

The State of American Federalism 2018–2019: Litigation, Partisan Polarization, and the Administrative Presidency

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Several themes characterize the state of American federalism. Increasing political polarization shapes preferences with respect to locating the vertical balance of power. To implement these preferences, the federal government is primarily relying on regulatory rollback and unilateral action. With Congress largely unable or unwilling to check the executive branch, states have pushed back on use of the tools of the administrative presidency through litigation. We address these themes through an analysis of voting and elections along with important policy developments from the previous year in the areas of immigration, health care, environmental policy, education, gun control, and criminal justice. We also review important federalism developments from the Supreme Court's 2017 term.

The political combat that characterized the first year of Donald Trump's presidential administration continued unabated in 2018 and early 2019, with important implications for federalism. Amidst the ongoing federal investigation of the Trump campaign, Russian interference in the 2016 election, and the personal and business conduct of President Trump and numerous individuals around him, the Trump administration maintained an active policy agenda, mostly through use of the administrative tools of the presidency. As has been the case for many presidents relying on unilateral action, the federal courts at times put the brakes on Trump administration efforts, and state and local governments are using their discretion to enact their own policies that often conflict with the goals of the Trump administration.

Perhaps the most important development during 2018 was the midterm election, which drastically reshaped the political landscape nationally and sub-nationally. At the national level, Democrats picked up forty seats in the House of Representatives, regaining control from Republicans for the first time since the 2010 midterm elections. In the Senate, Republicans gained a couple of seats, resulting in a divided Congress. Democrats also gained a stronger footing in many

state capitols, winning an additional seven governorships (Illinois, Kansas, Maine, Michigan, Nevada, New Mexico, and Wisconsin), and a net gain of over 300 state legislative seats, contributing to the flipping of control of six state legislative chambers. As a result of the 2018 election, there remain only two states with divided legislatures (Alaska and Minnesota), with the other state legislatures fully controlled by one of the parties. Democrats also picked up other important statewide offices, including four Attorney General offices (Colorado, Michigan, Nevada, and Wisconsin) and three Secretary of State offices (Arizona, Colorado, and Michigan) (Ballotpedia 2018).

These changes in political leadership at the state level have important implications for federalism, as many states have begun to pursue new policy directions and adopt different postures toward the federal government. The new composition of the Supreme Court is also likely to dramatically affect federalism. With the controversial confirmation of Brett Kavanaugh in October 2018 to fill the seat vacated by Anthony Kennedy's retirement, the Court now is firmly more conservative, which is likely to amplify state and local government authority vis-à-vis the federal government in some areas, while curtailing it in others.

In this introductory essay to the Annual Review of American Federalism issue, we first examine important developments in voting and elections as well as a range of policy areas including immigration, health care, environmental policy, education, gun control, and criminal justice. In tracing key developments in 2018 and the first few months of 2019, we emphasize several themes. First, policy-making at the federal level rarely took place during this period through congressional legislation, in view of intense partisan polarization, the relatively even balance between the parties in Congress, and the super-majority requirement for passing most legislation in the Senate. Criminal justice reform and opioid-abuse legislation are rare examples of bipartisan agreement and passage of significant congressional legislation. Second, and in part as a result of congressional inaction, the Trump administration has sought to achieve its policy goals primarily through executive orders and administrative rule-making and occasionally through issuance of waivers. These activities mostly point to continuity and intensification of developments during the first year of the Trump presidency, and have been met in Democratic-controlled states not just with stern opposition, but with frequent litigation that has had some measure of success. We discuss this litigation, as well as other federalism related issues that made their way to the Supreme Court, in the final part of the essay.

Voting and Elections

Voting and election disputes have been prominent at the federal and state levels over the last year. The key federal controversy concerns the proposed inclusion of a

citizenship question in the 2020 census. Over the objection of various Census Bureau officials—concerned about cost, data accuracy, and depressing the count of vulnerable groups—Secretary of Commerce Wilbur Ross proposed asking a citizenship question in March 2018, ostensibly to aid enforcement of the Voting Rights Act (Wang 2018). Led by New York, a coalition of state and local governments sued to block the question's addition, alleging a violation of the Administrative Procedure Act (APA) and the equal protection component of the Fifth Amendment's due process clause. A federal district court judge held that Ross's proposal to add the question was arbitrary and capricious in violation of the APA but found no constitutional violation (*New York v. U.S. Department of Commerce*, No. 18-CV-2921). In a rare move reflecting the issue's importance and pressing nature, the Supreme Court agreed to review the case before final judgment by a circuit court of appeal. After granting review on questions concerning administrative procedure, the Court subsequently added, and asked litigants to address, a constitutional question on whether the enumeration clause dictates resolution of the issue. The result could have important implications for the 2020 census, which in turn will impact the next round of redistricting.

Redistricting remains a salient issue heading into the 2020 elections. Former U.S. attorney general Eric Holder, for example, is leading the National Democratic Redistricting Committee, which is emphasizing litigation and mobilization in twelve target states during the 2019–2020 election cycle in an effort to impact the next round of redistricting. As discussed in more detail in the Supreme Court section in this article, the justices in their 2017 term largely sidestepped an important partisan gerrymandering case out of Wisconsin. However, the Court agreed to review two new partisan gerrymandering cases in the 2018 term, with oral arguments having occurred in March 2019, which could have important implications for redistricting.

Several states have taken steps to reduce the influence of politics on redistricting decisions, as discussed by Nancy Martorano Miller, Keith Hamm, Maria Aroca, and Ronald Hedlund, in their article for this issue examining the ways that redistricting reformers are increasingly turning to state forums to achieve their goals. Notwithstanding mixed empirical evidence concerning institutional performance, Colorado, Michigan, and Utah adopted reforms creating independent redistricting commissions in 2018. A variety of other states either adopted redistricting reforms in 2018 or are poised to vote on proposals in 2020. Missouri voters, for example, approved a constitutional amendment in 2018 creating a “nonpartisan state demographer” who would have initial responsibility for drawing district boundaries, though Governor Mike Parson (R) later announced his intention to seek legislative repeal (Lieb 2018).

Various states are also engaged in controversial efforts to purge voter rolls. As discussed in more detail in the Supreme Court section of this article, the justices

recently upheld Ohio's contentious scheme for removing ineligible voters. Led by then-Secretary of State Brian Kemp (R), the purging of more than 500,000 voters from Georgia's rolls in July 2017—107,000 of which were for not voting in previous elections and failing to respond to mailed notices—drew particular notice when Kemp later ran for governor and defeated Stacey Abrams (D) in a close race (Kauffman 2018). An effort to purge Texas rolls was halted in February 2019 by a federal judge who wrote that “perfectly legal naturalized Americans were burdened with . . .ham-handed and threatening correspondence from the state which did not politely ask for information but rather exemplifies the power of the government to strike fear and anxiety and to intimidate the least powerful among us” (*Texas League of United Latin American Citizens v. Whitley*, No. SA-19-CA-074-FB, 1). With evidence suggesting that removal rates are higher in jurisdictions formerly covered by the Voting Rights Act's preclearance requirements (Brater et al. n.d.), litigation is likely to continue with an emphasis on how people of color are disproportionately impacted by purge policies.

