

Trends in America



Issue Brief

The Council of State Governments

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STATE RESPONSES TO FEDERALISM

The U.S. federal system of government is often characterized as a layered cake—with separate-but-equal portions of power, influence and authority. Since its founding, our nation has seen fluctuations in the distribution of regulatory and decision-making power between states and the federal government. Chief among the cycles of federalism are trends in statutory pre-emption and unfunded mandates handed down from the central government to states.

Prior to the start of the last century, a mere 29 pre-emption statutes were enacted at the federal level. Compare that to the more than 500 federal pre-emptions since—164 of which have been enacted in the last 25 years alone—and the trend becomes apparent: Federal pre-emption is steadily increasing in number and scope. This rise is likely attributable to a variety of factors, including the advent of rapid communication enabling the federal government to oversee traditional state functions more efficiently. But opponents of federal pre-emption claim that the division of powers established by the Constitution promotes flexibility and in-

novation in problem-solving and encourages diversity among the states. Despite the 1995 Unfunded Mandates Reform Act, intergovernmental tension still exists over pre-emptions that states claim threaten their autonomy and authority.

In recent years, the federal government has commandeered state-level responsibilities to the point that even issues as inconsequential as where to stand on municipal buses and replacing water coolers in school buildings have come under federal jurisdiction. While these examples may seem insignificant, a number of more contentious issues in education and public safety have steadily received greater federal attention. In response to the federal pre-emption trend, states are acting alone and in concert, going against the federal grain, on issues such as stem cell research, Medicaid, sex offender registration, medical marijuana use and minimum wage. To illustrate state responses to increased federal pre-emption, this policy brief examines state responses to the No Child Left Behind Act, the REAL ID Act and regulation of greenhouse gas emissions.



The States Respond

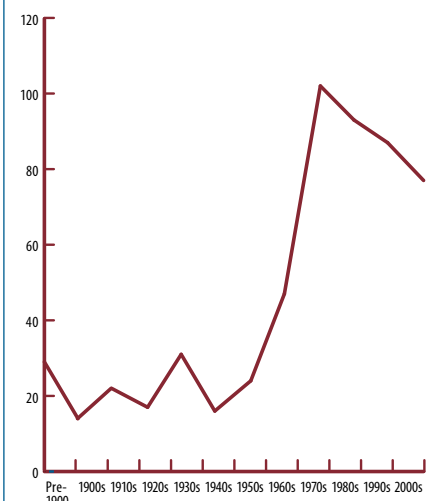
No Child Left Behind

The bipartisan No Child Left Behind Act (NCLB) of 2001 was initially met with enthusiasm, but support has steadily eroded as states become increasingly dissatisfied with various aspects of the federal mandate. The primary difference between NCLB and its precursor, the Elementary and Secondary Education Act (ESEA), is where ESEA allocated grant money to low-income schools to acquire supplies, more capable person-

nel and other educational materials, NCLB offers grant money as an incentive driven primarily by test scores.

Proponents of NCLB maintain that it improves the quality of teachers in public schools, closes the racial gap by setting common expectations across the board, and has increased the test scores of certain demographic groups. Indeed, results released in 2005 by the National Assessment of Educational Progress, independent of the U.S. Department of

Federal Pre-emption Statutes by Decade



Source: Joseph Zimmerman. "Congressional Pre-emption and the States" in *The Book of the States 2006*

Education, indicated that reading and math scores for African-American and Hispanic 9-year-olds, as well as math scores for African-American and Hispanic 13-year-olds, had reached an all-time high since the inauguration of NCLB. Despite these advances, critics of NCLB cite a number of dissatisfactions with the act, including:

- The mandate is not fully funded, which forces states to saddle the extra costs or risk losing federal grant money. According to an estimate by the National Association of State Boards of Education, federal funds only cover 69 percent of the testing costs associated with NCLB, which they estimate will be between \$1.9 billion and \$5 billion.
- Since standardized testing is the main variable used in assessment, teachers teach to the test, which produces lopsided lesson plans.
- Education has historically been a local and state responsibility, and federal regulation challenges states' autonomy.
- Because NCLB targets low-performing students, gifted children are being ignored and are migrating to private schools, which are exempt from the act.

