

## EFFECTING CHANGE AT THE STATE AND LOCAL LEVEL: TOWARD A PROGRESSIVE FEDERALISM

### I. Introduction

Federalism has often been treated as a bad word within the progressive community, associated both with conservatives and conservatism. This association is not without some reason, since for decades, states' rights had been the purported rationale for opposing the Civil Rights movement of the 1950s and 1960s and landmark federal legislation such as the Violence Against Women Act. However, the term federalism, in its most basic sense, merely describes a relationship between the federal government and state/local governments. Viewed as such, federalism need not be limited to the conservative lexicon.

As numerous scholars have recently pointed out, a new class of political actors – progressive scholars, policymakers, and practicing lawyers – have been invoking federalism to achieve progressive ends. This federalism, sometimes referred to as “blue state federalism,”<sup>1</sup> has been seen by some as a return to an earlier form of progressivism. The legal scholar Robert Schapiro, speaking of the federal government of the past few years and progressive efforts to effectuate change, states:

Times have changed. In an era when the federal government seems unable or unwilling to address a variety of pressing societal problems, states have taken the lead in providing their own solutions. This trend of state-level reform efforts represents a kind of return to the early Progressive movement of the late nineteenth and early twentieth centuries, when state-sponsored programs constituted the core of the Progressive agenda. It was the great progressive Justice Louis Brandeis who extolled the virtues of states as “laboratories” for experimenting with novel social policies.<sup>2</sup>

While there is now a greater prospect of progressive policy at the federal level, a large and critical role remains for state and local governments. First, federal change often takes a longer time than state and local change, and some problems may be too urgent to await federal resolution.<sup>3</sup> For instance, even if a truly universal health care plan is put forth by the

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<sup>1</sup> See Richard Thompson Ford, *The New Blue Federalists: The Case for Liberal Federalism*, SLATE, Jan. 6, 2005, <http://www.slate.com/id/2111942/>. While the reference to “blue state” refers to states whose electoral politics tend toward the Democratic party, blue state federalism is also often loosely used to describe progressive theories and uses of federalism, regardless of whether Democrats or Republicans dominate local electoral politics.

<sup>2</sup> Robert A. Schapiro, *Not Old or Borrowed: The Truly New Blue Federalism*, 3 HARV. L. & POL’Y REV. (forthcoming Winter 2009).

<sup>3</sup> To provide just one example of how, even with a clear commitment from an incoming presidential administration, federal change can be slow, one can look to climate change. The Obama Administration has clearly signaled its intent to advocate for the passage of climate change legislation, but many observers have noted that serious political and regional factions, combined with a grim economic outlook for the next year, make quick passage of federal legislation a significant challenge. See John M. Broder & Andrew C. Revkin, *Hard Task for New Team on Energy and Climate*, N.Y. TIMES, Dec. 16, 2008, at A24, available at [http://www.nytimes.com/2008/12/16/us/politics/16energy.html?\\_r=1&partner=rss&emc=rss](http://www.nytimes.com/2008/12/16/us/politics/16energy.html?_r=1&partner=rss&emc=rss).

Administration and Congress, it will likely be some time before such a plan is enacted and implemented. Second, even when federal legislation is passed, this does not necessarily mean that states and localities will be foreclosed from establishing even more stringent protections for their residents. For instance, the enactment of federal minimum wage standards has not prevented certain states from having higher minimum wage standards than the federal mandate. In short, the election of progressives on the federal level does not translate into the death, or even dormancy, of innovation at the state and local level. In addition, such innovation will have to be protected in the courts, where opponents have invoked distorted, overly broad notions of federal preemption in order to challenge progressive policy.

Given the relevance of such issues, ACS encourages its lawyer and student chapters to hold events and programming on these topics in 2009. To assist chapters in conducting such programming, we are providing this program guide along with a speaker list identifying some experts on the topic. Neither this program guide nor this speaker list should be seen as an exclusive listing. There is no shortage of instances where state and local policy has outpaced federal policy, and this program guide provides just a few examples: climate change; living wages for workers; health care; and employment protections for the lesbian, gay, bisexual, and transgender (LGBT) community. Similarly, there is no shortage of experts on these topics, and this speaker list attempts to provide you only with a beginning list. ACS strongly encourages you to consult with the Progressive States Network ([www.progressivestates.org](http://www.progressivestates.org)), a nonprofit organization that works with state legislators and advocates across the nation in order to support progressive policy development and change.<sup>4</sup> For more information, we also suggest reviewing ACSBlog posts online at [www.ACSBlog.org](http://www.ACSBlog.org). Other useful resources include publications available at [www.acslaw.org](http://www.acslaw.org) and the *Harvard Law & Policy Review*, the online version of which can be accessed at [www.HLPRonline.org](http://www.HLPRonline.org).<sup>5</sup> Additional substantive information may be found on the websites of the organizations associated with the various speakers identified on the speaker list.