The purge debate is related to a broader one about purported voter fraud. President Trump's repeated and unsubstantiated claims of widespread voter fraud (see, e.g., Seelye 2017) led to his formation of the Presidential Advisory Commission on Election Integrity in 2017. Headed by then-Kansas Secretary of State Kris Kobach (R), though formally chaired by Vice President Mike Pence, the Commission requested detailed voting data from the states but was largely rebuffed, found almost no evidence of fraud, and disbanded less than eight months after creation (Wines and Haberman 2018). Trump's unsupported fraud allegations continued during the 2018 midterms (e.g., Stokols and Jarvie 2018). Although there is no evidence of systematic voter fraud, allegations of election fraud in North Carolina resulted in the State Board of Elections refusing to certify the result of a congressional race showing the Republican candidate Mark Harris ahead by 905 votes. With charges that a political operative employed by Harris fraudulently handled absentee ballots, a new election has been called as the investigation continues, while the operative and others have been indicted for alleged fraud during the 2016 election (Blinder 2019). Notwithstanding the irregular occurrence of voter or election fraud, the rhetoric surrounding these issues will likely continue to influence voting reform debates heading into the 2020 elections.

States passed a variety of voting measures in 2018. Florida voters approved a constitutional amendment restoring voting rights to those who have been convicted of a felony but completed their sentence, including any parole or probation, while exempting those convicted of murder or felony sex offenses. Other measures potentially alter voting transaction costs. Maryland, Michigan, and Washington adopted same-day voter registration. Michigan and Nevada adopted automatic registration plans. Arkansas and North Carolina adopted photo identification requirements. And North Dakota adopted a measure limiting voting

in federal, state, and local elections to U.S. citizens. With respect to voting institutions, Maine adopted a ballot measure refusing to delay implementation of ranked-choice voting, where voters rank candidates with a winner chosen through sequential rounds of eliminating the last-place candidate.

States are also pursuing constitutional and constitutional-adjacent reform. As Patrick Condray and Timothy Conlan discuss in this issue, state legislatures are increasingly petitioning Congress to convene an Article V constitutional convention. Questions remain about the exact number of live petitions and the scope of any potential convention. So far in 2019, Arkansas, Mississippi, and Utah have approved petitions. While state petitions list a variety of issues to be addressed, budgetary constraints and term limits are commonly invoked by conservative states while liberal states tend to emphasize campaign finance. Meanwhile, the National Popular Vote (NPV) movement continues to gain momentum as a new presidential election mechanism. So far in 2019, Colorado and New Mexico have joined thirteen other states and the District of Columbia to pledge their electoral votes to the popular vote winner if states with a minimum of 270 votes join the NPV compact.

At the federal level, congressional Democrats in early 2019 passed a sweeping election reform bill after gaining control of the House of Representatives. The For the People Act (H.R. 1, 2019) emphasizes voting rights and has substantial federalism implications. Among other provisions, it would require states to authorize internet, automatic, and same-day voter registration. The bill would also restrict purges while allowing for polling place information updating and the provision of election information by email. Furthermore, the bill would require states to adopt an independent commission to draw district lines for congressional representation purposes. Representative Rodney Davis (R-IL) objected that the bill “is a prime example of the Democratic party telling states that the federal government knows better than they do” (Montellaro 2019). While the Republican-controlled Senate is unlikely to pass the bill in any similar form, it signals the Democratic Party’s commitment to the issue heading into the 2020 elections.

Policy Areas

Immigration

Immigration policy continues to be marked by staunch state–federal and city–state conflict being resolved by litigation. As part of a “zero tolerance” approach to unauthorized border crossings announced in April 2018, combined with a desire to discourage asylum seeking, the Trump administration directed federal prosecution of those caught attempting to enter the country without authorization. Adults were taken to federal detention centers to await criminal processing while the

Department of Health and Human Services took custody of migrant children, resulting in a de facto family separation policy. Although the number of separated children is unknown due to a lack of federal tracking, government estimates put it at about 2,700 (Goldstein 2019). Faced with mounting public opposition and a federal judge's issuance of a preliminary injunction against the policy in a suit filed by the American Civil Liberties Union (ACLU), Trump announced an end to the separation policy in June 2018. In addition to the ACLU's suit, seventeen states with Democratic attorneys general challenged the policy in court. Several governors also responded by withdrawing their National Guard troops from the border (Kelly 2019). Shortly after taking control of the U.S. House of Representatives in 2019, congressional Democrats issued subpoenas to three administration officials as part of an investigation into family separation (Thrush 2019).

The Trump administration took explicit action to further limit asylum seekers in November 2018 as migrants headed toward the U.S. from Central America. First, the Department of Homeland Security and Justice Department issued an interim final rule barring asylum eligibility at the southern border for those subject to any presidential proclamation (83 Fed. Reg. 55, 952). Later that day, President Trump issued a proclamation suspending entry at the southern border except for those "who enter[] the United States at a port of entry and properly present[] for inspection" (Proclamation 9822). As a result of these combined policies, asylum claims from anyone attempting to enter the country through Mexico would only be heard if presented at a port of entry. After a federal district court judge issued a temporary injunction preventing implementation, the U.S. Court of Appeals for the Ninth Circuit affirmed, finding that plaintiffs were likely to succeed in demonstrating that the policy contravenes federal law (*East Bay Sanctuary Covenant v. Trump*, No. 18-17274). By a five-four vote, with Chief Justice Roberts joining the liberal bloc, the Supreme Court subsequently refused to stay the injunction, in an order issued without a written opinion.

As litigation continues, there have been allegations that Border Patrol agents are physically blocking asylum seekers even at ports of entry (Moore 2018a), turning them back due to lack of capacity (Moore 2018b) and sending them to Mexico to await hearings (Srikrishnan 2019). Critics also allege that the administration has deliberately slowed processing "to a relative trickle," with an average of "about ten migrants a day in Brownsville, two in Laredo, and several dozen in El Paso" (Kriel 2019). When Border Patrol does allow asylum seekers to enter, humanitarian concerns often result—with substantial federalism implications. In December 2018, for example, about 200 asylum seekers were released at a bus station in El Paso without notifying local officials, who typically work with various public and private entities to ensure orderly entry and the provision of housing, food, medicine, and other necessities (Moore 2018c). Elsewhere, the San Diego Board of Supervisors, which sided with the Trump administration in its suit against California over

sanctuary policies, is now suing the administration for reimbursement in dealing with migrants alleged to have been “all but stranded” after entry; the Board of Supervisors is also seeking implementation of a federal policy that accounts for humanitarian concerns, arguing that “the feds need to be held accountable and do their job” (Clark 2019).