- If schools do not meet performance requirements, they are denied grant money for needy children.
- Children with learning disabilities are held to the same standards as other students, which brings collective scores down.

As of late 2006 the spectrum of state responses to NCLB was wide: Some states remain neutral or supportive of the act, while others have taken extensive measures to oppose it. Utah, for example, has reacted with legislation (2005; HB 135) prohibiting local school districts from implementing those portions of NCLB that are unfunded or conflict with state laws. Connecticut has filed suit (*Connecticut v. Spellings*, 453 F.Supp.2d 459, D.Conn. Sept. 27, 2006) against the U.S. Department of Education over inadequate funding of the act's required expanded student assessment. Three of Connecticut's four charges in *The State of Connecticut v. Margaret Spellings* (U.S. Secretary of Education), however, were rejected in U.S. District Court, while the fourth is still under consideration.

Eleven states have taken legal action including passing legislation that either allows local school districts to opt out of NCLB or prohibits spending state money

on NCLB implementation, and eight states are considering opt-out legislation. An additional 15 states have introduced or passed legislation that calls for full funding, or is in some other way critical of NCLB.

Regardless of whether state NCLB legislation was passed or defeated, more than half the states agree that NCLB is in serious need of revision. As NCLB faces reauthorization, state activism and calls for revision have the potential to make or break state-federal relations on this issue. Sens. Joseph Lieberman, I-Conn., Mary Landrieu, D-La., and Norm Coleman, R-Minn., have co-sponsored the All Students Can Achieve Act, which proposes reforms to NCLB to coincide with its possible reauthorization. All Students Can Achieve is an attempt to build on the successes of NCLB while addressing its weaknesses. More than 50 U.S. senators have expressed a desire to reform NCLB, and the movement is garnering widespread bipartisan support.

The REAL ID Act

Since Sept. 11, 2001, the nation has become more acutely aware of the threat of terrorism. This awareness, paired with recommendations from the 9/11 Commission report, led to the passage of the REAL ID Act in 2005, which seeks to deter terrorism by establishing guidelines for enhanced driver's licenses and non-driver identification cards. These cards will feature information typical of ID cards, but will be equipped with security features designed to prevent tampering. In addition, to obtain the enhanced ID cards, citizens will be required to present proof of citizenship, including official documentation of date of birth, legal status and Social Security number. The enhanced ID card will be used to board planes, enter federal buildings and possibly cross international borders. Despite the terrorism deterrence goals of the act, controversy over implementation exists among state leaders.

The deadline for state REAL ID compliance is Dec. 31, 2009. To help states cover the cost, Congress has appropriated \$40 million for REAL ID, but the Department of Homeland Security in 2006 estimated the total cost of implementation to be \$14.6 billion over a 10-year period. Homeland Security will allow states to utilize up to 20 percent of their federal grants to offset the costs of REAL ID implementation, but state officials say those funds are already committed to other projects.

The cost of REAL ID is not the only state complaint. Governors and attorneys general across the country have expressed concerns over the negative impacts to citizen privacy, which they claim will be jeopardized by allowing the federal government to warehouse personal information in national databases. Many are concerned that such databases may create a security nightmare, enabling government employees at all levels to access individuals' information, including Social Security numbers, with very little scrutiny and less oversight.

In response, many states have been proactive in their opposition to REAL ID implementation. Sixteen states have passed legislation that either allow them to opt out of REAL ID provisions or prohibit their state from participating in the program at all. Eight other states have introduced legislation opposing REAL ID that passed one chamber, but were never enacted. An additional 10 states and the District of Columbia have legislation that opposes REAL ID pending.

Washington became the first state to work with Homeland Security to create an enhanced driver's license. The new Washington ID is being tested not only in compliance with REAL ID, but also the Western Hemisphere Travel Initiative (WHTI) that requires citizens to present secure identification at North American border crossings. Vermont and Arizona recently joined Washington in the effort.

