 directive and then announcing in August 2008 that states would not be penalized for non-compliance with it.<sup>48</sup>

The controversy over the CMS letter demonstrates the extent to which communication between federal agencies and the states broke down during the Bush years, transforming SCHIP from a model of federal-state cooperation into an emblem of federal-state dysfunction. Indeed, the approach taken by CMS and the President—the setting of a standard that not one state has ever met—is a counterintuitive approach to problem solving. Instead of encouraging states to safeguard the health of their low-income citizens in a manner suited to their needs, the federal government imposed, without discussion or negotiation, a one-size-fits-all mandate. In appropriating monies to help states insure children, it denied states the opportunity to use their expertise and creativity to help determine how those monies could most effectively be spent. When forced to choose between acting on the basis of federalist principles or deferring to the private insurance market, the Bush administration chose the latter. It sacrificed federalist principles to the principles of forced federalization.

“The President’s fiscal year 2009 budget, if enacted, would go even farther and decrease federal Medicaid investment by an additional \$18.2 bil-

<sup>44</sup> MORTON ROSENBERG, CONG. RESEARCH SERV., APPLICABILITY OF THE CONGRESSIONAL REVIEW ACT TO A CMS GUIDANCE DOCUMENT REGARDING STATUTORY AND REGULATORY REQUIREMENTS TO BE USED IN REVIEWING STATE REQUESTS TO EXTEND ELIGIBILITY UNDER SCHIP 3 (2008) (unpublished report, on file with the Harvard Law School Library), available at <http://ccf.georgetown.edu> (search “Rosenberg”; follow “Memorandum” hyperlink).

<sup>45</sup> See *id.*

<sup>46</sup> See *New York v. U.S. Dep’t of Health & Human Servs.*, No. 07-CIV-8621 (S.D.N.Y. filed Oct. 4, 2007), available at <http://ccf.georgetown.edu/index/lawsuits> (follow “Multi-State Lawsuits” hyperlink); *New Jersey v. U.S. Dep’t of Health and Human Servs.*, No. 3:07-CV-04698-JAP-JJH (D.N.J. filed Oct. 10, 2007), available at <http://ccf.georgetown.edu/index/lawsuits> (follow “New Jersey Lawsuit” hyperlink).

<sup>47</sup> See ROSENBERG, *supra* note 44, at 1; GARY L. KEPPLINGER, GEN. COUNSEL, U.S. GOV’T ACCOUNTABILITY OFFICE, B-316048, APPLICABILITY OF THE CONGRESSIONAL REVIEW ACT TO LETTER ON STATE CHILDREN’S HEALTH INSURANCE PROGRAM 1 (2008) (on file with the Harvard Law School Library), available at <http://www.gao.gov/decisions/other/316048.pdf>.

<sup>48</sup> For the softening of terms, see Letter from Herb B. Kuhn, Acting Dir., Ctr. for Medicaid and State Operations, to State Health Officials, SHO #05-0708 (May 7, 2008), <http://www.cms.hhs.gov/SMDL/downloads/SHO050708.pdf> (on file with the Harvard Law School Library) (attempting to address state concerns about the August 17 letter and emphasizing the letter’s inapplicability to children already enrolled in SCHIP programs). For the announcement on the removal of penalties, see *Children’s Health Insurance Decision*, N.Y. TIMES, Aug. 15, 2008, at A12.

lion over five years.”<sup>49</sup> During the last recession, thirty-four states cut eligibility for public health programs, stripping over one million people of their coverage.<sup>50</sup> The goal of universal health care has been mentioned as a top priority for both President Obama and the 111th Congress.<sup>51</sup> A shift of this magnitude, however, will take considerable time and effort to be passed into law and implemented. In the interim, the federal government could rescind some of the constraints put in place by CMS under the Bush Administration. The new federal executive authorities must be cognizant that while they negotiate new programs in Washington, D.C., children live without state health care coverage because of federal regulations.