After failing to procure the requisite funds to fulfill a campaign promise to build a wall along the border with Mexico, President Trump issued a proclamation in February 2019 declaring a national emergency in order to unilaterally transfer funds designated for other purposes to aid construction of a wall. This maneuver came after two presidential attempts to withhold support for government funding bills until Congress provided money for a wall, resulting in one impasse that led to the longest federal government shutdown in U.S. history. After declaring a national emergency, Trump said, “I didn’t need to do this, but I’d rather do it much faster. I just want to get it done faster, that’s all” (Baker 2019). In response, several governors removed their states’ National Guard troops from the border, with Wisconsin governor Tony Evers (D) declaring, “I cannot support keeping our brave service men and women away from their families without a clear need or purpose that would actively benefit the people of Wisconsin or our nation” (Romo 2019). Congress passed a resolution blocking the president’s attempt to fund the wall with diverted funds, but Trump issued a veto. A sixteen-state coalition, along with other entities acting separately, filed suit in federal court arguing that the emergency declaration violates federal law (Savage and Pear 2019).

Debate also continues over “sanctuary” jurisdictions. In April 2019, President Trump announced plans to send the influx of migrants to sanctuary cities, explaining to supporters at a rally, “I’m proud to tell you that was actually my sick idea” (Carvajal 2019). Several state court decisions have prohibited local law enforcement from cooperating with ICE’s detainer requests absent a separate ground for establishing probable cause to keep people in custody (Goldbaum 2018). Meanwhile, the U.S. Court of Appeals for the Third Circuit invalidated the Justice Department’s withholding of grant funds from Philadelphia in retaliation for the city’s sanctuary policy, finding that Congress had not authorized such an action (*City of Philadelphia v. Attorney General of the United States of America*, No. 18-2648). Other jurisdictions have taken an anti-sanctuary stance. Heading into the 2019 session of the Florida legislature, for example, Florida governor Ron DeSantis (R) urged enactment of a law banning cities from passing sanctuary policies while simultaneously encouraging state law enforcement and prison officials to cooperate with federal officers in enforcing federal immigration law (Turner and Kam 2019).

Raising important city–state federalism issues, of the sort analyzed by Luke Fowler and Stephanie Witt in their article in this issue explaining adoption of state measures preempting local authority, the city of Huntington Beach successfully

sued California to block enforcement of state sanctuary policies in charter cities (Vega 2018). Furthermore, the Los Alamitos City Council voted to exempt itself from the state's sanctuary law, resulting in California filing suit to compel the city's cooperation (Kopetman 2018). These disputes demonstrate that increasing polarization not only impacts state–federal relations but also changes intrastate dynamics with respect to the vertical allocation of power.

Health Care

During the first year of the Trump presidency, headlines regarding health policy focused on the high profile attempts by the Republican-controlled Congress to repeal and replace the Affordable Care Act (ACA) (Thompson, Gusmano, and Shinohara 2018). Throughout 2017, Republicans continued their more than half-decade-long effort to fully dismantle the ACA, all of which came to a climactic conclusion when the late Senator John McCain (R-AZ) cast a deciding vote against repeal. These efforts virtually ended the legislative attempts of Republicans in Congress to fully undo one of former President Obama's signature domestic policy achievements.

Efforts to undermine the ACA, however, have not subsided. Rather, opponents have changed the policy venues for challenging the law and its specific components. For its part, the Trump administration has pursued a variety of strategies seemingly designed to diminish options for uninsured individuals. Most of these efforts consist of using tools of the administrative presidency, which has been a common tactic of the Trump administration in a variety of policy domains, including environmental protection, immigration, and education (Goelzhauser and Rose 2017; Konisky and Woods 2018).

As Lilliard Richardson describes more fully in his article in this issue, one approach has been to grant waivers to states that want to limit Medicaid coverage. As Richardson writes, the U.S. Department of Health and Human Services (HHS) has long utilized waivers under section 1115 of the Social Security Act to give states flexibility in their implementation of Medicaid, but in recent years, states have begun to pursue waivers for the purpose of undercutting the Medicaid coverage provisions of the ACA (Freedman, Richardson, and Simon 2018). The Trump administration has signaled its interest in granting waivers in a couple of ways. First, in November 2017, HHS' Centers for Medicare and Medicaid Services (CMS) announced that it would view favorably section 1115 waiver proposals if they included incentives for employment, the use of commercial insurance, and healthy behavior. Two months later, the CMS provided guidance for states that were interested in linking work requirements to Medicaid eligibility.

States have responded to these signals from the Trump administration. As Richardson details, several states have applied for section 1115 waivers to

incorporate work requirements into Medicaid eligibility standards. The CMS approved Kentucky's waiver in January 2018 and again in November 2018 (after legal wrangling) with nearly a dozen other states having similar section 1115 waivers pending. From a federalism standpoint, the federal government under the Trump administration is promoting an approach that allows states to pursue their own preferences, resulting in varying levels of health care access for their residents. This approach directly contravenes the intent of the ACA, which was to set up a national floor in health care access, and has encountered legal obstacles. In March 2019, U.S. District Judge James Boasberg issued a decision halting Kentucky's implementation of the program and blocking Arkansas from continuing its program (Galewitz 2019).

The Trump administration has also attempted to scale back the reach of the ACA through various efforts to undermine the health exchanges designed to provide uninsured individuals with access to affordable insurance. During 2018, the administration undertook several actions that made it more difficult for individuals to obtain insurance through the federal insurance exchange, HealthCare.gov. These decisions included cutting in half the period of open enrollment from 90 days to 45 days, a 90 percent reduction in advertising from \$100 million to \$10 million, and major cuts in funding for the navigator program from \$63 million to \$37 million (Keith 2018). Enrollment through HealthCare.gov declined by about 5 percent in 2018 compared to 2017, which led the GAO (2018b) to conclude that the collective effect of these decisions may have been modest. That said, preliminary numbers for 2019 suggest that the decline may be much more significant this year (KFF 2019).

Beyond the exchanges, the Trump administration issued a rule in June 2018 intended to provide an avenue for small businesses to join association health plans that would be exempt from many of the core protections mandated by the ACA. For example, under the new rule, association health plans would not be required to provide benefits deemed under the ACA to be "essential," such as mental health care, emergency services, maternity and newborn care, and prescription drugs (Pear 2018). In follow-up guidance issued by CMS in October 2018, the Trump administration announced that it would allow states seeking waivers to operate their own health insurance exchanges to use federal insurance subsidies for these association health plans, as well as short-term plans (Cunningham 2018). Similar to many other regulatory reforms pursued by the Trump Administration, the courts have intervened. In response to a lawsuit from a group of twelve Democratic attorneys general led by New York and Massachusetts, U.S. District Court Judge John D. Bates ruled that the Department of Labor's rule on association health plans was unlawful and "clearly an end-run around the [Affordable Care Act]" (Keith 2019).