## II. Examples of Innovation at the State and Local Level

There are countless areas in which state and local policies have effectuated progressive change, but this program guide provides just a few examples of such leadership: climate change; living wages for workers; health care; and employment protections for the LGBT community.

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<sup>4</sup> In addition to the resources provided on the Progressive States Network (PSN) website ([www.progressivestates.org](http://www.progressivestates.org)), chapter leaders can contact PSN's Executive Director, Nathan Newman, via email at [nnewman@progressivestates.org](mailto:nnewman@progressivestates.org) or via telephone at 212.680.3116 for ideas about local elected officials and advocates who might be willing to address chapters. Other sources of information about elected officials also exist, such as People for the American Way Foundation's Young Elected Officials Network (<http://www.yeonetwork.org/content/about-yeo-network>).

<sup>5</sup> The forthcoming issue of the *HARVARD LAW AND POLICY REVIEW* deals extensively with topics relevant to progressive federalism and includes articles such as: *Blue State Federalism at the Crossroads*, by David J. Barron; *Bearing the Burden of the Beltway: Practical Realities of State Government and Federal-State Relations in the Twenty-First Century*, by Governor Kathleen Sebelius and Ned Sebelius; *Not Old or Borrowed: The Truly New Blue Federalism*, by Robert A. Schapiro; and *Notes on a Progressive National Water Policy*, by John Leshy.

## Climate Change

States have a long history of innovation in protecting the environment. In fact, California's emissions standards, adopted in the 1960s to regulate vehicular emissions, predate the federal Clean Air Act. Once the Clean Air Act was passed, the Act specifically permitted states to adopt the stricter California standards instead of the federal standards, marking the federal standards as the floor, not the ceiling, for emissions standards.<sup>6</sup> Similarly, while the federal government during the last 8 years has been criticized for being insufficiently engaged in curbing greenhouse gas emissions to fight climate change, states have taken the lead. In 2006, the California legislature passed the Global Warming Solutions Act, which aims to reduce the amount of greenhouse gases generated in California by 25% by the year 2020. Thirty-eight states have climate action plans that are complete or are substantially complete.<sup>7</sup> These states are<sup>8</sup>:

- Alabama
- Alaska
- Arizona
- Arkansas
- California
- Colorado
- Connecticut
- Delaware
- Florida
- Hawaii
- Idaho
- Illinois
- Iowa
- Kansas
- Kentucky
- Maine
- Maryland
- Massachusetts
- Michigan

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<sup>6</sup> See generally Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159 (2006). In fact, even one of the few recent Supreme Court decisions lauded by progressive environmental scholars, *Massachusetts v. EPA*, 549 U.S. 497 (2007), which found that the Clean Air Act granted the Environmental Protection Agency (EPA) the authority to regulate greenhouse gases, was a result of state and local action. To be precise, the lawsuit was brought by twelve states and several cities in order to compel the federal EPA to use the Clean Air Act to regulate as pollutants carbon dioxide and other greenhouse gases.

<sup>7</sup> See generally PEW CENTER ON GLOBAL CLIMATE CHANGE & PEW CENTER ON THE STATES, CLIMATE CHANGE 101: STATE ACTION (2006), available at [http://www.pewclimate.org/docUploads/101\\_States.pdf](http://www.pewclimate.org/docUploads/101_States.pdf); PEW CENTER ON GLOBAL CLIMATE CHANGE & PEW CENTER ON THE STATES, CLIMATE CHANGE 101: STATE ACTION - UPDATE (2008), 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>8</sup> PEW CENTER ON GLOBAL CLIMATE CHANGE & PEW CENTER ON THE STATES, CLIMATE CHANGE 101: STATE ACTION – UPDATE 14 fig.7 (2008), available at [http://www.pewclimate.org/docUploads/States%20Brief%20\(May%202008\).pdf](http://www.pewclimate.org/docUploads/States%20Brief%20(May%202008).pdf).