Regardless of what role SCHIP plays in future health care plans, the new administration should immediately rescind the August 17 CMS directive as a first step towards restoring federal-state cooperation. The new administration should also commit the necessary resources to state administered health care programs generally, recognizing that in past times of financial turmoil, states have often been forced to cut their health care offerings as a result of budgetary constraints.<sup>52</sup>

### C. *A License to Burden: SCAAP and REAL ID*

As we have seen, No Child Left Behind and the State Children’s Health Insurance Program illustrate the recent deterioration of federal-state relations in two policy areas that have traditionally been within the purview of the states—education and health care. For ten years, state officials were able to work within SCHIP in a way that responded to the differences among the states and allowed for local innovation. For decades, local school boards and state legislatures were able to design funding formulas and curricula with minimal interference from the federal government. By intervening in both areas, the Bush administration expanded the role of the federal government in traditionally state affairs and left less room for experimentation and flexibility.

At the same time, the federal government disengaged from some areas where its assistance would have been helpful by offloading responsibility, legwork, and funding onto state governments. While the Bush Administration intruded on state sovereignty in areas where its interference was unwelcome, it often left the states to fend for themselves in areas where the federal government could have lent a hand. We now turn to two federal programs that address the increasingly salient issue of illegal immigration, which provide examples of the federal government’s recent shortcomings in federal-

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<sup>49</sup> *Economic and Fiscal Conditions of the States*, *supra* note 38.

<sup>50</sup> McNICHOL & LAV, *supra* note 6.

<sup>51</sup> Donna Smith, *Experts Urge More Health Care Aid to States*, REUTERS, NOV. 13, 2008, available at <http://uk.reuters.com/article/healthNews/idUKTRE4AC72620081113>.

<sup>52</sup> See McNICHOL & LAV, *supra* note 6, at 4 (“[I]n the last recession, some 34 states cut eligibility for public health programs, causing well over 1 million people to lose health coverage, and at least 23 states cut eligibility for child care subsidies.”).

state relations. Because the nation's borders stretch across thousands of miles and more than a dozen states, the federal government should play a leading role in the enforcement of immigration laws. But in recent years, the federal government has relied on two programs—SCAAP and REAL ID—that have shifted the burdens of immigration enforcement onto the states. Even worse, the programs have never been adequately funded.

### 1. *The SCAAP Tab*

The State Criminal Alien Assistance Program (SCAAP) was designed to reimburse states for the costs of capturing, transporting, and incarcerating individuals who, after entering the United States illegally, commit additional crimes.<sup>53</sup> Whenever a state incarcerates such an individual for a period of more than four days, the state becomes eligible for federal reimbursement if the prisoner is not otherwise transferred to a federal facility.<sup>54</sup> SCAAP grants the Department of Homeland Security (“DHS”) the authority to determine the level of reimbursement each state will receive, based on a variety of factors.<sup>55</sup> At first glance, SCAAP might appear to offer a promising opportunity for federal-state cooperation. The federal government has an interest in detaining criminals who enter the United States illegally, and by offering to reimburse states for the costs of dealing with them, it can encourage states not to release these criminals prematurely as a result of financial pressures.

Unfortunately, in practice, the federal government has regularly chosen not to reimburse states for the costs incurred, and so this program—seemingly designed in the spirit of fairness and cooperation between the federal and state levels of government—fails to create a productive intergovernmental relationship.<sup>56</sup> Each year of her tenure, Arizona Governor Janet Napolitano sent the federal government a bill for the amount her state spent incarcerating, feeding, and processing the roughly 300,000 undocumented immigrant criminals who entered the United States illegally, broke the law here, and were detained by state officials.<sup>57</sup> As she told Congress in February 2008, “I have regularly billed the Department of Justice for the costs of illegal immigrants in the Arizona prison system. The federal government now owes Arizona at least \$419 million, which, if paid, would significantly reduce the deficit we are incurring during this economic downturn.”<sup>58</sup> In her

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<sup>53</sup> The program was created in the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, 1823–24 (codified as amended at 8 U.S.C. § 1231(i) (2006)).

<sup>54</sup> See Bureau of Justice Assistance, State Criminal Alien Assistance Program (SCAAP), <http://www.ojp.usdoj.gov/BJA/grant/scaap.html> (last visited Nov. 18, 2008) (on file with the Harvard Law School Library).

