

# The State of American Federalism 2016–2017: Policy Reversals and Partisan Perspectives on Intergovernmental Relations

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Unified Republican Party control of the federal government after the 2016 election brought a reversal of several Obama administration policies, especially those adopted via executive and administrative action in areas such as immigration, energy, the environment, and LGBT rights. The 2016 election also prompted a reversal of partisan perspectives with respect to federal-state relations, as Republicans in Washington moved to preempt state discretion in various areas, whereas Democrats in state capitols challenged the legality of presidential actions and resisted federal efforts to constrain state and local discretion. In this essay, we discuss these themes through an analysis of developments in 2016 and early 2017 regarding health care, immigration, education, marijuana, and energy and environmental policy. We also consider key U.S. Supreme Court decisions affecting the contours of state policymaking.

The state of American federalism in 2016–2017 is characterized by transition and uncertainty following the presidential handover from Barack Obama to Donald Trump. The arrival of a new administration with radically different priorities foretells broad policy reversals in arenas such as health care, immigration, and the environment, with potentially important implications for federalism and intergovernmental relations. The preceding six years were characterized by divided government and congressional deadlock, with the resulting policy vacuum filled by a variety of political actors including state lawmakers, voters (through direct democracy), and judges (Rose and Bowling 2015). The 2016 election ushered in a period of unified Republican control of the federal government, as Republicans kept control of the House (which they have held since the 2010 election) and the Senate (held since the 2014 election) and won the presidency. This could translate into a more productive Congress in 2017–2018, assuming Trump and congressional leaders can work out their differences. It also gives the GOP a historic opportunity to pursue its conservative agenda not only at the federal level but also

in the states, where Republicans control a majority of governorships and legislative chambers.

This change in party control of government also contributed to a realignment of partisan positions on matters of federalism. Notwithstanding the GOP's historical emphasis on states' rights, the Trump administration is now promoting sweeping new immigration, LGBT, and health care policies to be imposed on all states. Meanwhile, having lost control of the federal government, Democrats—who have tended to embrace big federal government since the New Deal—“are now concluding that they have no alternative but to redouble their efforts at the local level” (Rosen 2016). Democratic governors, mayors, and attorneys general (AGs) are vowing to defend state laws when they conflict with the Trump administration's policies and resist presidential actions by declining to assist with enforcement (Gerken 2017; Kettl 2017). And on Election Day, progressives scored victories in several blue states when voters passed ballot initiatives legalizing marijuana and tightening gun control regulations, as discussed in greater detail later in this article. As Jessica Bulman-Pozen argued in a 2014 *Harvard Law Review* article, federalism “provides durable and robust scaffolding for partisan conflict,” with states and localities challenging the federal government when it is controlled by the opposing party; “They thus check the federal government by channeling partisan conflict through federalism's institutional framework” (Bulman-Pozen 2014, 1080–1081). Yet despite progressives' traditional skepticism of states' rights arguments—historically invoked by conservatives to defend institutions such as slavery and Jim Crow—this progressive localism is not wholly new. Rather, it reflects the continuation of work in recent years on issues such as climate change and the minimum wage, where a gridlocked Congress failed to take action (Gerken 2012).

In this year's annual review of American federalism, we focus attention on these themes of policy reversals and changing partisan positions on federalism in 2016–2017. We begin with a discussion of the 2016 elections and the policy environment created by current patterns of party control. Then, we examine five policy arenas in which Trump's election has significant federalism implications: health care, immigration, marijuana, education, and energy and the environment. Next, we turn to the Supreme Court and discuss Antonin Scalia's federalism legacy, decisions implicating core federalism doctrines, and decisions with important state policymaking implications. We conclude by summarizing how the current political context shapes our understanding of contemporary federalism.

## 2016 Election

On November 8, 2016, Donald Trump was elected president, winning 306 Electoral College votes to Hillary Clinton's 232 despite losing the popular vote with 62.9 million

votes to Clinton's 65.8 million. When electors actually cast their ballots in December, however, popular discontent spurred seven electors to vote faithlessly, bringing the official electoral vote total to 304–227. Although Clinton won approximately the same number of popular votes as President Obama won in 2012, they were not in the states where she needed them most (Lauter 2016). Trump's populist platform emphasizing opposition to illegal immigration and free trade proved especially popular with white voters, males, and blue-collar workers without college degrees (Tyson and Maniam 2016).

Nearly all pollsters failed to predict Trump's Electoral College victory. Clinton's strong poll numbers in the so-called "Blue Wall" of Wisconsin, Michigan, and Pennsylvania contributed to talk of inevitable victory. On election night, however, Trump swept these three states, albeit by thin margins, and carried traditional swing states Iowa and Ohio with wider 10- and 8-percentage point margins, respectively. Although the reasons for the inaccuracy of some state-level polls are not yet fully understood, some evidence suggests that late deciders ultimately broke for Trump, despite their reservations about his qualifications, at unexpectedly high margins (Tucker, Rapkin, and Smith 2017).

In Congress, Republicans lost a handful of seats while maintaining majorities in both chambers. Trump's short coattails helped Democrats pick up two seats in the Senate, reducing the GOP's majority from 54–46 to 52–48. (The Democratic totals include two independent Senators who caucus with the Democrats). In the House, Democrats picked up six seats, shrinking the Republican majority slightly from 247–188 to 241–194. Mirroring certain inaccurate state-level presidential polls, speculation by some that Democrats might regain the House in an anti-Trump wave failed to come true.

At the state level, the GOP maintained or consolidated the gains of the last several elections. Going into the 2016 election, Republicans controlled thirty-one governors' offices; on Election Day the party gained three governorships (Missouri, New Hampshire, and Vermont) but lost one (North Carolina), bringing the number to thirty-three. Control of state legislatures did not change much in 2016. Democrats flipped four legislative chambers while Republicans flipped three, bringing the total number controlled by the GOP to sixty-eight out of a total of ninety-nine state legislative chambers (Nebraska has a unicameral legislature and nonpartisan elections, but a majority of state senators are Republicans). The GOP picked up four "trifectas" (both chambers plus the governorship) in 2016 (Iowa, Kentucky, Missouri, and New Hampshire) but lost two (Nevada and North Carolina), which changed to divided government. The Democratic Party lost one trifecta (Vermont), which also changed to divided government. Republicans now have a trifecta in twenty-five states, compared to six for Democrats; the remaining nineteen states have divided government. Overall, the GOP continues to dominate state capitals throughout much of the nation.

Recent Republican dominance of state elections can be traced to several developments. First, American voters like checks and balances, so it is not uncommon to see the president's party lose seats in Congress and state government, as it did during the Obama years. (By this logic, the GOP may be expected to lose congressional seats in 2018.) Second, in the wake of the U.S. Supreme Court's decision in *Citizens United v. FEC*, 558 U.S. 310 (2010), Republicans poured money into state legislative elections, especially in states where the race was tight and the legislature plays a role in redistricting (Abdul-Razzak, Prato, and Wolton 2017). As a result, following the 2010 Census, Republicans got to draw the electoral maps in approximately three times as many states as Democrats (Phillips 2016). Gerrymandering thus may have helped the GOP tighten its grip on state legislatures.