Notwithstanding all of the aforementioned efforts to chip away at the ACA, another broader challenge to the law brewed in federal court. Late in 2018, U.S. District Judge for the Northern District of Texas Reed O'Connor, an appointee of President George W. Bush, struck down the ACA in its entirety. The basis for this decision was an opinion that the individual mandate was unconstitutional, and without it, the rest of the statute “can no longer be sustained as an exercise of Congress’s tax power” (*Texas v. U.S.*, No. 4: 18-CV-00167-O, 22). Six years earlier, the U.S. Supreme Court (in a five-four decision, with Chief Justice John Roberts providing the deciding vote) upheld the ACA’s individual mandate as constitutional, by accepting the validity of a tax imposed on people who choose to remain uncovered by health insurance. However, as part of the Tax Cuts and Jobs Act of 2017, Congress reduced the tax penalty to zero (to be implemented in 2019), prompting a coalition of twenty states led by Texas to argue that, without the tax, the individual mandate itself was unconstitutional. Although sixteen states, led by California, intervened to defend the law, Judge O'Connor sided with the plaintiffs, and struck down the entire statute, arguing that the individual mandate is inseparable from the overall law (Goodnough and Pear 2018). With this decision, the future of the ACA is uncertain, though Judge O'Connor issued a stay a couple of weeks later pending further legal haggling and possibly an eventual decision by the U.S. Supreme Court (Mervosh 2018).

Despite all of the continuing disagreements around health care and the Affordable Care Act, the White House and Congressional Republicans and Democrats were able to agree on legislation to address the ongoing opioids crisis. The SUPPORT for Patients and Communities Act, signed into law by President Trump on October 24, 2018, includes funding for federal and state agencies to increase access to addiction treatment and strengthens government programs to prevent over-prescription and increase drug supply interception (Sotomayor 2018). Political attention to the opioid crisis also continued at the state and local level. Of particular note are state and local lawsuits that are being brought against pharmaceutical manufacturers, which have been accused of engaging in deceptive marketing tactics. In March 2019, the State of Oklahoma negotiated a \$270 million settlement in one such lawsuit it had brought against Purdue Pharma (Raymond 2019).

Environmental Policy

Writing in last year’s Annual Review issue, Konisky and Woods (2018) commented that environmental policy during the first year of the Trump presidency was characterized by a deep and sustained effort of policy retrenchment, implemented primarily through rulemaking and other tools of the administrative presidency. In most respects, 2018 was a continuation of these trends. The U.S. Environmental

Protection Agency (EPA) and the Department of Interior (DOI) in particular persisted in their effort to rollback regulations on issues ranging from climate change to chemicals to public lands. For their part, states continued to push back; the deregulatory efforts of the EPA have been met with lawsuits by a large coalition of states, often led by California and New York.

One key difference in 2018 was that attention to scandals at the EPA and the DOI waned, with the resignation of EPA Administrator Scott Pruitt and Interior Secretary Ryan Zinke. With their departures, attention has focused far less on the potential personal misconduct of these officials than on the substance of policy coming out of the agencies they previously directed.

Three issues, all with important federalism dimensions, continued to develop in 2018. First, the EPA moved forward with a replacement for its previous Clean Power Plan, a rule finalized in 2015 to limit the emission of greenhouse gases from existing fossil-fuel power plants. Under the Clean Power Plan, states were assigned different emission reduction targets, and given flexibility as to how to meet them. Opponents of the Clean Power Plan had sued the EPA, arguing that the agency had exceeded its authority under the Clean Air Act, in part because to meet the new emission limits, states would need to pursue activities “beyond the fenceline” of facilities (e.g., by increasing reliance on natural gas and renewable energy sources for electricity generation). The replacement rule proposed by the EPA in August 2018, known as the Affordable Clean Energy (ACE) rule builds on this narrow view of the agency’s jurisdiction under the Clean Air Act. Rather than require states to reduce their greenhouse gas emissions from the electricity sector through system level changes, the ACE rule requires that power plants meet much more modest emission targets through on-site (i.e., “within the fenceline”) improvements in their heat-rate efficiency. By all accounts, the replacement rule will result in only modest emissions reductions, and once finalized it is certain to face legal challenges from some states and environmental organizations.

In another significant rollback of an Obama-era environmental rule, in August 2018, the EPA jointly with the U.S. Department of Transportation announced a proposal to scale back the nation’s fuel economy standards. Under a 2012 rule, automakers were required to increase the average fuel economy of passenger vehicles to about 54 miles per gallon by 2025. These standards were part of a broader effort by the Obama administration to reduce greenhouse gas emissions from cars, which included efforts to encourage the widespread deployment of electric and fuel cell vehicles (Siddiki et al. 2018). In contrast, the new rule proposed by the Trump administration would halt the increase of the standards after 2012 to an average of about 37 miles per gallon (Davenport 2018).

As part of the EPA’s proposed rewrite, the agency also challenged the ability of California to establish its own fuel economy standards. California has for decades received a waiver from the EPA to establish its own guidelines, and more than a

dozen states have adopted these more stringent standards over the years to address their own air quality problems. Federalism scholars have long regarded this feature of environmental policy as an important illustration of a regulatory race to the top, in what David Vogel once called the “California effect” (Vogel 1995). Under the proposed rule, the EPA is considering whether to revoke California’s waiver altogether. At the time of this writing, the federal government and California’s negotiations to resolve this issue had stalled, suggesting that the EPA may proceed with its plans to rescind California’s waiver.

A third important policy change that further illustrates the general retrenchment of U.S. environmental policy during the Trump administration is an ongoing effort to rewrite the jurisdiction of the Clean Water Act (CWA). In December 2018, the EPA, jointly with the U.S. Army Corps of Engineers, proposed to replace the Waters of the United States (WOTUS) rule issued by the Obama administration. The intent of both the Obama and Trump era regulations is to clarify which waterways are subject to protection under the CWA, which has been uncertain for more than a decade following a split Supreme Court decision in the 2006 case, *Rapanos v. United States*, 547 U.S. 715. Because the 1972 CWA is ambiguous, the jurisdiction of the EPA for issuing pollution permits and the U.S. Army Corps of Engineers for issuing wetlands permits has been the subject of considerable debate and legal argument.

The rule proposed by the Trump administration covers fewer water resources compared to the 2015 WOTUS rule, excluding from CWA jurisdiction some intermittent streams, all ephemeral streams, and isolated wetlands (Wittenberg 2018). By one accounting, the revised WOTUS rule would eliminate protections for more than half of all wetlands and nearly a fifth of streams that do not have relatively permanent surface water connections to nearby waterways (Wittenberg 2019). The rule is written in this manner to be consistent with the 2006 legal opinion from the late Justice Antonin Scalia in the aforementioned *Rapanos* case, but its fate, like the Clean Power Plan and the revised standards for fuel economy, will be decided in the years to come by the federal courts.

Education

Education issues emerged on the policy agenda of both state and federal governments throughout 2018 and early 2019. At the state level, one of the key developments has been labor disputes, resulting in several high-profile teachers strikes. The common thread behind the strikes were complaints about salary and benefits, which some teacher advocates suggest have stagnated following cuts made to education spending in many states and localities following the Great Recession (Gebeloff 2018). The onset of work stoppages came with a two-week statewide strike in West Virginia, which resulted in teachers successfully negotiating a five

percent pay raise. Statewide strikes followed in Arizona and Oklahoma, as well as in many local school districts including the Los Angeles Unified School District, which has 30,000 teachers.