<sup>55</sup> See *id.*

<sup>56</sup> See Greg K. Venbrux, *Devolution or Evolution? The Increasing Role of the State in Immigration Law Enforcement*, 11 UCLA J. INT'L L. & FOREIGN AFF. 307, 335 (2006).

<sup>57</sup> See *Economic and Fiscal Conditions of the States* *supra* note 38, at 9.

<sup>58</sup> *Id.*

testimony, Governor Napolitano noted that, increasingly, the Bureau of Justice Assistance (BJA) is withholding SCAAP funds and allocating some to federal administrative costs, while other funds' final destinations are simply never reported.<sup>59</sup> Arizona is hardly the only state dealing with unsettled SCAAP tabs, and indeed the problem stretches to areas of the country far removed from the Southwestern United States. Although states bordering Mexico are often hardest hit by lack of immigration funds, the State of Washington spent over \$25 million on the temporary incarceration of undocumented immigrant criminals in 2005 alone.<sup>60</sup> It received only \$1.72 million in reimbursement.<sup>61</sup> Across the country, states continue to bear the financial burdens of immigration enforcement. Through SCAAP, the federal government has implicitly recognized the leading role it must play in immigration matters, but as in the case of No Child Left Behind, it has failed to back up its vision of expanded federal involvement with adequate federal funds.

## 2. *Real Problems With REAL ID*

The REAL ID Act of 2005 (REAL ID) was intended to strengthen national security by establishing minimum nationwide standards for drivers' licenses and other identification cards.<sup>62</sup> To achieve this goal, REAL ID created a set of document requirements and issuance standards that every state would have to follow in order to make its licenses acceptable for "federal use."<sup>63</sup> Federal use includes "accessing Federal facilities, boarding federally regulated commercial aircraft, entering nuclear power plants, and any other purposes that the Secretary [of Homeland Security] shall determine."<sup>64</sup> In order for their citizens to continue using their drivers' licenses for many common purposes, such as boarding an airplane, the states will now have to revamp their licensing procedures to meet standards established by the federal government. Beyond the issue of conditional funding, REAL ID threat-

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<sup>59</sup> *Id.* ("If, in fiscal year 2006, BJA withheld \$14.1 million for Federal administrative costs (2.3 percent more than in fiscal year 2005), then SCAAP payments should have totaled \$52 million more than the actual amount paid. Though some of this funding was later reinstated, I request that Congress, in its oversight capacity, ask BJA to account in writing for these \$66 million in unobligated funds, including why these funds were targeted and why no one was notified.")

<sup>60</sup> *The Impact of Immigration on States and Localities: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law of the H. Comm. on the Judiciary*, 110th Cong. 6 (2007) (written statement of Rep. Sharon Tomiko Santos, Washington State House of Representatives and Co-Chair, Executive Committee Task Force on Immigration and the States, National Conference of State Legislatures) (on file with the Harvard Law School Library), available at <http://judiciary.house.gov/hearings/May2007/Santos070517.pdf>.

<sup>61</sup> *Id.*

<sup>62</sup> Cf. Michael J. Allen, *A Choice That Leaves No Choice: Unconstitutional Coercion Under REAL ID*, 32 SEATTLE U. L. REV. 231, 233 (2008) (proponents of REAL ID arguing that state-issued licenses create "a security risk that only federal standards can mitigate").

<sup>63</sup> REAL ID Act of 2005 § 202(a), 49 U.S.C. § 30301 (Supp. V 2005).

<sup>64</sup> *Id.* at § 201(3) (clarifying the term "official purpose" in, for example, § 202(a)(1)).

ens to limit the ability of states' citizens to move freely about the United States. It represents one of the most intrusive mandates placed on states and their citizens during the Bush years.