The 2016 election also featured ballot measures in several (mostly blue-leaning, Western) states that advanced progressive policies blocked in Congress and occasionally in state legislatures, as Kathleen Ferraiolo discusses in more detail in her article in this issue. Voters in nine states considered measures to legalize either the recreational or medicinal use of marijuana; eight of these measures passed. Voters in three states—California, Nevada, and Washington—tightened gun regulations; however, Maine voters narrowly defeated such a measure. Voters in Arizona, Colorado, Maine, and Washington passed measures increasing the minimum wage, while South Dakota voters used the referendum process to overturn the state legislature's attempt to lower the minimum wage for those under eighteen. Thus, the outcomes of most ballot measure votes in 2016 favored the progressive agenda. In contrast, however, efforts to repeal the death penalty in three states (California, Nebraska, and Oklahoma) failed.

The 2016 consolidation of Republican power at both the federal and state levels has potentially enormous consequences for federalism and intergovernmental relations. During his campaign, Trump made a number of promises with implications for state and local governments. He vowed that repealing and replacing the Affordable Care Act (ACA) would be “one of his first acts as president.” He also promised that on “day one” of his presidency he would take numerous other actions including building an “impenetrable physical wall” along the Mexican border, revoking federal funding from sanctuary cities, implementing “extreme” immigration vetting techniques, removing roadblocks to the Keystone XL Pipeline, and lifting restrictions on drilling for oil and natural gas and mining coal, among other measures.

Some of these actions proved easy for Trump to accomplish through executive and administration actions, even if in one case discussed later in this article, an executive order banning travel into the United States from seven largely Muslim nations became tied up in the federal courts. Trump signed executive orders advancing construction of the Keystone XL and Dakota Access Pipelines.

He ordered a review of the Obama administration's Clean Power Plan that aimed to reduce greenhouse gas emissions from power plants. A pair of executive orders called for building a wall on the southern border and cutting off funds to state and local governments that did not cooperate with federal immigration enforcement efforts. Additionally, the Departments of Justice and Education jointly issued a "Dear Colleague" letter retracting guidance letters issued during the Obama presidency interpreting Title IX of the Education Amendments of 1972 as requiring public schools to permit restroom use consistent with a student's gender identity. This action has important consequences for the ongoing debate over transgender rights. In short, in the early months of the Trump administration, in a continuation of patterns seen in recent administrations, a number of policy changes were achieved through executive and administration action.

Some other promises required cooperation from Congress and thus proved more challenging for the new administration to deliver in its early days. Despite his party's majorities in both chambers, and broad agreement on many policy priorities including tax cuts and repealing the ACA, Trump's relationship with Capitol Hill was strained from the outset. Many Republican lawmakers were openly unsupportive of Trump's candidacy during the primaries and lukewarm during the general election. After Trump took office, top Republicans criticized him over a growing list of issues including ties to Russia, the "flawed" and "poorly implemented" rollout of his travel ban, and his repeated speculation that millions of illegal ballots were cast in the presidential election (Bolton 2017). They also expressed frustration with his tendency to stray off message and concern that the series of controversies emanating from the White House was slowing the conservative agenda's momentum.

In contrast to the difficulty of passing legislation in Congress, leaders in newly red "trifecta" states moved swiftly to enact policy changes in 2017. Some of this legislation related to collective bargaining. Iowa scaled back a four-decade-old law governing union contract negotiations for the state's public employees. The measure, which is similar to one passed in Wisconsin in 2011, prohibits government workers from negotiating over issues such as health insurance, seniority, and extra pay. Kentucky and Missouri enacted "right-to-work" legislation, preventing unions from requiring that workers at companies they represent pay dues as a condition of employment. Passage of these two bills brings the total number of states with right-to-work laws to twenty-eight (Burns and Smith 2017). However, a similar measure narrowly failed in New Hampshire.

Newly red states also passed laws loosening gun regulations and restricting abortion. New Hampshire's legislature passed, and Republican Governor Chris Sununu signed, a "constitutional carry" law making it unnecessary to hold a permit to carry a loaded, concealed handgun. The legislature passed similar bills in 2015 and 2016, but they were vetoed by then-governor Maggie Hassan, a

Democrat. A dozen other states already have such laws on the books. Kentucky banned abortion after twenty weeks, and Iowa followed suit, bringing the total number of states with twenty-week abortion bans to seventeen (Guttmacher Institute 2017).

Republican-controlled state legislatures have also been active, both in 2016 and early 2017, in adopting laws that preempt local ordinances on a range of measures. As Lori Riverstone-Newell discusses in an article in this issue, Democratic-controlled local governments have in recent years adopted ordinances increasing the minimum wage, banning fracking, and expanding LGBT rights. However, conservative state legislatures have responded by considering and in a number of cases adopting local preemption measures barring localities from exceeding or deviating from state requirements in these and other policy areas.

Meanwhile, Democratic-controlled state legislatures continue to adopt innovative policies, especially in the area of voting and elections. For instance, in 2015, after Oregon and California became the first states to enact automatic voter registration laws, whereby persons are automatically registered to vote when conducting business at motor vehicle agencies, a handful of other states adopted these policies in 2016 and 2017. Additionally, as Christopher Kulesza, Michael Miller, and Christopher Witko demonstrate in an article in this issue, state and local governments continue to craft public-finance measures and other campaign-finance restrictions, even in the face of U.S. Supreme Court decisions interpreting the First Amendment of the U.S. Constitution as limiting state and local discretion in this area.

## **Policies and Intergovernmental Implications**

The next several sections examine federal and state policy developments in 2016 and early 2017, focusing on the arenas in which some of the most notable federalism-related events took place: health, immigration, education, marijuana, and energy and environmental policy.

### **Health Policy**

States' expansion of Medicaid under the ACA continued, albeit slowly, in 2016. The Supreme Court's 2012 ruling on the ACA struck down the mandated expansion of Medicaid, the federal-state health insurance program for low-income Americans, to millions of additional beneficiaries. As a result, the decision of whether to expand Medicaid was left to state leaders. The party composition of government was the single best predictor of early state participation, as blue states quickly implemented the expansion, while red states initially opted out (Jacobs and Callaghan 2013; Barrilleaux and Rainey 2014). Indeed, Jennifer Jensen's article in this issue suggests that governors in recent decades have taken increasingly partisan

positions on matters of national policy—mirroring rising polarization on Capitol Hill—and cites the ACA as a leading example.

Although the pace at which additional states choose to expand Medicaid has slowed in recent years, partisanship has continued to play a prominent role. Upon entering office in 2016, Louisiana’s Democratic Governor, John Bel Edwards, signed an executive order expanding Medicaid, reversing the stance of his Republican predecessor, Bobby Jindal. Louisiana’s participation brings the total number of participating states to thirty-one plus the District of Columbia. Meanwhile, North Carolina’s newly elected Democratic Governor, Roy Cooper, moved in early 2017 to expand Medicaid but ran into opposition from the Republican-led state legislature. Unlike Louisiana, North Carolina law does not permit the governor to expand Medicaid with an executive order.