At the federal level, the Trump administration continued its efforts to roll back many Obama-era education policies. Among the notable initiatives announced in 2018 were plans to undo a 2014 U.S. Department of Education guidance document on school discipline. The guidance had been developed as part of an effort by the Obama administration to encourage schools to scrutinize their discipline policies, and specifically those that use law enforcement to address low-level offenses, which critics have argued are racially biased. Despite the conclusions of a recent Government Accountability Office (2018) investigation that found continued evidence of racial bias in school discipline policies, the Trump administration decided to revisit the guidance policy as part of a school safety commission created by President Trump in response to the mass shooting in Parkland, Florida. Although school discipline was not a major factor in this shooting, some conservatives had been pushing the Trump administration to revisit the 2014 guidance that they perceived to constitute federal overreach and to undermine school safety (Green 2018b; Green and Benner 2018).

In fall 2018, Education Secretary Betsy DeVos announced a new rule under Title IX regarding the procedures regulating schools' responses to cases of sexual harassment and assault. The rule was designed to formally replace a guidance document that the U.S. Department of Education had issued in 2011 and Secretary DeVos had rescinded in 2017 (Green 2018b). Among other provisions, the new rule includes a narrower definition of sexual harassment, requires schools only to investigate formal complaints, to apply due process protections for students (including a presumption of innocence), and to require impartiality in investigations (U.S. Department of Education 2018).

A final issue that flared up during 2018 had to do with the U.S. Department of Education's processing of civil rights cases. Early in the year, the Department's Office of Civil Rights had begun to implement a new policy designed to expeditiously clear a large backlog of civil rights complaints, including cases where families claim that their children with special needs are not being provided sufficient accommodations. Of particular concern for Department of Education officials were serial filings, where civil rights advocates make many (e.g., hundreds) qualitatively similar complaints against multiple institutions. Under the protocol, the Department would be able to dismiss such cases without considering them on their merits if they determined them to be part of a pattern of complaints that create an undue administrative burden to resolve. Under these new procedures, the Department dismissed hundreds of complaints during the first half of 2018 (Green 2018b). Following a lawsuit by a coalition of civil rights organizations, including the NAACP, the Department reversed course late in 2018 (Flaherty 2018).

Gun Control

The school shooting at the Marjory Stoneman Douglas High School in Parkland, Florida in February 2018 once again brought the issue of gun control to the national policy agenda. Although past school shootings led to the mobilization of gun control advocates, the Parkland incident created a new groundswell of political activity, led by several Parkland students who became vocal supporters of new gun control legislation. This new youth movement organized demonstrations at state capitols, and in March 2018, a rally in Washington DC that included hundreds of thousands of people (with more than 800 partner rallies) throughout the country (Vasilogambros 2018). Despite this unprecedented political mobilization, and the hope of many gun control advocates that this mass shooting would finally undo the policy status quo, the Republican-controlled Congress did not enact new legislation.

In response to the Parkland shooting, President Trump advocated that teachers be armed with guns, ostensibly to enhance school safety. Although the suggestion was met with strident objections from many, Education Secretary DeVos did endorse the use of federal funds under Title IV of the Every Student Succeeds Act to train teachers and other school personnel to carry and use guns in elementary and secondary schools. The Trump administration also created a commission, led by DeVos, to consider school safety. The commission was charged, not with addressing guns in schools, but instead, as we discussed above, with addressing school disciplinary procedures, which by all accounts were unrelated to the case in Parkland.

With respect to regulation, the Trump administration issued a new rule in December 2018 to ban bump stocks, which are attachments that allow semiautomatic weapons to fire even faster. Although the timing of the ban suggests it may have been related to changing politics around gun control following the Parkland incident, bump stocks had emerged as a topic more than a year prior, after the mass shooting at a Las Vegas concert that resulted in fifty-eight fatalities. Under the new rule, the sale or possession of bump stock is illegal, and people who currently own these devices had ninety days to either destroy them or turn them over to the U.S. Bureau of Alcohol, Tobacco, Firearms, and Explosives (Savage 2018).

Although federal policy on gun control did not change in substantial ways, the Parkland incident generated a considerable policy response at the state level. According to one review, state legislatures in at least twenty-five states enacted new gun control laws. Notably, these laws were passed by state legislatures controlled both by Republicans and Democrats. The laws include new ownership restrictions in California, Nebraska, and Virginia, waiting periods in Florida and Illinois, expanded background checks in Louisiana, New Jersey, and Vermont, and

restrictions on concealed carry laws in Maryland, Oklahoma, South Dakota, and Washington (Vasilogambros 2018). By one count, state legislatures passed a total of sixty new gun control measures during 2018, which was more than in any other year since the Newtown, Connecticut shooting in 2012 (Astor and Russell 2018).

Criminal Justice

Criminal justice reform is a focus of attention at the state and federal level, but in contrast to other policy areas in recent years there is evidence of bipartisan support and federal action. At the federal level, a bipartisan coalition passed the First Step Act of 2018 (P.L. 115-391). Its panoply of provisions includes a reduction in enhanced sentencing for prior drug felonies. While federal law already dictates that convicts can spend a portion of their sentence in home confinement, the Act spurs implementation by dictating that the Bureau of Prisons “shall, to the extent practicable, place prisoners with lower risk levels and lower needs on home confinement for the maximum amount of time permitted.” Among other stipulations, the bill also largely prohibits the use of restraints on pregnant women, limits the use of solitary confinement for juveniles, increases opportunities to earn good time credits, facilitates prisoner placement near families, instructs the Bureau of Prisons to assess opportunities to provide evidence-based treatment for opioid and heroin addictions, and requires extensive data collection on matters such as prisoner demographics and the use of treatment programs. Although the Act is necessarily limited to addressing criminal justice reform at the federal level, it also authorizes grant programs for state and local governments to provide reentry and education programs.

Congress also passed a less noticed but important law with its Juvenile Justice Reform Act of 2018 (P.L. 115-385). After languishing in Congress for years, the bill—also passed with bipartisan support—reauthorizes and modifies the Juvenile Justice and Delinquency Prevention Act of 1974. Its purpose is “to assist State, tribal, and local governments in addressing juvenile crime through the provision of technical assistance, research, training, evaluation, and the dissemination of current and relevant information on effective and evidence-based programs and practices for combating juvenile delinquency.” The 2018 modification increases available funds for grant program implementation. Furthermore, the bill requires participating state and local governments “to identify and reduce racial and ethnic disparities among youth who come into contact with the juvenile justice system.” Among other stipulations, grant recipients must collect and analyze data on racial disparities to identify points in the system at which differences arise and develop plans to eliminate those disparities. The bill also further limits juvenile detention and placement in adult facilities.

Notwithstanding these federal legislative actions, state and local governments remain the primary focal points for reform given that they are responsible for the bulk of crime enforcement. Sentencing is one area where numerous states have taken action (see, e.g., Porter 2019). California, for example, recently passed laws increasing parole eligibility, eliminating life without parole for felony murder (i.e., where an accomplice who participated in a felony but did not directly commit murder can be held responsible for a murder committed by an accomplice), limiting sentencing enhancements, and limiting the prosecution of minors as adults (e.g., Arango 2019). Cash bail reform has been another area of emphasis. A new law in Colorado, for example, prohibits “people accused of many low-level offenses—such as petty, traffic or most municipal charges—from being jailed because they can’t pay their cash bail” (Paul 2019).