The burdens imposed on states by REAL ID are twofold. First, the program deprives states of their discretion over the procedures for screening new applicants. Before issuing an ID, states are required to demand, among other things, proof of the applicant's legal status and citizenry, proof of the applicant's Social Security Number, documentation stating the person's present residence, and a current photo ID containing the applicant's date of birth.<sup>65</sup> These requirements threaten to transform the traditional function of state motor vehicles offices. It would not be an exaggeration to say that once REAL ID has been fully implemented, motor vehicles offices will become immigration enforcement centers. Instead of performing their function of approving or declining permission for each applicant to operate a motor vehicle, DMV offices will become impromptu border check points, responsible for verifying the legal right of persons to remain in the United States.<sup>66</sup>

The second burden, stemming from the first, is the massive cost that states will incur in redesigning, issuing, and tracking the new licenses. Among other demands, REAL ID requires states to verify, "with the issuing agency, the issuance, validity, and completeness of each document" presented by applicants;<sup>67</sup> to make digital copies of all documents;<sup>68</sup> to photograph all applicants;<sup>69</sup> to strengthen the physical security of document storage locations;<sup>70</sup> to heighten employee security procedures and training;<sup>71</sup> and to make the collected licensee information accessible to other states in a nationwide electronic database.<sup>72</sup> Implementing these procedures will require substantial investment. To give a sense of the magnitude of work involved, consider that "all 245 million existing card holders will have to return in person to their DMV as if they were first time applicants," in addition to those who are seeking an identification card or driver's license for the first time.<sup>73</sup> Numerous federal databases will have to be connected to each state, and each state will become largely responsible for obtaining and man-

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<sup>65</sup> *Id.* at § 202(c).

<sup>66</sup> The enforcement of REAL ID has been repeatedly delayed. All fifty states, as well as the District of Columbia, applied for and were granted compliance extensions until December 31, 2009. States meeting certain benchmarks will be granted automatic second extensions until May 11, 2011. See Dep't of Homeland Sec., REAL ID: States Granted Extensions, [http://www.dhs.gov/xprevprot/programs/gc\\_1204567770971.shtm](http://www.dhs.gov/xprevprot/programs/gc_1204567770971.shtm) (last visited Nov. 18, 2008) (on file with the Harvard Law School Library).

<sup>67</sup> REAL ID Act of 2005 § 202(c)(3), 49 U.S.C. § 30301.

<sup>68</sup> *Id.* at § 202(d)(1).

<sup>69</sup> *Id.* at § 202(d)(3).

<sup>70</sup> *Id.* at § 202(d)(7).

<sup>71</sup> *Id.* at § 202(d)(8)–(9).

<sup>72</sup> *Id.* at § 202(d)(12).

<sup>73</sup> *Understanding the Realities of REAL ID: A Review of Efforts to Secure Drivers' Licenses and Identification Cards: Hearing Before the Oversight of Government Management, the Federal Workforce, and the District of Columbia Subcomm. of the S. Comm. on Homeland Security and Governmental Affairs*, 110th Cong. 3 (2007) (statement of Sen. Leticia Van de Putte, Texas State Senate and President, National Conference of State Legislatures) (on file

aging the necessary technology. Though DHS estimated the cost of implementation at \$3.9 billion, independent estimates have risen as high as \$11 billion.<sup>74</sup> By comparison, Congress has appropriated only \$90 million towards helping states carry out these improvements, and in his 2009 budget, President Bush assigned zero dollars to the specific goal of REAL ID implementation.<sup>75</sup>

In the face of daunting costs and an unreasonable timeline, many state legislatures and governors have decided to take stands against REAL ID, undeterred by the promulgation of the final REAL ID regulation on January 29, 2008.<sup>76</sup> Only six states have passed legislation that accepts or adopts the minimum federal standards of REAL ID,<sup>77</sup> while twenty-four states have proposed legislation that “either prohibits state compliance with the act or urges Congress to amend or repeal REAL ID.”<sup>78</sup> Further state legislative activity is pending.<sup>79</sup> Defiant legislation passed in Montana rejects the REAL ID Act in rallying terms, finding it “inimical to the security and well-being of the people of Montana” and a cause of “unneeded expense and inconvenience” that violates “the principles of federalism contained in the 10th amendment to the U.S. [C]onstitution.”<sup>80</sup> The legislation goes on to instruct any department, including the motor vehicle department, to alert the Governor of Montana if it detects any attempt to implement REAL ID in the state.<sup>81</sup>

Because REAL ID arises out of national concerns such as immigration and national security, it should be funded at the national level. Instead—because the federal government demands a full account of who is and is not in the country legally but lacks the infrastructure and know-how to conduct a complete check—it passes the costs of implementation on to the states. This is yet another example of the federal government saddling the states with a financial obligation that they are unsuited to carry out but, in practice, are unable to reject. Whether REAL ID violates the Tenth Amendment and the *Dole* test may be a question for the courts, but it is clear that the program upends the balance of responsibilities and support that should exist between the federal government and the states.