Budgetary considerations and pressure from interest groups representing hospitals and businesses have pushed a growing number of red states to participate, however, as Rose and Bowling observed in the 2015 Annual Review of Federalism (see also [Rose 2015](#)). Many such states are turning to waivers, which allow state experimentation with new health care approaches, as a way to reconcile these competing pressures. Arkansas became the first state to secure a waiver in 2013, using federal funds to buy private health insurance for the newly eligible—the so-called “private option”—instead of enrolling them in traditional Medicaid. In this special issue, Carol Weissert, Richard Nathan, and Benjamin Pollack provide a richly detailed account of the intergovernmental negotiation of the Arkansas waiver. Other waiver states have relied on traditional Medicaid managed care organizations but have adopted “personal responsibility” provisions such as premiums, required contributions to health saving accounts, and healthy behavior incentives. As such, waivers have enabled Republican leaders to distance themselves from, and remain critical of, the ACA and Medicaid while accepting federal funds that benefit their states ([Jones, Singer, and Ayanian 2014](#)).

Waivers remained popular in 2016. Coverage under Montana’s Medicaid waiver went into effect in January 2016, reflecting a compromise between the Republican-led legislature and Democratic Governor Steve Bullock. In Kentucky, Republican Matt Bevin, who ran a successful 2015 gubernatorial campaign on a platform that included reversal of the Medicaid expansion led by his Democratic predecessor, Steve Beshear, changed course upon winning election and applied for a waiver in summer 2016 (the application was still pending as of spring 2017). The waiver would allow Kentucky to charge monthly premiums, eliminate dental and vision coverage, and make employment a condition for Medicaid eligibility, among other changes. Given the Trump administration’s repeated promise to give states more flexibility over Medicaid, Kentucky’s chances of approval are now higher than under the Obama administration, which rejected all previous waiver proposals with work requirements. If its waiver is approved, Kentucky would follow in the

footsteps of Arizona, which, after initially opting for a traditional Medicaid expansion, secured a waiver in 2016, bringing the total number of waiver states to seven.

In late 2016, the movement toward Medicaid expansion came to a standstill. With Trump's election on a "repeal and replace" platform, uncertainty over the future of the ACA led conservative states such as Georgia, Idaho, Nebraska, and South Dakota—all of which had been considering expanding Medicaid—to halt their efforts (Japsen 2016). Following a meeting with Vice President-Elect Mike Pence in fall 2016, South Dakota Governor Dennis Daugaard pulled his support for expansion (Nord 2016). In Nebraska, state lawmakers who introduced Medicaid expansion bills in 2016 announced that they would not pursue such legislation in 2017. As one state senator explained: "There's certainly a desire to expand health care coverage to 97,000 Nebraskans, but until we get some clarity from Congress and the president, I don't think it's useful to spend much time on it" (Schulte 2016).

Mounting speculation about the potential repeal of the ACA's Medicaid expansion, and the loss of hundreds of billions of dollars in federal funding, elicited substantial opposition from the leaders of expansion states. Of the thirty-one states that have adopted the Medicaid expansion, sixteen have Republican governors—and more than half of them have joined their Democratic counterparts in expressing concern about repeal of this provision, despite their reservations about other parts of the ACA (Quinn 2017). Ohio Governor John Kasich wrote a letter to Congress in which he "strongly recommend[ed] states be granted the flexibility to retain the . . . Medicaid coverage expansion and federal matching percentage." Arkansas Governor Asa Hutchinson suggested that, rather than repealing the Medicaid expansion, federal lawmakers "look to . . . our state's new innovative approach to Medicaid expansion, as a model" (Sneed 2017). Several GOP Senators echoed these sentiments, saying they would not support a replacement bill that does not protect coverage gains made under the Medicaid expansion.

Over the protests of a "significant cadre of Republican governors," the House Republican leadership in March 2017 unveiled the American Health Care Act, which would dismantle the ACA's Medicaid expansion and individual mandate, among other things, while leaving in place some of the law's most popular features—including provisions protecting those with pre-existing conditions and allowing young people to remain on their parents' health plan until age twenty-six (Goldstein et al 2017). Under the proposal, states could continue to sign up newly eligible Medicaid enrollees under the ACA until 2020; after 2020, these enrollees would be grandfathered into the system, continuing to qualify for the expanded federal funding provided by the ACA. For new enrollees after 2020, the federal government would provide a per capita payment—set at a level designed to



produce significant federal budgetary savings—with the states paying for costs in excess of that cap. In exchange, states would be given additional flexibility to cut benefits, eligibility, and provider payments. The Congressional Budget Office estimates that 24 million people would lose their coverage by 2026 under the proposal, compared to current law, stemming in large part from changes in Medicaid enrollment (CBO 2017).

As health law scholar Timothy Jost (2017) observed, “the bill is not so much an ACA repeal bill as it is an attempt to change dramatically the Medicaid program.” Since its inception half a century ago, Medicaid has been structured as an open-ended entitlement program for anyone who meets its financial, age, or health criteria—traditionally, low-income seniors, disabled persons, and families with dependent children. The move to capped federal payments would mark a historic departure from this model—one that GOP lawmakers have sought unsuccessfully since the 1990s (Rose 2013). Now as then, the Republican congressional leadership hopes to convince state leaders—and, critically, their counterparts in the Senate—that trading additional flexibility for increased risks and costs is a good deal.

## Immigration

Several immigration-related matters have recently raised core federalism issues. Refugee settlement brought certain states and the federal government into direct conflict. In 2015, President Obama announced plans to settle 10,000 Syrian refugees during the fiscal year (Eilperin and Morello 2015). Some governors took formal actions to oppose the settlement of Syrian refugees in their states. In Texas, for example, Governor Abbott informed President Obama by letter that he had directed the relevant state agency “to not participate in the resettlement of any Syrian refugees in the state of Texas” (Abbott 2015). Similarly, then-Governor Pence issued a statement “directing all state agencies to suspend the resettlement of additional Syrian refugees in the state of Indiana pending assurances from the federal government that proper security measures have been achieved” (Pence 2015).

State lawsuits opposing the federal government’s refugee settlement policies were resolved in the latter’s favor. Cases filed by Alabama and Texas attempting to mandate additional state involvement in federal settlement decisions were dismissed by federal district courts (*Alabama v. United States*, Case No. 2:16-cv-00029-JEO [2016]; *Texas Health and Human Services Commission v. United States*, 166 F. Supp. 3d 706 [2016]). Furthermore, Indiana’s withholding of certain federal grant funds to a local nonprofit working to place Syrian refugees was preliminarily enjoined after a district court judge held that a full trial would likely demonstrate that the action violated the Fourteenth Amendment’s Equal Protection Clause (*Exodus Refugee Immigration v. Pence*, 165 F. Supp. 3d 718 [2016]). The U.S. Court

of Appeals for the Seventh Circuit affirmed the injunction, where Judge Richard Posner indicated that Indiana's concern about Syrian refugees engaging in terrorist activities was "nightmare speculation" for which there was "no evidence" (*Exodus Refugee Immigration v. Pence*, No. 16-1509 [2016]).