The wave of state-level cannabis legalization continues. In the 2018 midterm elections, for example, voters in Missouri and Utah approved measures legalizing marijuana for medicinal purposes, while Michigan voters approved use for recreational purposes. Although voters in North Dakota rejected a measure that would have permitted marijuana use for recreational purposes, the overarching trend is toward legalization. While the possession, sale, and use of marijuana still violates federal law, President Trump thwarted a previous Justice Department threat to increase enforcement after Senator Cory Gardner (R-CO) retaliated by blocking the confirmation of certain Justice Department nominees (Halper 2018).

Police reform sits at the intersection of federal and state authority. Police militarization, for example, is driven in part by funds and equipment provided by the federal government to state and local jurisdictions. While President Obama took steps to limit and prohibit the transfer of certain military surplus items, President Trump reversed the policy and debate continues over the extent to which objects such as weaponized aircraft, armored vehicles, grenade launchers, and explosives should be transferred to local law enforcement (Lopez 2017). State lawmakers, meanwhile, are pursuing police reforms on issues such as the use of deadly force, professional training, and officer discipline (e.g., Wimbly 2019).

Qualified immunity, which limits the private recovery of damages for civil rights violations committed by state actors such as the police, poses another important federalism issue. While Congress first provided for suit against state actors for civil rights violations in the Ku Klux Klan Act of 1871, the U.S. Supreme Court has limited recovery to actions that violate “clearly established” law under the doctrine of qualified immunity. As salient instances of the controversial use of police force mount, calls for Congress or the Supreme Court to end qualified immunity have come from diverse outlets such as the Cato Institute (Schweikert 2018), *National Review* (French 2018), and *The New Republic* (Ford 2018). Although the Court has repeatedly emphasized the high burden qualified immunity imposes on civil rights plaintiffs and repeatedly reversed lower court decisions allowing suits to go forward

(see Baude 2018, 82–88), Justice Clarence Thomas recently followed numerous calls to implement a less restrictive standard more in line with congressional intent by writing a concurring opinion noting his desire to reconsider the Court's qualified immunity jurisprudence (*Ziglar v. Abbasi*, 137 S. Ct. 1843, 1872 [2017]).

The Supreme Court

The Supreme Court's 2017 term, which ran from October 2017 through June 2018, marked the first time since the 2014 term that the Court completed a full term with nine justices. After holding or ducking numerous closely watched disputes while short-staffed between Justice Antonin Scalia's passing and Justice Neil Gorsuch's confirmation toward the end of the 2016 term, the 2017 term included several high-profile cases, many of which have important federalism implications. After the 2017 term's conclusion, Justice Kennedy retired. Frank Colucci discusses Justice Kennedy's contributions to federalism jurisprudence in this issue. Brett Kavanaugh, whose contentious confirmation to replace Kennedy included allegations of sexual misconduct, won Senate approval by a 50-48 vote and took office on October 6, 2018. Although the Court does not have a single median justice (Lauderdale and Clark 2012), replacing Kennedy with Kavanaugh likely makes Chief Justice Roberts the grand median and raises questions about precedent stability in areas such as reproductive choice and discrimination on the basis of sexual orientation where Kennedy supplied the liberal bloc with a pivotal fifth vote. This section discusses cases from the Court's 2017 term with important federalism implications; it also briefly previews the 2018 and 2019 terms.

2017 Term

The Court had several redistricting cases on its docket but only resolved one on the merits. In *Gill v. Whitford*, 138 S. Ct. 1916 (2018), the Court considered a charge of partisan gerrymandering in Wisconsin. Rather than reach the merits, the justices unanimously held that the plaintiffs failed to demonstrate individualized harm as necessitated by standing doctrine. Instead of dismissing the case outright, though, all but Justices Thomas and Gorsuch voted for a remand to give plaintiffs an opportunity to prove that they lived in impermissibly drawn districts as opposed to merely basing their suit on generalized statewide evidence of gerrymandering. Even less came of *Benisek v. Lamone*, 138 S. Ct. 1942 (2018), which raised questions about First Amendment retaliation and partisan gerrymandering in Maryland. Instead of reaching the merits, the Court issued a unanimous per curiam opinion affirming the lower court's refusal to issue the preliminary injunction requested by plaintiffs. The three-judge federal district court panel subsequently invalidated the redistricting law, and the case is now before the Court again on appeal.

The Court reached the merits in *Abbott v. Perez*, 138 S. Ct. 2305 (2018), a case challenging whether certain districts in Texas were impermissibly drawn on the basis of race. By a five-four vote, the Court held that the three-judge panel below improperly required Texas to demonstrate that its 2013 districts cured the “taint” previously found to imbue its 2011 districts; rather, the Court held that “it was the plaintiffs’ burden to overcome the presumption of legislative good faith” (2325). The Court also reversed a determination that the drawing of three districts violated the Voting Rights Act. The Court did, however, invalidate one state house district as an impermissible racial gerrymander. Apart from the merits, *Abbott* posed an important threshold question as to whether the three-judge court had issued an appealable interlocutory injunction, without which the Court would not have had jurisdiction. Disagreeing with the majority’s position that the lower court effectively issued an injunction, the dissenters concluded that “the Court will no doubt regret the day it opened its courthouse doors to such time-consuming and needless manipulation of its docket” (2343). With respect to the merits, the strongly worded dissent by Justice Sotomayor, joined by Justices Ginsburg, Breyer, and Kagan, argued that the majority position “does great damage to [the] right of equal opportunity. Not because it denies the existence of that right, but because it refuses its enforcement” (2360).

In *Murphy v. NCAA*, 138 S. Ct. 1461 (2018), the Court invalidated a federal law prohibiting states from authorizing sports gambling. Enacted in 1992, the Professional and Amateur Sports Protection Act allowed existing regulatory schemes in jurisdictions such as Nevada to continue but otherwise authorized the attorney general and certain sports organizations such as the NCAA to enjoin violations. New Jersey, which had been granted a one-year window to authorize sports gambling by the law, refused to do so at the time but subsequently moved for legalization in 2012. When the NCAA sought to block the law, New Jersey argued that doing so violated the anticommandeering principle. A six-justice majority agreed, with Justice Alito writing, “It is as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals. A more direct affront to state sovereignty is not easy to imagine” (1478). As the majority noted, Congress could still decide to regulate sports gambling directly, making it a federal crime through its commerce power (see 1484). But for now numerous states are moving to implement regulatory frameworks to tap into this billion dollar industry ([Drape 2019](#)).