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with the Harvard Law School Library), available at [http://hsgac.senate.gov/public/\\_files/testimonyvanputte.pdf](http://hsgac.senate.gov/public/_files/testimonyvanputte.pdf).

<sup>74</sup> *Economic and Fiscal Conditions of the States*, supra note 38, at 10. See also *The Impact of Implementation*, supra note 10, at 3.

<sup>75</sup> *Economic and Fiscal Conditions of the States*, supra note 38 at 10.

<sup>76</sup> See Minimum Standards for Driver’s Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes, 73 Fed. Reg. 5,272 (Jan. 29, 2008) (to be codified at 6 C.F.R. pt. 37).

<sup>77</sup> See TODD B. TATELMAN, CONG. RESEARCH SERV., THE REAL ID ACT OF 2005: LEGAL, REGULATORY, AND IMPLEMENTATION ISSUES 19 (2008) (unpublished report, on file with the Harvard Law School Library), available at <http://www.fas.org/sgp/crs/misc/RL34430.pdf>.

<sup>78</sup> *Id.*

<sup>79</sup> See *id.*

<sup>80</sup> MONT. CODE ANN. § 61-5-128(1) (2007).

<sup>81</sup> *Id.* § 61-5-128(2).

## III. WHAT LIES AHEAD: CLIMATE CHANGE AND FEDERAL PREEMPTION

Until this point, this Article has considered affirmative steps taken by the federal government that have imposed burdens, financial or otherwise, on state governments. First, No Child Left Behind intervened in an area of public policy traditionally left to state and local officials. Second, restrictions on the State Children's Health Insurance Program threatened to limit states' ability to offer health care to low-income children. Third, SCAAP and REAL ID offloaded traditional federal immigration and national security responsibilities onto state governments. In each case, the federal government acted without consulting state officials and ignored local expertise. Each program also imposed financial burdens on states, which they were ill-equipped to bear.

The federal government under Bush seemed not to appreciate the burdens that are imposed on states when they are tasked with implementing federal legislation. In particular, the failure of the federal government to deliver funds as promised under certain programs, along with a substantial lag in what limited reimbursements states actually receive, undermines any program for federal and state collaboration. States under such conditions grow less committed to federal programs and are unable to steer those programs to align with their local priorities. Programs aimed at achieving federal-state cooperation should not deny state and local officials the opportunity to exercise initiative. These officials have developed expertise in implementing regulations and allocating funds in a vast array of policy areas. They should be listened to, but more importantly, they should be trusted with greater flexibility and room to innovate and adapt federal policy goals to their particular situations.

In addition to denying states initiative in policy areas traditionally reserved to the states, and in addition to burdening states with the responsibility for carrying out policies traditionally in the purview of the federal government, Bush-era federalism failed in a third way. By not addressing the problem of climate change, the Bush Administration shirked its responsibility in an area where the federal government alone has the power to initiate effective action. Climate change is a problem that faces the country and the planet as a whole, and it is one that states acting alone simply cannot solve. Unlike in the case of immigration enforcement, where the problem is national in scope but the solution necessarily lies in part with individualized state action, climate change requires a single, uniform, national policy. Until last year, however, the Environmental Protection Agency (EPA) declined to address the issue of climate change through the regulation of carbon emissions, arguing that Congress had not given it sufficient authority under the Clean Air Act to do so.

Twelve states and four municipalities and territories challenged the EPA's reluctance to regulate and won a landmark victory in the U.S. Su-

preme Court.<sup>82</sup> According to the Court, a state-by-state approach to global climate change would be inefficient and insufficient. Writing for the Court, Justice Stevens highlighted the limitations of states acting alone: “Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions, it cannot negotiate an emissions treaty with China or India, and in some circumstances the exercise of its police powers to reduce in-state motor-vehicle emissions might well be pre-empted.”<sup>83</sup> But the Court did not require the EPA to act immediately, nor did it establish guidelines for the EPA’s regulations. Instead, the Court sent the task back to the EPA, observing that the agency could “avoid taking further action only if it determines that greenhouse gases do not contribute to climate change.”<sup>84</sup> However, the Court deemed it “uncontested” that man-made climate change is creating ongoing harms.<sup>85</sup> Nonetheless, through the end of the Bush Administration, the EPA failed to offer any national plan for reducing the risk of real, “catastrophic harm”<sup>86</sup> as identified by the Court.