- Minnesota
- Missouri
- Montana
- Nebraska
- Nevada
- New Hampshire
- New Jersey
- New Mexico
- New York
- North Carolina
- Oregon
- Pennsylvania
- Rhode Island
- South Carolina
- Tennessee
- Utah
- Vermont
- Virginia
- Washington
- Wisconsin

Eighteen of these same states have set concrete emission targets for gases produced within their state borders. These states are<sup>9</sup>:

- Arizona
- California
- Connecticut
- Florida
- Hawaii
- Illinois
- Maine
- Massachusetts
- Minnesota
- New Hampshire
- New Jersey
- New Mexico
- New York
- Oregon
- Rhode Island
- Vermont
- Virginia
- Washington

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<sup>9</sup> *Id.* at 14 fig.8.

## Living Wages for Workers

Minimum wages have been established through both federal and state legislation. However, many states and localities have taken the initiative to ensure that wages for workers exist not just at a minimum level for subsistence, but at a level that allows workers to meet basic needs. Living wage ordinances have been described in the following way:

A living wage ordinance requires employers to pay wages that are above federal or state minimum wage levels. Only a specific set of workers are covered by living wage ordinances, usually those employed by businesses that have a contract with a city or county government or those who receive economic development subsidies from the locality. The rationale behind the ordinances is that city and county governments should not contract with or subsidize employers who pay poverty-level wages. The living wage level is usually the wage a full-time worker would need to earn to support a family above federal poverty line, ranging from 100% to 130% of the poverty measurement.<sup>10</sup>

The modern living wage movement traces its origins to the passage of a 1994 city ordinance in Baltimore that required firms with city contracts to pay employees a rate above the minimum wage when those employees were working on city contracts.<sup>11</sup> Living wage ordinances have been passed in over 120 localities.<sup>12</sup> This growth has been attributed to the increasing number of Americans who work but are still unable to make ends meet, as well as the relative stagnation of the federal minimum wage. Until passage of legislation amending the Fair Labor Standards Act in 2007, the federal government had not increased the minimum wage in 11 years and had resisted making substantial increases for two decades.<sup>13</sup> To improve conditions for at least some portion of workers, living wage ordinances have been passed to require that wages on city contracts be high enough to allow workers to meet basic needs. The coverage under living wage ordinances varies considerably; most ordinances cover municipal employees working under municipal contracts, but some also cover employees of businesses receiving public economic development funds or employees of businesses located in districts benefiting from significant public investment.<sup>14</sup>

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<sup>10</sup> ECONOMIC POLICY INSTITUTE, LIVING WAGE: FACTS AT A GLANCE, (2002), *available at* [http://www.epi.org/content.cfm/issueguides\\_livingwage\\_livingwagefacts](http://www.epi.org/content.cfm/issueguides_livingwage_livingwagefacts).

<sup>11</sup> JEFF THOMPSON & JEFF CHAPMAN, ECONOMIC POLICY INSTITUTE, THE ECONOMIC IMPACT OF LOCAL LIVING WAGES 1 (2006), *available at* <http://www.epi.org/briefingpapers/170/bp170.pdf>.

<sup>12</sup> *Id.*

<sup>13</sup> According to the Department of Labor's Employment Standards Administration, the 2007 amendments increased the minimum wage to \$5.85 per hour effective July 24, 2007; \$6.55 per hour effective July 24, 2008; and \$7.25 per hour effective July 24, 2009. *See* WAGE & HOUR DIV., DEP'T OF LABOR, HISTORY OF CHANGES TO FEDERAL MINIMUM WAGE LAW, <http://www.dol.gov/esa/minwage/coverage.htm> (last visited Jan. 22, 2009).

<sup>14</sup> THOMPSON & CHAPMAN, *supra* note 10, at 2. Some ordinances have faced legal challenges, but these ordinances have largely been upheld. When acting as proprietors exercising their spending powers, these governmental actors have been permitted to place stipulations on contracts. *See, e.g., Amaral v. Cintas Corp.*, 78 Cal. Rptr. 3d 572 (Cal. Ct. App. 2008) (upholding an ordinance requiring all contractors to pay a living wage to employees working on a city contract); *see also Burns Int'l Sec. Servs. Corp. v. County of L.A.*, 19 Cal. Rptr. 3d 776 (Cal. Ct. App. 2004) (upholding an ordinance requiring contractors to provide employees five days paid leave for jury duty).