The Court’s decision in *South Dakota v. Wayfair*, 138 S. Ct. 2080 (2018), also has important federalism and state budgetary implications. In *Wayfair*, the Court held by a five-four vote that states can require out-of-state sellers to collect and remit sales tax on items sold to in-state residents regardless of whether the seller has a physical presence in the state. Two previous decisions, which the Court

overturned in *Wayfair*, prohibited states from requiring tax collection and remission from out-of-state sellers lacking a physical in-state presence. An ideologically heterogeneous group of forty-one states filed an amicus brief supporting South Dakota's position, arguing that the revenue at stake was important for funding "critical government operations" and that their inability to collect "infringe[d] their sovereign authority to enforce their tax laws" (Brief for the States of Colorado et al. as Amici Curiae 2018, 1). In an unusual voting alignment, Justice Ginsburg silently joined a majority coalition that included Justices Kennedy, Thomas, Alito, and Gorsuch. Chief Justice Roberts wrote for the dissenting coalition, which included Justices Breyer, Sotomayor, and Kagan, agreeing that the Court's previous precedents were "wrongly decided" while expressing reticence about overturning such a longstanding rule—particularly in light of "the potential to disrupt the development" of e-commerce. As a result of the Court's decision in *Wayfair*, numerous states have either implemented new tax collection plans or are considering legislative options (see, e.g., [Pellitteri 2019](#)). The *Wayfair* ruling is one of several recent federal developments with important implications for state tax policy, along with the 2017 Tax Cuts and Jobs Act, whose passage and implications for state and local governments are analyzed by J. Wesley Leckrone in an article in this issue.

Aside from the cases implicating core federalism doctrine, numerous decisions have important implications for state and local governments. Perhaps the term's most salient case, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2017), offered another example of the Roberts Court finding a minimalist short-term solution to a contentious constitutional question. The core issues were whether a refusal to offer services to individuals on the basis of sexual orientation in violation of a state nondiscrimination law could be justified under the First Amendment's free speech and free exercise clauses. Writing for the majority, Justice Kennedy argued that the state civil rights commission's documented "hostility" toward the cake maker was sufficient to run afoul of the free exercise clause and that "the outcome of cases like this in other circumstances must await further elaboration in the courts" (1732). As a result of this fact-specific resolution, numerous follow-up cases are percolating to press the important underlying constitutional questions (see, e.g., [Sherry 2019](#)).

Another of the term's most closely watched cases involved the validity of President Trump's entry restrictions against nationals from certain countries. Although the entry restrictions took various forms over the course of a series of executive orders and proclamations, including at first applying only to nationals from select Muslim-majority countries, the reviewed order included Chad, Iran, Iraq, Libya, North Korea, Syria, Venezuela, and Yemen. By a five-four vote, the Court upheld the order against statutory and constitutional challenges. With respect to whether federal law authorized the order, the Court concluded that the

Immigration and Nationality Act delegated sufficient power with its proviso that the president “may by proclamation...suspend the entry of all aliens or any class of aliens...or impose on the entry of aliens any restrictions he may deem to be appropriate” when “find[ing] that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States” (8 U.S.C. 1182). With respect to the constitutional issue, which questioned whether the order was motivated by religious animus and thus violated the First Amendment’s establishment clause, the majority argued that it was “facially neutral toward religion” (2418) and otherwise grounded with “a sufficient national security justification to survive rational basis review” (2423).

The dissenters considered President Trump’s claims to be implementing a “Muslim ban” and other rhetoric more problematic. Joined by Justice Kagan, Justice Breyer dissented on the grounds that the case should be remanded for further consideration of whether religious animus was motivating case-by-case enforcement, but if that were not possible then “on balance” he found the order to be impermissibly grounded in “antireligious bias” in violation of the statutory framework and Constitution (2432). Joined by Justice Ginsburg, Justice Sotomayor argued that evidence of religious animus was sufficient to find the order in violation of the establishment clause. Importantly, differences among the justices about how to weight the president’s rhetoric discussing an executive action against facial neutrality could prove instructive in litigation concerning the recently declared national emergency in an effort to procure border wall funding.

A statutory interpretation question led to an important voting rights decision in *Husted v. A Philip Randolph Institute*, 138 S. Ct. 1833 (2018), where the Court upheld Ohio’s policy of removing individuals from voter rolls as being in accordance with the National Voter Registration Act. The Act requires states to make a “reasonable effort” to remove ineligible voters due to death or residency change; it permits removal after notice and failing to vote in a period covering two federal elections, but it prohibits removal solely due to failure to vote. Ostensibly as a proxy for detecting ineligibility due to residency change, Ohio sends notices to registrants who fill out a change of address form with the Post Office or do not engage in “voter activity” for two years, including voting, updating a voting address, filing a voter registration form, or signing a petition. After sending notices, Ohio removes people who do not respond and remain inactive for the next four years. While the five-justice majority held that Ohio’s law followed federal guidelines, the dissent argued that the scheme ran afoul of the mandate not to remove anyone solely due to failure to vote. Moreover, the dissenters argued that Ohio’s law failed the “reasonable effort” command due to the poor fit between the policy’s design and the ostensible goal of removing ineligible voters due to residency change. Reflecting the underlying political debate concerning voter disenfranchisement and purported fraud that animated the technical statutory

interpretation issue in *Husted*, twelve states and the District of Columbia supported plaintiffs as amici while seventeen states supported Ohio.

The Court issued several free speech decisions. In the most closely watched case, *Janus v. American Federation of State*, 138 S. Ct. 2448 (2018), the Court invalidated an Illinois law providing for agency fee arrangements in public-sector collective bargaining agreements, overturning *Abood v. Detroit Board of Education*, 97 S. Ct. 1782 (1977). The five-justice majority argued that extracting fees from nonconsenting employees ran afoul of “fundamental free speech rights” (2460), whereas the dissenters contended that *Abood* struck a workable balance between free speech rights and the government’s interest in recouping costs incurred from negotiating non-union member rights. Manifesting deep political divisions over unions, twenty states indicated a “vital interest in protecting the First Amendment rights of employees, and in the fiscal health of state and local governments” (*Brief for the States of Michigan et al. as Amici Curiae* 2017, 2), while twenty states and the District of Columbia expressed “a substantial interest in avoiding the vast disruption in state and local labor relations” that would accrue by overruling *Abood* (*Brief for the States of New York et al. as Amici Curiae* 2018, 2).

Another First Amendment case raised a question at the intersection of free speech and voting. In *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018), the Court invalidated a Minnesota law that prohibited wearing political badges, buttons, or insignia inside polling places on election day. Minnesota’s law enjoyed a long pedigree, dating back to late eighteenth and early nineteenth century laws designed to bring order to what were at the time often unruly polling places. In *Mansky*, plaintiffs wore apparel to polling places that featured messages such as a Tea Party logo, the words “Don’t Tread on Me,” and “Please I.D. Me.” Writing for a seven-justice majority, Chief Justice Roberts explained that the statute’s use of the term “political” was “unmoored” (1880) and insufficiently reasonable to repel challenge even in the nonpublic forum of a polling place. Justices Sotomayor and Breyer would have certified the case to the Minnesota Supreme Court to offer an opportunity to adopt a narrowing construction that would save the statute.

The Court confronted the intersection of free speech and reproductive choice in *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018). The California law at issue imposes notice requirements on licensed and unlicensed facilities providing pregnancy-related services. With respect to licensed facilities, the law requires notice that the state provides free or low-cost services related to contraception and abortion. With respect to unlicensed facilities, the law requires notice that service providers are unlicensed. Plaintiffs were licensed and unlicensed groups that sought to provide alternatives to and steer women away from abortion. Writing for a five-justice majority, Justice Thomas’s opinion argued that both laws were likely to be impermissible infringements on speech rights and remanded the case for further consideration.