While the Bush Administration bided its time, state governments and local officials attempted to act. For instance, in April 2008, the Secretary of the Kansas Department of Health and Environment, Roderick L. Bremby, denied air quality permits for the Sunflower Electric Power Corporation, which was seeking to build two 700-megawatt, coal-fired power plants in the state.<sup>87</sup> Citing the similarities between the language in the Clean Air Act and the Kansas Air Quality Act, Secretary Bremby stated, “I believe it would be irresponsible to ignore emerging information about the contribution of carbon dioxide and other greenhouse gases to climate change and the potential harm to our environment and health if we do nothing.”<sup>88</sup> In response, state legislators attempted to override the Kansas Air Quality Act and effectively reverse Secretary Bremby’s decision.<sup>89</sup> Although legislation making such changes successfully passed both the Kansas House and Senate, Governor Sebelius, one of this Article’s authors, vetoed the measures, and efforts to override her vetoes proved unsuccessful.<sup>90</sup> Sunflower and sev-

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<sup>82</sup> See *Massachusetts v. EPA*, 127 S. Ct. 1438, 1446 nn.2–4 (2007).

<sup>83</sup> *Id.* at 1454.

<sup>84</sup> *Id.* at 1462.

<sup>85</sup> *Id.* at 1458.

<sup>86</sup> *Id.*

<sup>87</sup> Press Release, Kan. Dep’t of Health and Env’t, KDHE Denies Sunflower Electric Air Quality Permit (Oct. 18, 2007), [http://www.kdheks.gov/news/web\\_archives/2007/10182007a.htm](http://www.kdheks.gov/news/web_archives/2007/10182007a.htm) (on file with the Harvard Law School Library).

<sup>88</sup> *Id.*

<sup>89</sup> James Carlson, *No Charm for Coal Bill*, TOPEKA CAPITAL-JOURNAL, May 17, 2008, at 1A.

<sup>90</sup> John Hanna, *Sebelius vetoes third bill allowing coal-fired plants*, LJWORLD.COM, May, 17, 2008, [http://www2.ljworld.com/news/2008/may/17/sebelius\\_vetoes\\_third\\_bill\\_allowing\\_coalfired\\_plan/](http://www2.ljworld.com/news/2008/may/17/sebelius_vetoes_third_bill_allowing_coalfired_plan/) (last visited Dec 26, 2008).

eral local chambers of commerce have already begun litigation in Kansas courts.<sup>91</sup>

Other states have gone even further. In 2006, California enacted the first enforceable statewide program to cap greenhouse gas emissions.<sup>92</sup> While several other states have adopted emission targets, California's legislation is the only one that includes truly enforceable penalties for non-compliance.<sup>93</sup> The Global Warming Solutions Act requires the state to reduce its emissions to 1990 levels by 2020, using market-based mechanisms.<sup>94</sup> The draft plan for implementation from California's Air Resources Board includes strengthening the state's energy efficiency programs, expanding its use of renewable energy sources, implementing existing clean car standards, and developing a cap-and-trade system to create a regional market system with other western states.<sup>95</sup>

The state actions initiated by Secretary Bremby and California's Air Resources Board represent the only kind of action currently undertaken by any government in the United States: local and piecemeal. Unfortunately, these isolated actions can never supplant the need for federal action directed towards a national strategy and international cooperation. As ambitious as these state plans are, their contributions towards a global climate change solution pale in comparison to what might be accomplished with federal support and a national strategy. Climate change presents too large and too complex a challenge for any one state to handle on its own. Shifts in ocean temperatures, weather patterns, growing seasons, and disease transmission patterns are beyond the capacities of even the largest state government to address. Sadly, less than a year before the end of Bush's second term, the EPA announced that instead of issuing standards for the regulation of greenhouse gases, it would solicit public comment on the issue for several more months.<sup>96</sup> It effectively passed the issue off to the next administration.

