

## On Drug Pricing, States Step In Where Washington Fails

Fran Quigley [FIXES](#) FEB. 27, 2018 *The New York Times*

*Fixes looks at solutions to social problems and why they work.*

President Trump continues to vent about high drug prices, most recently in his State of the Union speech. Democrats like Senators Bernie Sanders and Claire McCaskill keep proposing legislation to curb rising medicine costs.

But these pronouncements may not be worrying drug companies too much. They can see that for all of his bluster, the president has not embraced any significant reforms, and that Democrats don't get much support on anything from the Republicans who control Congress.

Brian Sandoval, however, is another story. He's the governor of Nevada, and a Republican. Him, they worry about.

Last June, Sandoval praised a new Nevada law that requires manufacturers of insulin to disclose more details about why have increased prices [as much as 325 percent](#) in recent years. Surrounded by people with [diabetes](#) who struggle to afford the higher cost of insulin, Sandoval said that his own grandfather also had diabetes. "He's somebody that I saw suffer because of that," Sandoval [said](#). The new law, he added, is going "to make a difference, I believe, with regard to transparency in drugs for those suffering from [diabetes](#), and transparency for insulin."

According to the National Academy for State Health Policy, a nonprofit organization that supports states in seeking solutions to health issues, more than 130 pieces of legislation on prescription drug pricing were introduced in statehouses last year. Several became law. Maryland, for example, empowered its attorney general to sue generic drug manufacturers whose prices rose more than 50 percent in a year. California enacted a requirement for pharmaceutical companies to give notice and justification for large price increases. Like the Nevada legislation that Sandoval signed into law, the Maryland and California bills enjoyed strong bipartisan support.

At the same time, Louisiana's health secretary is considering asking the federal government to bypass a drugmaker's patent on an expensive hepatitis C drug. New York has imposed a cap on the growth of the state's Medicaid spending on prescription drugs.

States are partly responsible for funding the Medicaid program, which with 70 million beneficiaries is the country's largest insurer. When Medicaid's prescription costs are added to state obligations to pay for medicines for public employees and prisoners, state governments spend more than [\\$20 billion a year](#) on prescription drugs.

That number has been rising fast, producing particular urgency at the state level, since most state governments are required to maintain a balanced overall budget.

Lawmakers are also under pressure to act from their constituents. [One in five Americans](#) reports skipping medicine doses or failing to fill [prescriptions](#) each year because of cost, and polls show that [as many as 82 percent](#) support changing laws to lower prices.

“State lawmakers know two things: the feds are not going to do something about drug prices anytime soon, and states have to pay the price,” said Trish Riley of the National Academy for State Health Policy.

So states have embraced their role as laboratories of democracy, a description invoked in a Supreme Court decision by Justice Louis Brandeis, in 1932. Recent precedent for states leading the way in health care include the Children’s [Health Insurance](#) Program and even the structure of the Affordable Care Act, both of which were rolled out in states before becoming federal law.

Historically, the federalist philosophy of states taking the policy lead has resonated with political conservatives. And some current drug pricing reforms have a distinctly free-market flavor. More than a decade ago, Massachusetts adopted the health care program that would later influence President Barack Obama’s Affordable Care Act while the state was governed by a Republican, Mitt Romney. Now Massachusetts, governed by another Republican, Charlie Baker, is asking the federal government to allow its state Medicaid program to increase price competition among drugmakers by excluding some high-priced medicines from coverage if an identical cheaper version is available. Last week, Ohio’s Republican governor, John Kasich, urged President Trump to give similar authority — and the negotiating clout that comes with it — to all states.

In Utah, a Republican state representative from Provo, Norman Thurston, is sponsoring legislation to allow the state government to engage in wholesale re-importation of medicines from countries like Canada. “You have manufacturers who are willing to sell the same drugs we use for far lower prices in other places,” he said. “But we are their biggest customer, so where is our volume discount? This is a violation of basic free-market principles.”

