



*Defying Washington*

# U.S. state capitols take on policy making

BY JOHN DINAN

**State** governments have long been seen as the chief policy innovators in the U.S. This is true today, even with, and to some degree because of, unified Republican Party control of the presidency and Congress.

This continuing policy leadership role for states is partly a testament to the tremendous challenge of enacting federal legislation, given the partisan polarization and proliferation of veto points in Washington, in contrast with the situation in many states. As well, a minority party frustrated in its policy aims at the federal level is often able to secure its goals through state governments where it enjoys majority support. Finally, a number of policy areas remain outside of federal control and lodged firmly in the hands of the states, despite continuing efforts to nationalize them.

## **Face-off against national gridlock**

Republican control of the presidency and both houses of Congress for part of 2001, and from 2003 to the mid-term elections in 2006, might have been expected to facilitate passage of national legislation, especially after the 2004 election when Republicans added to their margins in the House of Representatives and Senate. To some degree, this expectation has been borne out, with passage in the 109<sup>th</sup> Congress (2005-06) of a comprehensive energy policy act, a class-action reform bill and a bill protecting gun manufacturers from civil liability suits, all of which would have encountered more difficulty under divided party government of the kind seen from 1969-76, 1981-92, 1995-2000 and 2001-02.

But enactment of national policy in other areas has proved elusive, either because Republicans are not all on the same page or because of plentiful opportunities for minority party obstruction. And in many of these instances, states have been led to fill in the vacuum.

**Illegal immigration** is a leading issue where states in 2006 have been forced into action by splits in the Republican majority in Washington. In December 2005, the House passed a bill that focused heavily on securing the border and on requiring employers to verify the legal status of their workers. But in May 2006, the Senate, with the support of President George W. Bush, approved a very different bill that would combine border security and employer-enforcement provisions (which are both quite popular with the public) with a pair of highly controversial plans: a major new guest-worker program and a process to permit most of the 11 million illegal immigrants currently in the country to become legal residents and eventually citizens. Although the usual procedure is to iron out such inter-

cameral differences in a conference committee, there has been a long delay in convening such a committee, resulting in no major immigration law emerging from Congress before the November 2006 elections, thereby boosting state and local government efforts to pass their



Photo: City of Albuquerque, New Mexico

Albuquerque Mayor Martin Chavez launched a free downtown bus in July 2006.

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own restrictive immigration policies instead. In fact, the National Conference of State Legislatures (NCSL) reported that as of July 2006, about 57 immigration-related laws had been enacted this year, far outpacing the state legislative output in previous years. Among other things, these state laws (and local ordinances) deny benefits or services to individuals who cannot prove their legal residence, penalize employers and landlords for failing to check the legal status of workers and renters, and increase penalties for human trafficking.

**Minimum-wage** policy is another area where gridlock in Washington has prompted state legislators to fill the void. For nearly a decade, the federal minimum wage has been \$5.15 an hour, despite several efforts, mainly on the part of congressional Democrats, to pass an increase. Then, in August 2006, Congress came close to finally accomplishing this goal when the House combined a minimum-wage increase to \$7.25 (favoured mostly by Democrats) with major reductions in the estate tax (favoured mostly by Republicans). However, the bill failed to emerge from the Senate, even though it was supported by a clear majority of members.

The cause of the defeat, as observers of U.S. politics have become all too aware, is the increasing resort in recent years to the filibuster — the practice of obstructing legislation by giving a never-ending-speech — which essentially requires all non-budget measures to obtain support from a super-majority of 60 senators. In this case, Senate Majority Leader Bill Frist could only muster 57 votes in favour of the package, and so it failed. Once again, though, state governments have stepped into the breach, with 18 states now boasting a minimum wage higher than the federal minimum. As well, voters in seven states went to the polls in November 2006 on ballot measures aimed at providing further minimum-wage increases. In one case, California Governor Arnold Schwarzenegger, a moderate Republican, reached a deal with Democratic lawmakers in August 2006 to boost California's minimum wage to \$8 an hour, the highest of any state.

### **Response to one-party control in Washington**

Before the November 2006 elections, the Democrats were already firmly entrenched in a number of state capitols. Democrats held 22 governorships, compared with 28 for the Republicans. As for state legislatures, Democrats controlled both the House and Senate in 19 states, while Republicans control both houses in 20 states, with 10 other legislatures under divided-party control. Nebraska's legislature, the only unicameral body at the state level, is non-partisan.

The fact that Democrats are well represented in many state capitols and enjoy large majorities in several of them, particularly in the Northeast and Far West,

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provides an excellent opportunity for them to enact policies that are blocked by Republicans at the national level. To be sure, Democrats are still generally the party of centralization and federal power, whereas Republicans tend to favour decentralization and state power more often than not.

But throughout U.S. history, party positions on federalism have been determined as much by pragmatic calculations of political advantage as by principled assessments of the virtues of centralization or decentralization. Thus, it is no surprise that as Republicans have ascended to

power in Washington in recent years, they have embraced centralization in certain respects, while Democrats have gained a newfound appreciation for state governmental innovation in certain areas.

**Climate change** is one area where Democrats (and some moderate Republicans) have been quite active at the state level in opposition to conservative policies in Washington. The Bush administration and congressional Republicans have hesitated to move quickly, if at all, in mandating reductions in greenhouse gas emissions responsible for global warming.