<sup>91</sup> See Associated Press, *Court Hearing Set in Dispute Over Kansas Coal Plants*, JOP-LIN GLOBE, July 14, 2008, available at [http://www.joplinglobe.com/statenews/local\\_story\\_196232621.html](http://www.joplinglobe.com/statenews/local_story_196232621.html).

<sup>92</sup> See PEW CTR. ON GLOBAL CLIMATE CHANGE, *LEARNING FROM STATE ACTION ON CLIMATE CHANGE 12-13* (2008) (on file with the Harvard Law School Library), available at [http://www.pewclimate.org/docUploads/States%20Brief%20\(May%202008\).pdf](http://www.pewclimate.org/docUploads/States%20Brief%20(May%202008).pdf).

<sup>93</sup> See *id.* at 12.

<sup>94</sup> *Id.* See also ROBERT MELTZ, CONG. RESEARCH SERV., *CLIMATE CHANGE LITIGATION: A GROWING PHENOMENON* 25 n.98 (2007) (unpublished report, on file with the Harvard Law School Library), available at <http://ncseonline.org/NLE/CRSreports/07Dec/RL32764.pdf>.

<sup>95</sup> CAL. AIR RESOURCES BOARD, *CLIMATE CHANGE DRAFT SCOPING PLAN 8* (2006) (unpublished report, on file with the Harvard Law School Library), available at <http://www.arb.ca.gov/cc/scopingplan/document/draftscopingplan.pdf>.

<sup>96</sup> Juliet Eilperin & R. Jeffrey Smith, *EPA Won't Act on Emissions This Year*, WASH. POST, July 11, 2008, at A01.

## IV. 2009 AND BEYOND: A CHANCE TO LIGHTEN THE STATES' LOADS

Man-made climate change represents the new frontier in federal-state relations. Continued non-action by the federal executive branch will spark national opposition from state and local officials, and citizens will not stand by while their governments do nothing to address a problem so clearly visible to all. But the challenges faced by state and local officials range far beyond the policy areas addressed in this article. These challenges include funding and reimbursing medical care costs for the members of the National Guard and their families, both while the members are on duty and once they become veterans. They also include properly adjusting and administering the Federal Medical Assistance Percentages, the rates at which the federal government reimburses states for social service payments.<sup>97</sup> These rates deserve reexamination in light of the tighter state budgets and growing need for services that accompany tough economic times.<sup>98</sup> Additional vital programs too numerous to cover in this Article depend on functional, cooperative relationships between state and federal officials. Many of these policy areas will require a significant re-tooling of the lines of communication and collaboration between the state and federal levels of government. Above all, none of the policy challenges we face justifies inefficient approaches like further unfunded federal mandates, conditional spending, and refusals to address the challenges in implementing practical solutions.

The barriers to federal-state collaboration that have been erected over the last eight years must be dismantled. President Obama and the new Congress will have an opportunity to learn from President Bush's mistakes and call upon the expertise and experience that state and local officials can provide in implementing national programs aimed at solving major, even global, problems. By 2011, the United States will have at least nineteen new governors. In the two years before then, there is a tremendous opportunity for the newly sworn-in President Obama to benefit from the collective wisdom and best practices developed by state and local officials over the last decade.

The new Administration might take several steps to achieve this goal and repair federal-state relations. For instance, reinstating decision-making authority in regional federal offices and giving broad guidelines and maximum flexibility to states to be innovative would help to ensure timely program implementation and effective results. Additionally, most of the conditions on federal executive agency funding—from Federal Emergency Management Agency rebuilding to HHS waivers to Department of Labor

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<sup>97</sup> See generally VIC MILLER, NAT'L ACAD. FOR STATE HEALTH POLICY, ANALYZING THE IMPACT OF ADJUSTING THE FEDERAL MEDICAL ASSISTANCE PERCENTAGE TO IMPROVE THE COUNTERCYCLICAL IMPACT (2005), [http://www.nashp.org/Files/FMAP\\_countersyclical\\_final\\_1.31.05.pdf](http://www.nashp.org/Files/FMAP_countersyclical_final_1.31.05.pdf) (on file with the Harvard Law School Library).