Thurston’s bill passed the Utah House on Feb. 18, and similar proposals are pending in other states. A federal bill that would allow patients to personally import medicines has attracted the support of conservatives like Senators Ted Cruz and Rand Paul.

Proposals like these reveal an ideological fault line in the longstanding cozy relationship between the pharmaceutical industry and Republicans. Prescription drug makers are not paragons of the free market. Their business model relies on government-imposed monopolies of patents — even when the drugs’ discovery [was made possible by federal funding](#) — followed by restrictions imposed by the government on itself on negotiating down the cost of the medicines it purchases. The Medicare program, for example, is barred by federal law from using its bulk purchasing power to get discounts.

Last year, President Trump’s accusation that drug companies were [“getting away with murder”](#) earned headlines. But his follow-up comments at that news conference may be more important. They advanced a free-market remedy that resonates with many of his

fellow Republicans. “We’re the largest buyer of drugs in the world, and yet we don’t bid properly,” Trump said then. Referring to his campaign promise to reverse the Medicare restrictions on drug price negotiations, he added, “We’re going to save billions of dollars.”

Writing in the conservative monthly magazine [The American Spectator](#), the Institute for Liberty’s Mytheos Holt has cheered a bill by Senator Mike Lee, Republican of Utah, to ease the path for generic drugs to compete with patented versions. “Lee’s bill is also doing an important service,” Holt wrote. “It is smoking out the anti-conservative nature of an industry that conservatives have been willing to accept uncritically as an ally for far too long.”

Conservative arguments for lower drug pricing carry particular resonance at the states, where Republicans control 32 legislatures.

Thurston points out that most state lawmakers see their constituents’ frustration over drug prices close up. “And it’s not just patients,” Thurston said. “We are also interacting with our friends and neighbors who are small-business owners and can’t afford these costs to cover their employees.”

With [employers’ health care expenses](#) increasing far faster than the rate of inflation, and drug prices a top driver of those increases, the business community has become active in [national](#) and [state-level](#) coalitions for drug pricing reform.

Another factor — the role drug makers have played in pushing opioids and denying or understating their ability to be addictive — may be powerful enough to undercut the political might of the pharmaceutical industry. People are angry. And more than 100 states, cities and counties have filed tobacco-industry-style lawsuits against pharmaceutical companies, seeking to recoup the costs of dealing with the epidemic of addiction and fatal overdoses.

Can you sue a drug company and accept their campaign donation at the same time? Yes, apparently you can — although in November, Oklahoma’s attorney general, Mike Hunter, a Republican, announced that his re-election campaign would not accept donations from drug companies.

The pharmaceutical industry will fight big changes, of course. Before the recent burst of state legislative activity, the industry, which has been [reliably near the top of the lists](#) for lobbying expenditures and campaign contributions, had always managed to block reform proposals. As recently as April 2016, the Wall Street brokerage and research firm Bernstein issued a report concluding that state-level drug pricing proposals are “a very modest risk to pharma, if at all.”

But few if any in the industry are as cavalier about state-level action now. Drug companies hired a reported 70-plus lobbyists to descend on Nevada’s capitol to fight the insulin pricing bill, and one lobbyist for every two state legislators in Louisiana showed

up when a proposal seemed to be gaining traction there. The industry is ramping up its campaign donations to state legislators, too.

When state drug pricing bills do pass, the industry challenges them in court, arguing that federal patent regulations and the Constitution's interstate commerce clause pre-empt the state's effort to address prices, and that transparency mandates force them to reveal trade secrets. States respond by pointing to their right to regulate commerce and protect consumers in their own communities. Several lawsuits have been filed, but none of the industry's court challenges have succeeded yet.

Most advocates concede that comprehensive reform of the American drug pricing system will have to come from national-level changes. Some think the flurry of state legislation will kick-start the federal process. Yet Thurston, who is also part of a bipartisan national coalition that has laid out various options for state governments to tackle drug pricing, insists that the states are no longer willing to wait.

"When it comes to a problem that has national implications, my experience is that states are patient to a point," he said. "But when it becomes clear that the federal government is not going to act, we are going to step in and fix it."