Generally, state trends do not point toward a lack of desire to improve security features of identification cards. Rather

states' resentment seems to stem from the central government's desire to impose a set of regulations on states that is far too expensive and does not adequately address state concerns.

Ultimately, if states do not comply with REAL ID requirements, residents of noncompliant states may not be allowed to board airline flights or enter federal buildings with their current state-issued ID cards or driver's licenses. They will thus require a federally issued passport to board airline flights. Some argue that if even a few states refuse to comply with REAL ID by the 2009 implementation deadline, there will be a gap in enhanced ID coverage that will cause REAL ID to ultimately fail. Opposition to the act is gaining momentum as the deadline nears, so it remains to be seen whether the mandate will ever be fully implemented.

Regulation of Greenhouse Gas Emissions

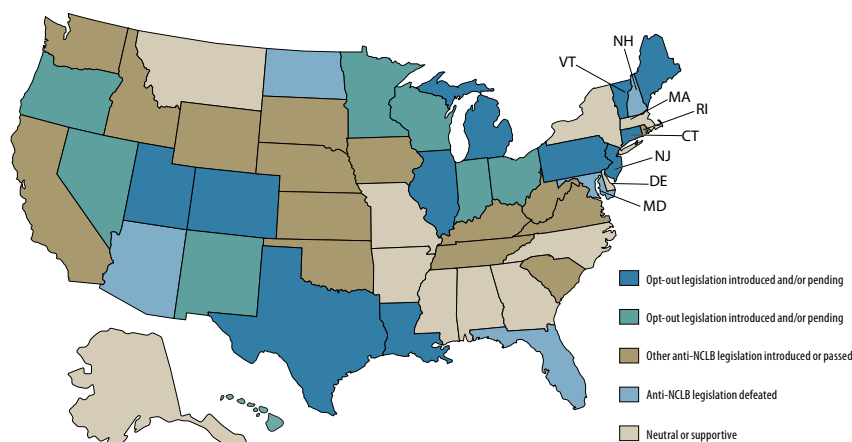
Unlike unfunded mandates such as NCLB and REAL ID, the conflict over the regulation of greenhouse gas emissions is an issue in which roles are reversed: States are being proactive and going beyond the ac-



tions achieved at the federal level. In 2006, a coalition of 13 states filed suit against the Environmental Protection Agency for its failure to regulate greenhouse gas emissions. In April 2007, the U.S. Supreme Court ruled that the EPA has the authority to regulate emissions and is now required to give better reasons for not doing so.

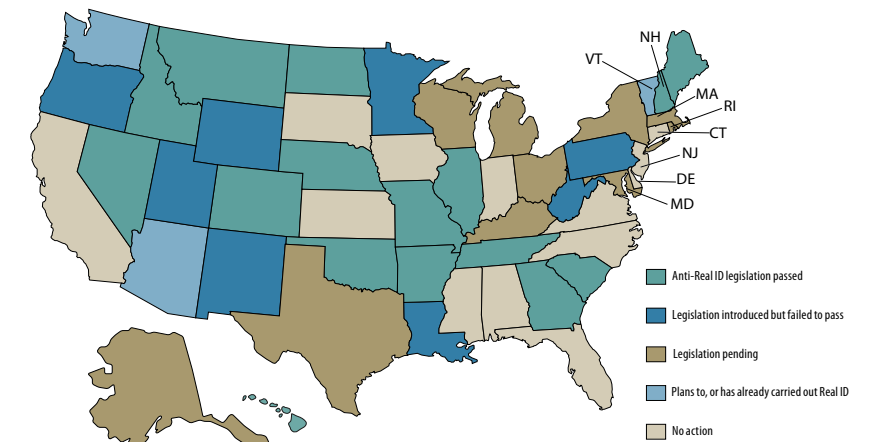
Historically, state and local governments were responsible for regulating activities that contributed to pollution. In the 1960s and 1970s, coinciding with an increased awareness of threats from excessive pol-

State Responses to No Child Left Behind



Source: *The Peculiar Politics of No Child Left Behind*. The Brown Center on Education Policy at the Brookings Institution. August 2006

State Responses to REAL ID



Source: The Council of State Governments

lution, responsibility began to shift. The Clean Air Act, signed in 1970, gave the federal government the dominant role in setting standards and regulating air quality. In recent years, however, concerns about global warming have moved to the forefront and an effort is underway to devolve responsibility for these issues back to the states.