Relatedly, President Trump issued an executive order on January 27, 2017 prohibiting citizens of seven majority-Muslim countries from obtaining visas and suspending refugee admission from those countries (Executive Order 13769). In response, the state of Washington filed suit, alleging that the order violated several federal laws as well as the First and Fifth Amendments of the U.S. Constitution. The state argued that the order was "separating Washington families, harming thousands of Washington residents, damaging Washington's economy, hurting Washington-based companies, and undermining Washington's sovereign interest in remaining a welcoming place for immigrants and refugees" ([Complaint 2017](#), 1, 2). Minnesota subsequently joined the suit as a party, and seventeen other states filed an amicus brief emphasizing the order's deleterious effects on "state colleges and universities, state medical institutions, and state tax revenues from students, tourists and business visitors" ([Amended Motion 2017](#), 1). A stay request was granted by a district court and subsequently upheld by a Ninth Circuit panel. On March 6, President Trump issued a modified executive order (Executive Order 13780), which was again challenged in federal court, this time by the state of Hawaii. On March 29 the U.S. District Court for the District of Hawaii temporarily enjoined the revised executive order, finding that plaintiffs had "establish[ed] a strong likelihood of success on the merits of their Establishment Clause claim" (*Hawaii v. Trump*, No. 17-00050 [2017]). As of this writing, the case was pending appeal before the U.S. Court of Appeals for the Ninth Circuit.

The so-called "sanctuary cities" became another immigration-related subject raising core federalism issues. Although there is no legal or widely accepted definition of the phrase "sanctuary city," it generally refers to any subnational government entity that refuses to cooperate in the enforcement of some immigration-related policy. In practice, sanctuary policies take different forms. A Philadelphia executive order states, for example, "No person in the custody of the City who otherwise would be released from custody shall be detained pursuant to an ICE civil immigration request" (Executive Order No. 5-16). Although detainer requests are not mandatory orders by law, other subnational policies go further in prohibiting cooperation with federal immigration policy under certain circumstances. A Minneapolis ordinance states, "Other than complying with lawful subpoenas, city employees and representatives shall not use city resources or personnel solely for the purpose of detecting or apprehending persons whose only violation of law is or may be being undocumented, being out of status, or illegally residing in the United States" (Minneapolis Ordinance 2017).

After making the elimination of sanctuary cities a central part of his campaign, President Trump issued an executive order noting the administration's policy to "[e]nsure that jurisdictions that fail to comply with applicable Federal [immigration] law do not receive Federal funds, except as mandated by law" (Executive Order 13768). Efforts to combat or eliminate sanctuary policies encounter two hurdles. First, the Supreme Court has held that the Tenth Amendment and broader constitutional structure prohibit the federal government from commandeering state and local officials to assist with implementing federal law (e.g., *Printz v. United States*, 521 U.S. 898 [1997]). Thus, any command that states help enforce federal immigration policy may be unconstitutional. Second, the Court has held that any grant withholdings to motivate policy compliance must be "reasonably related to the federal interest in particular national projects or programs" (*Massachusetts v. United States*, 435 U.S. 444, 461 [1978]) and not "be so coercive as to pass the point which 'pressure turns into compulsion'" (*South Dakota v. Dole*, 483 U.S. 203, 210 [1987]). As a result, any effort to withhold a substantial portion of federal funding from recalcitrant jurisdictions, or tie fund dispersal for immigration-irrelevant policies to compliance, may be unconstitutional.

## Marijuana

The year 2016 was an eventful one in marijuana policy. On November 8, voters in four states (California, Maine, Massachusetts, and Nevada) passed ballot measures legalizing recreational use of the drug—doubling the number of states where such use is legal (joining Alaska, Colorado, Oregon, and Washington). California, Massachusetts, and Nevada approved the measures by wide margins (57-43, 54-46, and 54-46, respectively) while the vote was significantly closer in Maine (50.2-49.8), prompting an unsuccessful recount effort. Nearly one-quarter of the nation's population now resides in a state where recreational use is legal (Steinmetz 2016).

Efforts to legalize the recreational use of marijuana failed in two other states, however. Arizona was the sole state to reject a ballot measure to legalize recreational marijuana in 2016. Proponents of legalization outspent opponents by a 3:1 margin, but the Arizona Republican Party came out against it and ultimately 52 percent of the conservative state's voters rejected the measure (Quinn 2016). In Vermont, outgoing Governor Peter Shumlin, a Democrat, led an effort to legalize marijuana through the legislative process. A bill passed the State Senate but was rejected by the State House of Representatives, where some representatives felt rushed by the tight end-of-session deadline and others disagreed with the language, which would have licensed and taxed commercial growers and retailers while banning home-grown plants (Ledbetter 2016). Had the bill passed, Vermont would

have been the first state to legalize recreational marijuana through the legislative process.

Voters in four states (Arkansas, Florida, Montana, and North Dakota) approved ballot measures on November 8, 2016 allowing or expanding the use of medicinal marijuana. Earlier in the year, Ohio and Pennsylvania passed legislation to legalize medical marijuana. These developments bring the total number of states that have legalized the medicinal use of marijuana to twenty-eight plus the District of Columbia (NCSL 2017).

The continued movement toward marijuana legalization reflects rapidly shifting attitudes toward the drug. Today, 60 percent of American adults say recreational use should be made legal—double the percentage that favored legalization in 2000. This is the highest recorded level of support for legalization since Gallup began tracking the issue nearly five decades ago (Gallup 2016). By contrast, there is more longstanding support for medical marijuana, with polls consistently showing a majority in support since 2000—which helps account for the longer list of states (including several conservative states) that have legalized medicinal use (ProCon.org 2016).

Legalization of recreational marijuana is on the 2017 legislative agenda in several states. Indeed, just as ballot measures legalizing medical marijuana in the 1990s paved the way for other states to do the same through the legislative process in the 2000s, the recent wave of successful initiatives legalizing recreational marijuana may clear the path for legislation in neighboring states (Smith 2016). In the wake of the Massachusetts ballot measure, the Democratic leaders of neighboring states Rhode Island and Connecticut signaled an increased openness to legalization. And popular support for legalization is strong in Colorado's neighbor, New Mexico, where Democrats regained the state legislature in 2016; however, Republican Governor Susana Martinez is opposed. Vermont lawmakers have indicated they will try again, though they will likely face resistance from new Republican Governor Phil Scott.

Uncertainty about federal regulatory policy toward marijuana may slow the legalization movement's momentum, however. On the campaign trail, Trump expressed support for medical marijuana and said the issue of recreational marijuana should be left to the states, suggesting he would not make enforcement of the Controlled Substances Act a top priority. After entering office, Trump continued to express general support for medical use, but spokesman Sean Spicer suggested there would be "greater enforcement" of federal law against recreational use of the drug, citing "a big difference between the medical use that's very different than the recreational use, which is something the Department of Justice will be further looking into" (Lopez 2017). Similarly, Attorney General Jeff Sessions signaled during the confirmation process that regulating marijuana would not be a priority, but then in February 2017 said he was "dubious about marijuana" and

ordered a review of the Obama administration's "hands-off" policy toward state marijuana laws (Everett 2017). Under the Cole Memo, the Obama administration had de-prioritized marijuana enforcement in states where the drug is legal except where it was being sold to minors or crossing state lines, among other infractions. Given widespread public acceptance of legalization, some experts dismissed these statements as "saber rattling," but the administration's mixed signals nonetheless had state and industry leaders uneasy and girding for battle (Kumar and Hotakainen 2017).