## Health Care Coverage

In 1994, the Clinton Administration proposed a groundbreaking plan for universal health care coverage. However, since the failure of that effort, no federal proposal for universal coverage has been issued by successive presidential administrations. This does not mean, however, that the problem has been solved, as roughly 47 million individuals are without health insurance in this country.<sup>15</sup> Further, in an economic recession and facing increased global competition, some private sector companies have argued that our largely employment-linked health care system places U.S. companies at a competitive disadvantage with companies in countries where federal governments assume responsibility for health care costs.<sup>16</sup> Still, to date, no federal plan exists for comprehensive health care coverage for our nation's citizens.<sup>17</sup> Into this void several states have stepped.

One example of state innovation is provided by Massachusetts. In Massachusetts, a scheme has been developed much in the manner of mandatory car insurance, in which most individuals are required to obtain health insurance that provides at least a certain minimum level of coverage.<sup>18</sup> Among other things, the 2006 Massachusetts Health Care Reform Law provides the following:

- For low-income individuals with incomes below, at, or slightly above the poverty line, the health insurance will be provided for free.
- For low and moderate-income individuals who have no other sources of coverage, insurance is being made available on a sliding-scale level, depending upon ability to pay.
- Adults who do not qualify for free or subsidized health insurance, unless they obtain a special waiver, must purchase insurance or face a financial penalty.
- All employers, except for very small businesses, are being required to offer their employees health insurance and pay a fair share of the cost, or face a financial penalty.
- A Massachusetts Commonwealth Health Insurance Connector is established to order to link individuals to appropriate insurance products.<sup>19</sup>

By April 2008, 355,000 individuals who were formerly uninsured have obtained insurance coverage in Massachusetts.<sup>20</sup> The experience in Massachusetts only seems to have

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<sup>15</sup> U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES 21 tbl.6 (2007).

<sup>16</sup> In fact a coalition of business leaders and union leaders led by SEIU President Andy Stern and Wal-Mart C.E.O. H. Lee Scott formed a coalition, Better Health Care Together, in order to end a reliance on employer-based health care coverage and to promote universal coverage. See Kaiser Daily Health Policy Report, *Wal-Mart, SEIU Outline Themes to Reach Health Coverage Goal by 2012*, Feb. 8, 2007, available at [http://www.kaisernetwork.org/Daily\\_reports/rep\\_index.cfm?DR\\_ID=42811](http://www.kaisernetwork.org/Daily_reports/rep_index.cfm?DR_ID=42811).

<sup>17</sup> The Obama Administration has signaled that comprehensive coverage will be one of its goals. See Robert Pear, *Daschle Will Lead Health Care Overhaul*, N.Y. TIMES, Dec. 11, 2008, available at <http://www.nytimes.com/2008/12/12/us/politics/w11health.html?partner=rss&emc=rss>.

<sup>18</sup> KAISER COMMISSION ON MEDICAID AND THE UNINSURED, MASSACHUSETTS HEALTH CARE REFORM PLAN: AN UPDATE (2007), available at <http://www.kff.org/uninsured/upload/7494-02.pdf>.

<sup>19</sup> MASSACHUSETTS HEALTH CARE REFORM COALITION, FACTS ON THE NEW HEALTH REFORM LAW, available at <http://www.masshealthreform.org/faqs.html> (last accessed on December 15, 2008).

<sup>20</sup> John E. McDonough et al., *Massachusetts Health Reform Implementation: Major Progress and Future Challenges*, 27 HEALTH AFFAIRS w285 (2008).

inspired other state strategies for expanding coverage. “Kansas, Louisiana, Mississippi, New Mexico, and Utah are contemplating market-based reforms, such as the implementation of insurance exchanges to facilitate consumer access to a broad range of policies,” while “others are investigating public subsidies.”<sup>21</sup>

Some cities have also tried innovative approaches to ameliorating the problem of the uninsured. For instance, a plan that was challenged and ultimately upheld in San Francisco required employers (except very small businesses) to pay a certain amount toward health care costs for each employee-hour worked. The employer was permitted to directly pay the amount to the employee or to pay the amount into a health savings account, health insurance plan, or a special city fund established for the ordinance.<sup>22</sup>

### Workplace Discrimination Protection for the LGBT Community

While attempts have been made to pass federal anti-discrimination legislation to protect lesbian, gay, bisexual, and transgender (LGBT) workers, no federal protections currently exist. There have been diligent attempts to pass the Employment Non-Discrimination Act (ENDA), legislation that would address discrimination in the workplace by making it illegal to fire, refuse to hire, or refuse to promote employees simply based on a person’s sexual orientation or gender identity.<sup>23</sup> However, to date, such attempts have failed. In the absence of federal protections, states have enacted laws to protect LGBT workers within their own borders.