In one of the most closely watched Fourth Amendment cases in recent years, *Carpenter v. U.S.*, 138 S. Ct. 2206 (2018), the Court held by a five-four vote—with Chief Justice Roberts joining the liberal bloc in the majority—that acquisition of a criminal suspect’s cell phone records was a search for Fourth Amendment purposes and thus required probable cause and a warrant to execute. Although *Carpenter* involved the FBI’s acquisition of a robbery suspect’s phone records to obtain location tracking information stored by cell-tower pings, nineteen predominantly conservative states joined an amicus brief articulating their support for the dissenting position, arguing that state and local law enforcement regularly make use of such requests in criminal investigations “at little or no cost to individual privacy” (Brief for the States of Alabama et al. as Amici Curiae 2017, 19).

Last, a case raising a routine statutory interpretation question has important implications for small state and local government subdivisions. In *Mount Lemmon Fire District v. Guido*, 139 S. Ct. 22 (2018), the Court unanimously held that the Age Discrimination in Employment Act of 1967 (ADEA) applied to state and local government entities regardless of size. The litigation arose when the Mount Lemmon Fire District laid off its two oldest firefighters. The firefighters sued for age discrimination and the Fire District sought dismissal arguing that its small size exempted it from the ADEA. The ADEA applies to any “employer...affecting commerce who has twenty or more employees” but adds that employer “also means...a state or political subdivision of a state.” The Court concluded that the latter provision meant that Congress intended the ADEA to apply to states and their political subdivisions even when those entities had fewer than twenty employees.

Impending Issues

The Court’s 2018 term has already yielded one case with important federalism implications. In *Timbs v. Indiana*, No. 17-1091 (2018), the Court unanimously held that the Sixth Amendment’s prohibition on excessive fines is applicable to the states. The case involved a man named Tyson Timbs who pleaded guilty to dealing a controlled substance and conspiracy to commit theft. He received one year of home detention, five years of probation, and paid fees and costs totaling \$1,203. In addition, the state seized a vehicle Timbs bought for \$42,000 using money obtained from his deceased father’s insurance policy. Alleging that the vehicle had been used to transport a controlled substance, the state brought a civil suit for forfeiture, which the trial court denied because the vehicle was worth more than the \$10,000 state maximum monetary fine associated with the relevant charges. After Indiana’s intermediate appellate court affirmed the judgment, the state high court reversed on the grounds that the excessive fines clause had not been incorporated against the states and thus posed no bar to forfeiture. In addition to incorporating one of

the few remaining provisions of the Bill of Rights that had yet to be applied to the states, the facts demonstrate the case's potential importance in asset forfeiture disputes.

At various points in this article we have highlighted important legal questions that either will or could be decided by the Court in its 2018 term and beyond. As noted in the voting section, for example, the Court is poised to decide whether a question on citizenship can be added to the 2020 census (*Department of Commerce v. New York*, No. 18-966). The Court is also set to address partisan gerrymandering cases from Maryland (*Lamone v. Benisek*, No. 18-726) and North Carolina (*Rucho v. Common Cause*, No. 18-422). Other disputes continue to percolate in areas such as health care and immigration. The 2018 term also includes important federalism cases concerning state and federal prosecution for the same crime under the Fifth Amendment's double jeopardy clause (*Gamble v. U.S.*, No. 17-646), state and federal jurisdiction in takings disputes (*Knick v. Township of Scott*, No. 17-647), whether states can be sued in other state courts without consent (*Franchise Tax Board of California v. Hyatt*, No. 17-1299), whether states can limit liquor licenses to those who have resided in-state for a specified time period (*Tennessee Wine & Spirits Retailers Association v. Blair*, No. 18-96), and a state's ability to prohibit National Park Service regulation of land located within state and national park boundaries (*Sturgeon v. Frost*, No. 17-949).

As usual, the Court is also set to decide a number of issues that have important policy implications for state and local governments. Example issues of interest to be decided during the Court's 2018 term include the validity of memorial crosses under the establishment clause (*The American Legion v. American Humanist Association*, No. 17-1717), striking prospective jurors in criminal trials on the basis of race (*Flowers v. Mississippi*, No. 17-9572), and withdrawing blood without consent from unconscious motorists (*Mitchell v. Wisconsin*, No. 18-6210). There are also a number of cases to watch already on the Court's 2019 term docket. Examples include cases concerning whether discrimination on the basis of sexual orientation or against transgender individuals is covered by Title VII of the Civil Rights Act of 1964 (*Altitude Express Inc. v. Zarda*, No. 17-1623 and *R.G. & G.R. Harris Funeral Homes Inc. v. EEOC*, No. 1807), whether the Sixth Amendment's unanimous verdict guarantee is incorporated against the states (*Ramos v. Louisiana*, No. 18-5924), and whether a city ordinance banning transportation of a licensed, locked, and unloaded handgun violates the Second Amendment, Commerce Clause, or right to travel (*New York State Rifle & Pistol Association Inc. v. City of New York*, No. 18-280).

Conclusion

Several features mark the state of American federalism. As an initial matter, political polarization has generated intense partisan conflict with respect to the

vertical balance of power between states and the federal government. But this conflict seems to be primarily driven by the pursuit of partisan policy ends rather than a broader sense of how power should be divided and shared across government units. In practice, federalism in the current political environment is largely a tool used to help justify the maintenance or pursuit of favored policy outcomes. As in recent years (see [Goelzhauser and Rose 2017](#); [Rose and Goelzhauser 2018](#)), unilateral federal action, regulatory rollback, and state resistance are the focal points of dispute over the allocation of power between states and the federal government. At the federal level, the Trump administration is leaning heavily on the tools of the administrative presidency to shape policy outcomes during a period of divided government. With Congress largely unwilling or unable to push back, states are regularly resorting to litigation to check the executive branch. As a result, the federal courts are increasingly being called upon to resolve the key disputes that are defining the nature of contemporary federalism.

As we have discussed in this article, administrative action, regulatory rollback, and state-driven litigation are prominent across a wide range of areas. Regulatory rollback has been particularly prominent in education, the environment, and health care. At the same time, the administration continues to test the limits of unilateral action with respect to immigration. Disputes concerning issues such as redistricting, voting rights, gun control, and criminal justice continue to be fiercely contested in a politically polarized environment. However, there is also evidence of counter-trends in the area of criminal justice with the bipartisan passage of two federal laws and implementation of numerous state reforms.

Across these policy areas, liberal states regularly sue the administration to impede its policies while conservative states offer support; meanwhile ideologically divergent local governments sue their states and are being sued by them. This continues a trend that became prominent during the Obama administration, albeit with Democrats and Republicans having switched sides for the most part with respect to judging the propriety of federal action and state response. The ongoing litigation that marks nearly every salient public policy issue with federalism implications is indicative of the boundary-pressing nature of these debates. With the Supreme Court back at full strength after years of turnover-induced disruption, many of these issues will or could be addressed there. But how the Court will decide novel questions impacting the balance of power between the federal government and states remains unclear.

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