## Education

In December 2015, President Obama signed the Every Student Succeeds Act (ESSA), which replaces No Child Left Behind (NCLB), an initiative that was advanced by the George W. Bush administration and passed by the Republican-controlled Congress in 2001 but quickly lost favor with conservatives and liberals alike. The law was criticized for increasing the federal government's role in K-12 education and for relying too heavily on standardized tests, among other things. However, when NCLB expired in 2007, national lawmakers could not agree on how to update the much-maligned law, leaving it in limbo for nearly a decade. This impasse was finally broken in 2015 when Congress passed ESSA by overwhelming bipartisan margins of 359-64 in the House and 85-12 in the Senate, in what President Obama referred to as a "Christmas miracle" (Kerr 2015). The law went into effect in August 2016 and allows for an eighteen-month transition period.

The *Wall Street Journal* (2015) hailed ESSA as "the largest devolution of federal control to the states in a quarter-century." The new law retains some features of NCLB while eliminating others that were widely viewed as too restrictive or punitive. It requires children to continue to take standardized tests in the third through eighth grades, and schools to continue to report on the progress of disadvantaged groups including disabled students, minorities, and English learners. However, ESSA significantly reduces the federal role in turning around (or closing) struggling schools by allowing states to establish their own accountability systems. Such systems must be partly based on test scores and graduation rates, but otherwise the new law gives states substantial flexibility to incorporate other factors, such as school safety and teacher engagement, and to determine how much these factors count toward defining a school's success or failure.

The law represents a balancing act between Republicans' (and many Democrats') desire to return more control over public education to states and localities and Democrats' desire to protect vulnerable students. The compromise reflects the extent to which the two parties have traded places since 2001 when it comes to their positions on the federal role in K-12 education. During the debate

over NCLB, Republicans—concerned that the American education system was no longer internationally competitive—hoped a greater federal role would improve school accountability, while many Democrats were skeptical of the top-down approach, fearing teachers would be micromanaged. But then during the Obama years, Republicans grew concerned about what they saw as federal government overreach in the administration’s NCLB waivers and its Race to the Top competitive grant program, which pushed states to adopt the Common Core standards (Edwards 2015). And while Democrats found many things to criticize in NCLB, they liked that it forced schools to pay attention to minorities and other disadvantaged groups of students. In an article in this issue, Andrew Saultz, Lance D. Fusarelli, and Andrew McEachin examine the role played by liberal and conservative constituencies in pressuring Congress for NCLB reform.

Although the new law rolls back much of the NCLB Act, the magnitude of its effects on the American education system will be muted by waivers. Forty-two states and the District of Columbia had waivers from certain NCLB requirements at the time ESSA became law, allowing them to establish their own standards for student success. “This means that most of the country’s students have already been learning under a system that eschewed much of No Child Left Behind’s most obvious and onerous aspects—and looks a lot like the system envisioned in Every Student Succeeds” (Wong 2015). Nonetheless, the law does attempt to change the federal-state power balance. Senator Lamar Alexander (R-TN), who co-authored the legislation, claimed ESSA “will end the waivers through which the U.S. Department of Education has become in effect a national school board. Governors have been forced to come to Washington, D.C., and play Mother May I” (Camera 2015).

In 2017, the bipartisan compromise underlying ESSA fell apart as the GOP-controlled Congress—in a narrow vote along partisan lines—relied on a process set out in the rarely used Congressional Review Act to rescind accountability regulations that had been adopted by the Obama administration in late 2016, one year after ESSA’s passage. The regulations were intended to clarify how states should measure schools’ performance and hold low-performing schools accountable under ESSA. Congressional Democrats defended the reporting requirements as necessary to protect vulnerable students, but Republicans argued that the regulations were another example of federal overreach by the Obama administration. The rollback effectively leaves it up to states to find ways to enforce protections for at-risk students. Some state education leaders welcomed the additional flexibility, while others said they feared the move opened a loophole that would make it easier to ignore or hide failing schools, to the detriment of vulnerable students (Brown 2017).

## Energy and the Environment

Energy and the environment were salient election topics, and several of the attendant policy issues have important federalism implications. President Trump's America First Energy Plan claims the country has been "held back by burdensome regulations" and emphasizes commitments to policies such as "clean coal technology," "energy independence," and "refocusing the EPA" (White House 2017). Early efforts to implement this policy include executive memoranda to facilitate construction of the Dakota Access and Keystone XL pipelines. One of the Trump administration's first major actions was issuance of Executive Order 13783. Among other things, it orders review of "existing regulations that potentially burden the development or use of domestically produced energy resources." The order also rescinds unilateral Obama administration actions such as the Climate Action Plan and requires "review of estimates of the social cost of carbon, nitrous oxide, and methane for regulatory impact analysis."

Executive Order 13783's most noteworthy initiative was to begin the process of unraveling the Clean Power Plan. First proposed in 2014, the Clean Power Plan aims to reduce carbon dioxide emissions from power plants in an effort to combat climate change. The Plan sets state-specific reduction targets and has important cooperative federalism implications (Engel 2015). In 2016, the Supreme Court issued a stay of the final rule by a 5:4 vote pending review by the U.S. Court of Appeals for the D.C. Circuit and potentially the Court itself. Litigation against the Plan was initiated by a coalition of twenty-nine largely conservative states, and the Court's order was the first time it stayed a federal regulation prior to appellate court review (Liptak and Davenport 2016). President Trump's order directs Environmental Protection Agency (EPA) Administrator Scott Pruitt—who as Oklahoma Attorney General was among the key state actors challenging the Plan—to "as soon as practicable, suspend, revise, or rescind" the regulation. Subsequently, the EPA asked that the D.C. Circuit delay its ongoing proceedings related to the validity of the Plan and a coalition of liberal states contested that request (Valdmanis 2017). Formally abolishing the Plan requires the agency to go through notice and comment rulemaking, and the process is likely to take time due the nontrivial administrative transaction costs and expected litigation.

Questions concerning the future treatment of waiver requests under the Clean Air Act also raise important federalism issues. When Congress passed the Clean Air Act it included a provision allowing California, which had already adopted more stringent regulations, to request a waiver from preemption with respect to emission standards for motor vehicles. Although the exemption formally applies only to California, the Act allows other states to adopt California's standards and numerous states subsequently adopted those standards (Engel 2009, 436). Although the EPA denied a request in 2007 during the Bush administration (Dinan 2008,

395–396), waivers have otherwise been granted. The Trump administration is reported to be considering ways to end the waiver program, and a coalition of car manufacturers has written to EPA Administrator Scott Pruitt that doing so would be “the single most important decision the EPA has made in recent history” (Davenport 2017, 3). Any action on this front is likely to generate legal challenges concerning the scope of the EPA’s authority to withdraw or deny waivers.

As a result of an apparent impending reduction in federal environmental regulation and enforcement, state and local governments may become more of a focal point for stakeholders interested in enhancing protections. Of course, subnational governments have long been important participants in environmental policymaking (see, e.g., Hays, Esler, and Hays 1996; Konisky 2009; Woods 2005). Examples of recent subnational policymaking efforts that are likely to continue or expand include cutting greenhouse emissions, promoting renewable energy, enhancing regulations on oil production and shipment, expanding restrictions on fossil fuels, and providing financial incentives for electric car purchases (see, e.g., Adler 2017; Nagourney and Fountain 2016). In addition to local policy changes, an increased emphasis on subnational action regarding energy and the environment may lead to enhanced interstate and interlocal collaboration through efforts such as the Mayors National Climate Action Agenda.