<sup>98</sup> See *id.*

grants—are written for the worst-case scenario and are designed to prevent fraud and abuse. Although these are worthy concerns, the various barriers and hurdles that have been erected to ensure that no one does or ever can cheat tend to grind progress to a halt. Therefore, replacing barriers to implementation with audits and oversight would vastly improve the current federal-state dynamic.

Above all, however, to improve federal-state relations under the new administration and to make the most of each level of government's strengths, we support the establishment of a "Common Sense Commission"—a roundtable composed of current federal, state, and local officials, as well as former officials and policy experts, dedicated to fostering a collaborative relationship between governments at the state and federal levels and to maximizing the unique assets of the federal government and its state partners. By drawing upon each government's respective strengths, the Commission could maximize efficiency, reduce bureaucratic barriers, and minimize administrative costs and constraints.

The Commission is envisioned as a bipartisan, geographically diverse group of governors, legislators, and representatives of the federal executive, launched by Executive Order and ratified by the 111th Congress in its first 100 days. Its appointees would ideally have had prior service or developed particular expertise in the levels and branches of government they represent. For instance, the Commission might have eleven members: one representative from the federal executive branch; five state governors appointed by the Democratic and Republican Governors Associations; two members of the U.S. House of Representatives, one Democrat and one Republican; and two members of the U.S. Senate, one from each party. The president might appoint the chair of the Commission, and membership would be selected to optimize geographic diversity and to ensure that problems faced by particular regions or groups of states would be addressed.

A Commission designed along these lines could serve as a forum for especially contentious federal-state interactions. It could be charged with improving the implementation of federal-state programs and resolving administrative disputes in key domestic policy areas. Top-priority issues might include health care; homeland security, including matters involving FEMA; and education policy, particularly in areas with pending state-federal disputes that have grown worse throughout the Bush Administration. For the Commission to have any positive impact, its work would have to be thorough and thoughtful but completed in an expedited manner. Developing timelines for input and discussion and setting deadlines for decision-making would be essential elements of the Commission's work.

Such a commission could help to ensure that federal-state conflict does not stand in the way of arriving at common sense solutions to our nation's problems. The Commission could establish a forum for flushing out ongoing disputes regarding the implementation of congressional programs, for addressing requests by states for policy review, for eliminating unnecessary

regulatory mandates, for promptly resolving disputes over the interpretation of regulatory language, and for developing a set of best practices for federal-state cooperation. It could focus on the most significant areas of interaction between state and federal governments, such as education and health policy.

Institutions resembling the Common Sense Commission have already been proven effective. Perhaps the best model of federal-state cooperation would be the SCHIP program as it operated prior to the August 17 CMS letter. SCHIP allowed both the states and the federal government to do what they do best. The president and Congress agreed upon the importance of insuring America's children, particularly those in families with lower incomes. Every state across the country participated and most were quite successful in meeting their goals within the budgeted resources. Federal officials established broad guidelines but allowed state and local leaders to take ownership of the program and determine the details based on local circumstances and needs. The result was a diverse assortment of plans, each catered to the demographics and particular citizenry of an individual state. The next administration should follow the model of SCHIP and spearhead the creation of a Common Sense Commission. After all, the United States is too large and diverse a nation for a cookie-cutter approach to policy design and implementation.

Therefore, in addition to establishing clearly defined goals for federally funded state programs, the federal government should rely on policy tools that encourage state innovation and the flexibility to respond to local conditions. It should employ block grants instead of strictly defined funding, and broad standards instead of one-size-fits-all rules. It should provide at least matching resources for its initiatives, and it should challenge states to be creative. The result of these reforms could be a reconciliation of the federal government and the states after years of growing conflict, as well as a restoration of those aspects of federalism that remain most relevant to the challenges of the twenty-first century. Unlike the states' rights federalism of the civil rights era or the blue state federalism sometimes promoted in recent years, this common sense federalism could endure regardless of which party controls the levers of federal power. It would aim not to serve the interests of red states or blue states, but to respect and promote the interests of all states under a federal government supportive of experimentation and responsive to local needs.