Thirty-two states and the District of Columbia have laws that prohibit discrimination on the basis of sexual orientation. These states are<sup>24</sup>:

- California
- Colorado
- Connecticut
- District of Columbia
- Hawaii
- Illinois
- Iowa
- Maine
- Maryland
- Massachusetts
- Minnesota

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<sup>21</sup> See Robert A. Schapiro, *Not Old or Borrowed: The Truly New Blue Federalism*, 3 HARV. L. & POL’Y REV. (forthcoming Winter 2009)(citing Henry J. Aaron & Stuart M. Butler, *A Federalist Approach to Health Reform: The Worst Way, Except for All the Others*, 27 HEALTH AFFAIRS 725, 727-28 (2008)).

<sup>22</sup> See *Golden Gate Restaurant Ass’n v. City and County of S.F.*, 512 F. 3d 1112, 1124 (9th Cir. 2008)(reversing the District Court decision and upholding the ordinance as not being preempted by ERISA).

<sup>23</sup> Two versions of ENDA circulated in the 110<sup>th</sup> Congress. H.R. 2015 would have made it illegal to fire, refuse to hire, or refuse to promote employees simply based on a person’s sexual orientation or gender identity. Narrower in scope, H.R. 3685 would have addressed discrimination based only on sexual orientation, not on gender identity.

<sup>24</sup> HUMAN RIGHTS CAMPAIGN, STATEWIDE EMPLOYMENT LAWS & POLICIES 1 (2008), available at [http://www.hrc.org/documents/Employment\\_Laws\\_and\\_Policies.pdf](http://www.hrc.org/documents/Employment_Laws_and_Policies.pdf).

- Nevada
- New Hampshire
- New Jersey
- New Mexico
- New York
- Oregon
- Rhode Island
- Vermont
- Washington
- Wisconsin

Of the aforementioned jurisdictions, 12 states and the District of Columbia have laws that prohibit discrimination not only on the basis of sexual orientation, but on the basis of gender identity, as well. These states are<sup>25</sup>:

- California
- Colorado
- District of Columbia
- Illinois
- Iowa
- Maine
- Minnesota
- New Jersey
- New Mexico
- Oregon
- Rhode Island
- Vermont
- Washington

### **III. Conclusion**

Even when there are reasons to be optimistic about the prospect of progressive advances at the federal level, the possibility of state and local innovation should not be overlooked. In many areas, such as in the example of California's emissions standards, state innovation has served as a precursor and template for subsequent progressive policy on the federal level. In other areas, such as in the example of state health care reform, state initiatives might serve as stopgap measures, intended to help the crisis of the uninsured until federal efforts to ensure comprehensive coverage can be realized. Such a view of federalism, where state measures are intended to complement, rather than substitute for, federal policies, allows progressives to embrace the possibility of state and local change while not denying the important role played by the federal government.<sup>26</sup> Of course, this will likely also entail protecting state and local innovation in the courts against opponents who invoke distorted, overly expansive theories of

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<sup>25</sup> *Id.*

<sup>26</sup> See generally, Robert A. Schapiro, *Not Old or Borrowed: The Truly New Blue Federalism*, 3 HARV. L. & POL'Y REV. (forthcoming Winter 2009).

federal preemption in order to quash such progressive policy.<sup>27</sup> ACS lawyer and student chapters are invited to explore these themes through topically related programming. Such programming could include inviting:

- state/local officials and legislators who have been involved in progressive initiatives to describe their work and the challenges they have faced;
- legal, governmental, and policy scholars to speak about specific subject areas (climate change, for instance) and the state and local initiatives in that area;
- legal practitioners and legal scholars to speak about combating efforts to overturn state and local progressive policy based on overly expansive views of federal preemption; or
- federal officials and legislators who could talk about how federal policy efforts have been helped by trailblazing efforts by states and localities.

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<sup>27</sup> Indeed, in some cases, such as in *Riegel v. Medtronic*, 128 S.Ct. 999 (2008), the courts have accepted such theories, much to chagrin of progressive legal scholars in the health and safety arena.