Increasing vertical regulatory friction over energy and environmental policy is likely to bring preemption battles to the political forefront. At the state level, legislatures have reined in local governments by preempting policymaking on subjects such as fracking and banning plastic bags. In turn, these preemption efforts may generate lawsuits as a result of local noncompliance or challenges regarding the scope of home rule provisions (see, e.g., Fischer 2016). At the federal level, the newly unified executive and legislative branches may preempt a variety of subnational energy and environmental policies. While preemption efforts may take numerous forms, recently proposed legislation is illustrative, stipulating that states may not “prohibit construction of [an oil or gas] pipeline” (H.R. 1663 2015) or “adopt or continue in effect any requirement to comply with a standard for energy conservation or water efficiency with respect to a product” (H.R. 1663 2016).

Federal lands are also poised to be an area of political emphasis with respect to energy and environmental regulation. President Obama sparked debate, especially in the administration’s waning weeks, by designating millions of acres of land as national monuments. Although the Antiquities Act gives the president unilateral authority to designate national monuments, critics contend that too much land has been designated without sufficient accounting for state and local stakeholder preferences or the potential for energy-related development (see, e.g., Burr 2017). While sporadic state-specific proposals have been made to open federal lands to additional energy development, a more receptive president may help drive broader efforts. For example, President Trump’s America First Energy Plan states, “We



must take advantage of the estimated \$50 trillion in untapped shale, oil, and natural gas reserves, especially those on federal lands that the American people own” (White House 2017). Executive Order 13783 initiated action in this regard by instructing the Secretary of the Interior to “lift any and all moratoria on Federal land coal leasing activities.”

## The Supreme Court

The Supreme Court’s 2015 Term, which ran from October 2015 through June 2016, produced a series of cases with important federalism implications, though it did not yield any canonical decisions. Before addressing the key cases, however, we briefly discuss Justice Scalia’s federalism legacy. Although Scalia’s death could have dramatically shifted the Court’s ideological balance, the Senate’s strategic inaction on President Obama’s nomination of Merrick Garland, followed by President Trump’s victory and subsequent confirmation of Neil Gorsuch, may mean a relatively smooth jurisprudential transition. The remaining sections discuss the term’s core federalism decisions and those that have important implications for state policymaking. We also offer a brief glimpse into certain federalism issues percolating in lower courts.

### Justice Scalia and Federalism

While a comprehensive retrospective with respect to Justice Scalia’s influence on federalism doctrine lies beyond this article’s scope (see, e.g., Rossum 2006, 90–126; Staab 2006, 227–308), some highlights are in order. Perhaps the closest Scalia came to articulating an overarching theory of federalism came in a brief law review article published the year he became a judge (Scalia 1982). Scalia’s perspective, which may have been jettisoned to some extent during his time on the bench (see Staab 2006), emphasized that federalism “justifies a predisposition towards state and local control—but not, I think, the degree of hostility towards national law which has become a common feature of conservative thought” (20). He also noted that federalism “is a stick that can be used to beat either dog,” (19) highlighting its potential use as a strategic political weapon. Scalia closed by contending that “the federal government is not bad but good” (p. 22), urging conservatives to be proactive policymakers when in power rather than merely minimizing action in deference to states.

Justice Scalia was a critical member of the Court’s minimum winning coalition that set outer limits on the commerce power (e.g., *United States v. Lopez*, 514 U.S. 549 [1995]). However, Scalia also voted to uphold the federal government’s regulation of marijuana under the commerce power in a case that presented a vehicle for overturning the arguably expansionist precedent set in *Wickard v. Filburn*, 317 U.S. 111 (1942). With respect to the dormant Commerce Clause,

however, Scalia was more stringent. He argued that the concept of a “dormant” Commerce Clause, which prohibits state policies deemed to impermissibly interfere with interstate commerce, had “no basis in the Constitution” (*Tyler Pipe Industries v. Washington State Department of Revenue*, 483 U.S. 232, 254 [1987]).

Aside from commerce issues, Justice Scalia’s federalism jurisprudence made important marks in a variety of areas. His most significant majority opinion regarding federalism may have been *Printz v. United States* (1997), where the Court held 5-4 that Brady Act interim provisions requiring local law enforcement to conduct background checks and perform other tasks related to gun purchases unconstitutionally commandeered state officials into federal service. Justice Scalia also provided a critical fifth vote in important cases granting states sovereign immunity from lawsuits, even in the face of express congressional abrogation (e.g., *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 [1996]). His views on preemption were somewhat more nuanced, perhaps because any overarching theory of preemption under the Supremacy Clause was muted by the text-based questions that tend to drive inquiry in this area. As a result, Scalia often ruled in favor of the federal government in preemption cases (see [Rossum 2006](#); [Staab 2006](#)).

### **Decisions Implicating Core Federalism Doctrines**

One of the Court’s 2016 non-decisions is notable for its horizontal and vertical federalism implications. In 2012, Colorado voters passed Amendment 64 decriminalizing the personal use of marijuana in small amounts, providing for the lawful operation of marijuana-related facilities, and mandating the adoption of implementing regulations. At the end of 2014, Nebraska and Oklahoma initiated an action against Colorado under the Court’s original jurisdiction contending that the Controlled Substances Act preempted Amendment 64’s facilities and regulation-implementing provisions. Plaintiff states argued that they “dealt with a significant influx of Colorado-sourced marijuana,” resulting in “detrimental economic impacts. . . especially in regard to the increased costs for the apprehension, incarceration, and prosecution of suspected and convicted felons (States of Nebraska and Oklahoma 2014, 25-26). Nine former Drug Enforcement Administration (DEA) administrators filed an amicus brief urging review, while Washington and Oregon jointly urged the Court not to hear the case. In May 2015, the Court called for the views of the Solicitor General, who ultimately urged the Court not to review the case.

In 2016, the Court denied review without opinion (*Nebraska v. Colorado*, No. 144, Slip. Op. [2016]). Given the Court’s original and exclusive jurisdiction over interstate cases, this denial effectively ended any chance of litigating claims against Colorado. Dissenting to the denial, Justices Clarence Thomas and Samuel Alito questioned whether the Court could lawfully refuse to review interstate cases under

its original and exclusive jurisdiction and contended that plaintiff states made a “reasonable case” that the dispute should move forward (1). The Solicitor General argued that “entertaining the type of dispute at issue here—essentially that one State’s laws make it more likely that third parties will violate federal and state law in another State—would represent a substantial and unwarranted expansion of this Court’s original jurisdiction” (Brief for the United States as Amicus Curiae 2015, 8). While it is not unusual for the Court to deny review under its original and exclusive jurisdiction, the *Nebraska v. Colorado* refusal may have important implications for states attempting to litigate issues concerning interstate regulatory spillovers.