Many states, particularly California, argue that the United States should set an example for developing nations around the world. California, which has been plagued by air pollution for decades, is leading a surge to set the global example on emissions. Five states and two Canadian provinces have joined California in the Western Climate Initiative (WCI), which plans to

implement a cap and trade program to cut greenhouse gas emissions from mobile sources (such as refineries, power plants, etc.) to 15 percent below 2005 levels over the next 13 years. Colorado, Kansas, Nevada and Wyoming are observing WCI and may join in the future.

While California and others are working the issue on the West Coast, a similar response to federal inaction has materialized in the East. The Regional Greenhouse Gas Initiative is a cooperative effort by eastern states to craft a similar plan. Seven states are members of the initiative, while three states—Massachusetts, Pennsylvania and Rhode Island—and the District of Columbia are observers. Tailored regional approaches may help minimize concerns that these

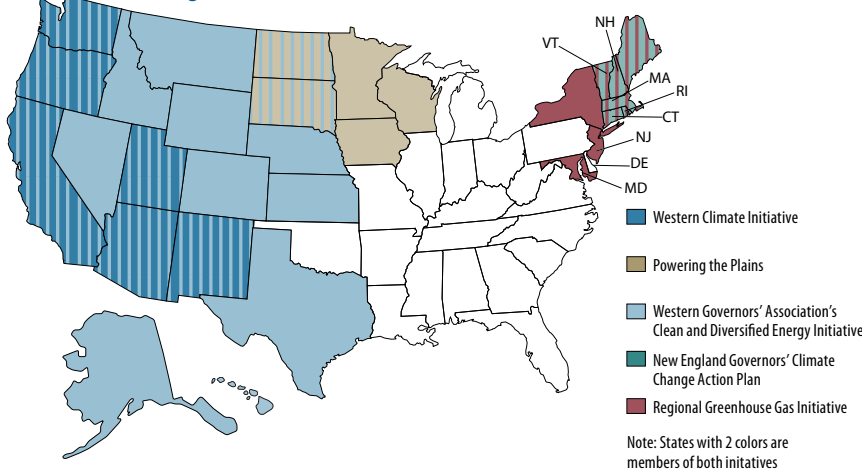
enhanced regulations may cause industry to flee to other states. Other regional initiatives include the Western Governors' Association's Clean and Diversified Energy Initiative, Powering the Plains in the Midwest and the New England Governors' Climate Change Action Plan.

Will States be Heard?

Responsibility for specific governmental functions will continue to ebb and flow between the federal government and the states, just as it always has. But the question remains: Who will step up and take the lead on important issues? Some recent attempts by the federal government to hand down mandates have been met with resistance by states. States have also shown that they have the political will to collaborate on issues they believe need attention. The rise in the use of interstate compacts and other less formal agreements have given states a sure footing on several regional and national issues. Embedded in the Constitution is the notion that the United States should embrace a system of dual federalism. Over time, the central government has been encroaching on the states' share of that governing power. But the future offers states a chance to retrieve some of that autonomy. Who takes the dominant role in this relationship will depend on the states.

—Gabe Swain is a research assistant at The Council of State Governments.

Regional Initiatives on Greenhouse Gas Emissions



Source: Pew Center on Global Climate Change
http://www.pewclimate.org/what_s_being_done/in_the_states/regional_initiatives.cfm

Trends in America

The most dominant characteristic of the 21st century is not just change, but the rate of change. Understanding change is the first step toward identifying and implementing effective responses. Trends in America Issue Briefs are designed to help state leaders promote positive change through forward-looking policies and strategic investments.