Not only has President Bush failed to submit the Kyoto Protocol for congressional ratification, but his administration has declined to designate carbon dioxide as a pollutant to be regulated under the Clean Air Act Amendments. Nor have Democratic Congress members had success in recent years in enacting mandatory reductions in greenhouse gas emissions.

But state and local officials have pushed ahead in the face of national Republican opposition. A growing number of Northeastern states are signatories to the Regional Greenhouse Gas Initiative (RGGI), which works toward reducing carbon dioxide emissions from power plants in the region. And in June 2006, the U.S. Supreme Court agreed to hear in its coming term the case of *Massachusetts v. EPA*, where twelve states from the Northeast, Midwest and Far West are trying to force the federal government to regulate carbon dioxide emissions under the Clean Air Act Amendments.

Then, in July 2006, Schwarzenegger, the moderate Republican governor of California, met with British Prime Minister Tony Blair, and they agreed to work together on ways that California and Britain can reduce greenhouse gas emissions. Even local governments have got into the act. The mayor of Albuquerque, New Mexico, Martin J. Chavez, told the Washington Post in August 2006: "Like most mayors, I'm disappointed the federal government has not taken more of a lead on this issue, but so be it. We're moving forward."

**Embryonic stem-cell research** is another issue where state officials have pressed ahead in the face of conservative opposition in Washington. President Bush announced in August 2001 that he would permit federal funding of research on existing stem-cell lines but would not allow federal funds to support research on stem cells created after that time. Then in July 2006 he used his veto pen — for the first time in his presidency — to block a law seeking to authorize federal funding of newly created stem cells. However, state governments are free to fund this research, and several states have done so, most notably when California voters approved a 2004 ballot initiative authorizing the issuance of \$3 billion in state bonds for such research over the next decade. A number of other states have authorized funding on a smaller scale, including several grants announced in the wake of, and in response to, the president's July 2006 veto. In November 2006, Missourians voted on a constitutional amendment ensuring the continuation of embryonic stem-cell research in that state.

### **Action in areas outside federal control**

Because the federal government possesses limited enumerated powers, states retain sole responsibility for a number of policy areas, as was made quite clear in 2006 in regard to laws governing marriage and land use. In both cases, efforts were made during the last year to centralize the issue and bring about a national resolution, but without success. This left the matters to the states, which have been quite active this year on both fronts.

**Same-sex marriage** has been a bitterly disputed issue since the Massachusetts Supreme Judicial Court in 2003 interpreted the state constitution as requiring marriage licenses to be granted to same-sex couples, making Massachusetts the only state to legalize gay marriage. Several others permit same-sex civil unions. Although this ruling inspired same-sex marriage supporters to file similar lawsuits in other state courts around the country, it also prompted critics to advocate a federal constitutional amendment to declare marriage in the U.S. to be between a man and a woman, and to prohibit judges from issuing contrary rulings. This proposed Federal Marriage Amendment failed in 2004 to receive the necessary two-thirds votes in the House and Senate to be sent to the states for ratification, and it failed again when it was brought for votes in June and July of 2006. As a result, states are left to decide whether to legalize same-sex marriage, and this question has been at the forefront in 2006 of the state judicial docket and the legislative and constitutional agenda. Supporters continue to press other

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state judges to legalize same-sex marriage, though so far without success, including a key defeat in July 2006 when such an argument was rejected by the New York Court of Appeals. Opponents have enjoyed considerable success in working through state legislatures to prevent legalization of same-sex marriage, and they have gone on to cement these bans by enacting state constitutional amendments.

Before this year, 19 states had already enacted constitutional provisions of this sort. Then, in a June 2006 vote, Alabama became the 20<sup>th</sup> state to approve such an amendment.

**Eminent domain** is not an issue that one would usually expect to leap to the forefront of the national political agenda, but this is exactly what has happened in the aftermath of the U.S. Supreme Court's June 2005 decision in *Kelo v. New London*. At issue was whether state and local governments are prohibited by the U.S. Constitution from invoking their eminent domain power to condemn private property (with just compensation) for economic development purposes. The plaintiffs in this case, along with supportive interest groups, wanted the court to set a national policy prohibiting such actions. But in a 5-4 vote, the court declined to do so, thereby leaving the matter to the states. Roused to action by a public that had not previously been aware of the full extent of the use being made of the eminent domain power, state governments have responded with a flurry of wide-ranging legislation intended to better protect property owners and limit the use of the eminent domain power. Four states passed such laws in the remaining months of 2005, and 2006 has brought even more activity. The National Conference of State Legislatures reported that as of August, 23 states have passed such legislation in their 2006 session.

### **Laboratories of democracy**

The U.S. states have long been celebrated as laboratories of democracy, by which it is usually meant that policy experiments in some states are later implemented in others, and then at the federal level. But as can be seen from a review of political developments in 2006, state policy innovation also takes other forms, such as providing an outlet for policies blocked in Washington by gridlock or unified party control, and permitting a range of policy outcomes on controversial issues ripe for different treatment in various states. This could be fortunate, given the difficulty of governing such a large and diverse country if the national government would ever come to be seen as the sole policy incubator, with no recourse for proposals blocked in Washington, and if one-size-fits-all solutions were to be imposed on controversial issues over which citizens are bitterly divided. ©