Justice Scalia’s death resulted in two tie votes on important federalism questions. In *United States v. Texas*, No. 15-674 (2016), the Court considered whether President Obama’s unilateral immigration policies regarding deferred action were consistent with federal law, subject to notice and comment rulemaking under the Administrative Procedure Act, and—in a question added at the Court’s request—violative of the Constitution’s Take Care Clause. Although the core substantive issues emphasized the scope of executive power rather than federalism per se, federalism implications were clear in light of the suit being brought by twenty-two states contending that the executive actions imposed costs with respect to driver’s licenses, health care, education, and law enforcement, in addition to having deleterious labor market effects on state citizens (see Brief for the State Respondents 2016, 18–30). These arguments were addressed to the key federalism-related threshold question of whether states had standing to challenge the executive actions. In contrast to the state respondents, sixteen states and the District of Columbia filed an amicus brief rebutting the “distorted picture” of impact painted by state respondents, arguing instead that the policies would “benefit States and further the public interest” (Amicus Brief of the States of Washington et al. 2016, 1, 2). Ultimately, the Court divided 4-4, thereby affirming the lower court’s issuance of a nationwide injunction against the policies. Although the substantive issues have been rendered moot by the change in presidential administrations, the contours of state standing to challenge federal law and its administration remain unclear (see Grove 2015).

A tie vote in *Franchise Tax Board of California v. Hyatt*, 136 S. Ct. 1277 (2016) left another of the term’s most important federalism questions unanswered. In *Hyatt*, the Court granted certiorari in part to consider whether to overturn *Nevada v. Hall*, 440 U.S. 410 (1979). In *Hall*, the Court held that sovereign immunity did not bar a state from being sued in another state’s courts. Many consider *Hall* an aberration within the Court’s broader sovereign immunity jurisprudence, which generally limits the extent to which suits can be brought against unconsenting states. Reflecting the issue’s importance from a federalism perspective, forty-four states filed an amicus brief urging the Court to overturn *Hall*, and subnational

groups such as the Council of State Governments and National League of Cities filed an amicus brief supporting California more generally. Perhaps poised to overrule *Hall*, the Court ultimately split 4-4 on the question after Justice Scalia's death. Given the tie vote, this issue seems to be a good candidate for returning to the Court in the near future.

Notwithstanding the inability to resolve the sovereign immunity issue, the outcome in *Hyatt* had important federalism implications. The case involved a former California resident who moved to Nevada and sued a California agency in Nevada courts, winning a damage award that was more than what could have been obtained in a suit against a Nevada agency in Nevada courts. By a 5-1-2 vote, the Court held that allowing for a monetary recovery that was higher than what could have been obtained in Nevada courts violated the Full Faith and Credit Clause. Whether Nevada courts implemented a "policy of hostility" toward other states was the key debate. The majority, led by Justice Breyer, argued that hostility was evident by the fact that Nevada law capped damages for similar suits against Nevada agencies; the dissent, written by Chief Justice Roberts, credited Nevada's argument that the departure from its damage cap was warranted because California, unlike Nevada, did not have adequate institutional control over its agencies.

The Full Faith and Credit Clause was also at issue in *V.L. v. E.L.*, 136 S. Ct. 1017 (2016), a case with policy implications for adoptions by same-sex couples. V.L. and E.L. were same-sex partners residing in Alabama. During the relationship, E.L. gave birth to three children through the use of assisted-reproductive technology and the couple raised the children together. To formalize V.L.'s parental status, E.L. consented to V.L.'s adoption of the children while retaining parental status; while residing in Alabama, which did not permit same-sex adoption, the couple rented a house in Georgia to establish residency and a Georgia court subsequently granted V.L.'s petition. Subsequently, the relationship ended and E.L. denied V.L. access to the children. V.L. sued in Alabama court to enforce the Georgia court's adoption judgment. The Alabama Supreme Court refused to enforce the judgment, finding that the Georgia court lacked jurisdiction. In a unanimous summary reversal delivered per curiam, the Court held that the Full Faith and Credit Clause required Alabama courts to recognize the validity of the judgment entered by the Georgia court.

In *Taylor v. United States*, 136 S. Ct. 2074 (2016), the Court touched on the Commerce Clause for purposes of clarifying the scope of the Hobbs Act, a federal law that in part criminalizes robbery "affect[ing] commerce." At trial, a defendant was not allowed to introduce evidence that robberies in search of marijuana targeted dealers who possessed locally grown marijuana as opposed to marijuana that had moved through interstate commerce. Following conviction, the defendant challenged the sufficiency of the evidence proffered by the government to satisfy

the commerce element. By a 7-1 vote, the Court upheld the conviction through an application of *Gonzales v. Raich*, 545 U.S. 1 (2005) for the proposition that “it makes no difference. . . that any actual or threatened effect on commerce in a particular case is minimal” (2081). In dissent, Justice Thomas contended that the opinion “creates serious constitutional problems and extends our already expansive, flawed commerce-power precedents,” (2082) indicating that limitations on the commerce power require the government to demonstrate beyond a reasonable doubt that a robbery affected interstate commerce. In response, the majority opinion written by Justice Alito emphasized the holding’s narrowness, adding “we have not been asked to reconsider *Raich*. So our decision in *Raich* controls the outcome here” (2081).

The Court addressed a redistricting question of limited current applicability in *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016). As in other states, Texas’s legislative districts are drawn in accordance with Census data on total population. Plaintiffs were residents of Texas Senate districts that they argued were malapportioned with respect to voter-eligible populations (as opposed to total populations) in violation of the “one-person, one-vote” principle. Although the Court unanimously held that states might continue to draw lines based on total population, reservations and differences of opinion among justices may have important downstream federalism implications. For example, Justice Alito concurred specially to disavow the government’s implied argument that the Constitution demands use of the total population metric. And Justice Thomas concurred specially arguing that the “one-person, one vote” principle lacked constitutional moorings, and that the Constitution “instead leaves States significant leeway in apportioning their own districts to equalize total population, to equalize eligible voters, or to promote any other principle consistent with a republican form of government” (1133).

The Court grappled with preemption issues in several cases, though none are likely to make a lasting contribution to preemption jurisprudence. In *Hughes v. Talen Energy Marketing*, 136 S. Ct. 1288 (2016), the Court unanimously held the Federal Power Act preempted Maryland’s efforts to generate new power because the state regulatory order resulted in rate setting that “invades FERC’s regulatory turf” (1297). In *Gobeille v. Liberty Mutual Insurance* 136 S. Ct. 936 (2016), the Court ruled 6-2 that the Employee Retirement Income Security Act (ERISA) preempted a state law requiring assorted health care professionals to provide certain information for its all-payer claims database. And in *DirectTV v. Imburgia*, 136 S. Ct. 463 (2016), the Court ruled 6-3 that the Federal Arbitration Act preempted a state court’s interpretation of a company’s arbitration provision in a customer contract. Although each of these cases has important implications for its underlying subject matter, the accompanying preemption analyses do not dramatically shift preemption doctrine.

### Decisions with Important State Policymaking Implications

Several of the Court's 2015 term opinions have important federalism implications due to their articulation of federal constitutional standards governing state policymaking in salient areas. In *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), the Court invalidated two abortion regulations from Texas: one requiring a physician performing an abortion to have admitting privileges at a hospital within thirty miles, the other mandating that any facility providing abortion services meet the same health and safety code requirements as surgical centers. These invalidations are particularly notable since numerous states have adopted similar regulations. But by clarifying the standard of review, *Hellerstedt* has further-reaching consequences for state authority to regulate abortion access. As an initial matter, the Court emphasized that the relevant analysis must consider the weight of empirical evidence regarding the purported benefits of abortion regulations on women's health. Furthermore, the Court explicitly rejected the Fifth Circuit's suggestion that abortion regulations must satisfy only the low standard of being "reasonably related to (or designed to further) a legitimate state interest," emphasizing that it "is wrong to equate the judicial review applicable to the regulation of a constitutionally protected personal liberty with the less strict review applicable where, for example, economic legislation is at issue" (2309). This clarification may result in a more searching judicial scrutiny of abortion regulations going forward.

The Court revisited the constitutionality of affirmative action policies in higher education with its decision in *Fisher v. University of Texas at Austin*, 136 S. Ct. 2198 (2016). *Fisher* involved a challenge to an undergraduate admissions policy that indirectly accounted for race as part of an applicant scoring system employed in conjunction with a state policy mandating acceptance of a large percentage of each class based on high school performance. When the Fifth Circuit first upheld the university's policy in 2011, the Court vacated and remanded with instructions to properly apply strict scrutiny, which requires that a law be supported by a compelling government interest and narrowly tailored to support that interest (*Fisher v. University of Texas*, 113 S. Ct. 2411 [2013]). Many interpreted this as a signal that the Court was prepared to apply the narrow tailoring requirement in a way that made it difficult for universities to satisfy. Upon returning after the Fifth Circuit again upheld the policy, however, the Court ruled 4-3 that the university's plan was sufficiently narrowly tailored to further the compelling interest of having a diverse student body. Although the case may ultimately prove to be of little lasting importance due to a somewhat peculiar factual scenario, for now it reaffirms a signal to lower courts that the threshold for satisfying strict scrutiny in the affirmative action context is stringent but not unobtainable.

Two additional decisions had important federalism implications but less lasting precedential value. In *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016), the Court

vacated and remanded a Massachusetts Supreme Court opinion upholding a state law banning the possession of stun guns. Specifically, the Court unanimously found the state court's reasoning, which emphasized that stun guns did not exist when the Second Amendment was ratified and were not easily adapted to military use, inconsistent with *District of Columbia v. Heller*, 554 U.S. 570 (2008). And in *Lynch v. Arizona*, 136 S. Ct. 1818 (2016), the Court summarily reversed an Arizona Supreme Court ruling that a defendant had no constitutional right to inform a jury of parole ineligibility when the question of future dangerousness is raised in a capital sentencing proceeding with life imprisonment without parole being the only possible alternative to death; by a 6-2 vote, the Court suggested that the question was controlled by *Simmons v. South Carolina*, 512 U.S. 154 (1994). In dissent, Justice Thomas indicated that *Simmons* was wrongly decided, lamented the "micromanagement of state sentencing proceedings," and criticized issuance of a summary disposition rather than undertaking a full hearing on the merits as "a remarkably aggressive use of our power to review the States' highest courts" (*Lynch*, 1822). Both *Caetano* and *Lynch* send strong signals to state courts about how to apply important existing precedents, but are not likely to make lasting jurisprudential contributions in their own right.

### Percolating Issues

There are numerous federalism issues percolating in lower courts. As Paul Nolette argues in an article in this volume analyzing the behavior of state attorneys general, whereas Republican AGs challenged and won several high-profile judgments against Obama administration directives regarding immigration, the environment, and LGBT rights, Democratic AGs have followed a similar script in the opening months of the Trump administration. In particular, as we discussed previously, ongoing and expected litigation related to Trump administration policies in the areas of immigration and the environment may soon attract Supreme Court review. Furthermore, the state-led immigration cases raise interesting and jurisprudentially underdeveloped but core questions concerning the scope of state authority to bring suit against the federal government as *parens patriae*. Liberal states are also contemplating legal challenges if they perceive the Trump administration to be undermining implementation of the ACA (*Abutaleb, Hurley, and Levine 2017*).

Aside from the issues discussed previously, several others concerning federalism are percolating or already on the Court's docket. For example, the Court's current term includes a new round of preemption cases (*Kindred Nursing Centers v. Clark*, No. 16-32 [2017]; *Howell v. Howell*, No. 15-1031 [2017]). And a three-judge panel of the U.S. District Court for the Western District of Texas concluded by a 2-1 vote that three congressional districts were impermissibly constructed under the Voting Rights Act by using race as a motivating factor in drawing lines, setting up a direct appeal to the Supreme Court (*Perez v. Abbott*, No. SA-11-CV-360 [2017]).

Several issues concerning LGBT rights are percolating. The Court vacated and remanded a closely watched case concerning the use of bathroom facilities by transgender students under Title IX after the Trump administration revoked an Obama-era guidance letter indicating that schools should treat transgender students in accordance with their gender identity (*Gloucester County School Board v. G.G.*, No. 16-273 [2017]). The Court continues to hold a case challenging whether Colorado can require a cake maker to provide service he would otherwise deny on the basis of sexual orientation under the First Amendment (*Masterpiece Cakeshop v. Colorado Civil Rights Commission*, No. 16-111 [2017]). While the petition was filed nearly one year ago, and has been distributed to Conference eleven times, Justice Gorsuch's confirmation may allow the Court to move forward on it one way or the other. Recently, the Seventh Circuit held *en banc* that discrimination on the basis of sexual orientation constituted sex discrimination under Title VII of the Civil Rights Act of 1964 (*Hively v. Ivy Tech*, No. 15-1720 [2017]). Each of these cases raises important questions that could be addressed further in the year ahead.

## Conclusion

In some respects, 2016–2017 brought about significant change in the U.S. federal system. After six years of divided federal government, the 2016 elections produced unified Republican control of Congress and the presidency. As a result, Obama-era policies in areas such as health care, immigration, and the environment are ripe for reversal. But a unified federal government coupled with Democratic control of several state and local governments has also brought about changing partisan perspectives with respect to federal-state relations. For example, after years of Republican AGs challenging presidential actions and Republican state officials frustrating the implementation of federal programs (with Democratic resistance), Democratic AGs are now invoking federalism principles to challenge Republican-led actions (with Republican resistance).

In other respects, the past year is characterized by continuity with longstanding patterns of intergovernmental relations as well as recent trends. This can be seen in the continued expedient adoption of positions on federal preemption and state autonomy on the part of Republican and Democratic Party officials, who are often willing to assume positions on federalism questions that accord with policy priorities. As exemplified by the unified Republican government's early inability to coalesce around health care reform, the inter-institutional conflicts that characterized unified control in 2003–2004 (Krane 2004) may also frustrate contemporary policymaking. Thus, unified government is not necessarily a panacea for increased legislative production, and as during other periods the transaction costs of governing may impede policy reversion.



As a result of this lawmaking friction, continuity is also evident in the executive's use of unilateral and administrative actions to implement policy goals. While Republicans regularly challenged President Obama's use of unilateral policymaking tools to circumvent congressional opposition, these same tools have been instrumental in advancing policy goals favored by Republicans during the first few months of the Trump administration. This type of continuity also reinforces the theme of changing partisan perspectives with respect to federalism. A similar continuity theme is evident with respect to state policy creation. Just as state and local governments have advanced policies dealing with issues such as the minimum wage, climate change, marijuana, and firearms, they promise to do so in the coming year in areas concerning issues such as right-to-work, LGBT rights, abortion, and immigration.

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