The State of American Federalism 2019–2020: Polarized and Punitive Intergovernmental Relations

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The state of American federalism is characterized by polarization and punitiveness. As in previous years, political polarization continues to shape intergovernmental relations. But we also identify punitiveness as an increasingly prevalent aspect of vertical power sharing. Punitive federalism describes the national government's use of threats and punishment to suppress state and local actions that run contrary to its policy preferences. In this Annual Review of American Federalism overview article, we introduce the concept of punitive federalism and discuss its application to contemporary public policy. We also highlight federalism implications concerning the COVID-19 pandemic; discuss recent policy developments concerning the environment, gender identity, health care, immigration, reproductive choice, and sexual orientation; and review recent Supreme Court decisions that impact intergovernmental relations.

The state of American federalism is characterized by polarization and punitiveness. Polarization is, of course, a defining feature of contemporary American politics (Abramowitz 2010; McCarty 2019; Theriault 2008). As such, the concept is regularly invoked to illuminate the study of federalism (Jensen 2017; Nolette 2017; Volden 2017). Reflecting this prominence, *Annual Review of American Federalism* overview articles regularly emphasize polarization (Goelzhauser and Konisky 2019; Krane 2004; Pickerill and Bowling 2014). More broadly, polarized federalism has taken its place among entrenched concepts such as coercive, cooperative, and dual federalism (Conlan 2017; Grumbach 2018; Kincaid 2017). Building on this background, we discuss the importance of polarization for understanding recent federalism developments.

Punitiveness is the second theme. As the U.S. transitioned from dual to cooperative federalism (Corwin 1950; Weiser 2001; Zimmerman 2001), state and federal governments increasingly shared policy implementation responsibilities. In

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particular, subnational governments received financial inducements in exchange for assisting with federal policy implementation (Maciag 2017; Stauffer, Pontari, and Samms 2018; Stebbins 2019). Over time, however, the image of benign intergovernmental cooperation partially gave way to coercive federalism (Kincaid 1990). Conceptually, coercive federalism describes federal efforts to bend subnational governments to its will through financial withholdings and regulatory initiatives (Posner 2007, 391–392). Building on this perspective, and informed by increasing polarization, we highlight how coercive federalism is being exercised punitively. Punitive federalism is characterized by the federal government's use of threats and punishment to suppress state and local actions that run contrary to its policy preferences.

This article proceeds in four parts. First, we develop the concept of punitive federalism and highlight its recent impact on intergovernmental relations. Punitive federalism has been particularly prevalent with respect to environmental policy, but we also detail applications from immigration, disaster response, and reproductive choice. Second, we describe early federalism implications surrounding the COVID-19 pandemic. Third, we chronicle recent events from select policy areas raising important federalism issues, including the environment, gender identity, health care, immigration, reproductive choice, and sexual orientation. Fourth, we review decisions from the Supreme Court's most recent term that impact intergovernmental relations.

Punitive Federalism

Federalism scholars have long been interested in the degree of collaboration or adversarialism that characterizes relationships between central and subnational governments. In the U.S. context, scholars have extensively examined concepts such as "cooperative" and "competitive" federalism, most often as a way to characterize legal and institutional relationships across jurisdictions. During the Trump administration's first few years, the federal government's relations with some states has been tense, and there has been an increasing tendency for federal agencies to threaten or punish states that adopt policies conflicting with the administration's agenda.

Federal-state conflict is, of course, nothing new. The federal government and states are in some respects perpetually struggling over relative power and autonomy. In contemporary politics, this conflict frequently emerges in policy design debates (e.g., health insurance regulation), the content of federal regulations that require state policy changes (e.g., pollution regulation), and rules for disbursing federal entitlements (e.g., social assistance program eligibility). Increasing multistate litigation is one illustration of increased federal-state discord (Nolette 2015). Additionally, as Timothy Callaghan, Andrew Karch, and Mary

Kroeger demonstrate in this Annual Review, states have enacted numerous measures challenging federal policies. As Daniel J. Mallinson and A. Lee Hannah show in their Annual Review article examining medical marijuana policy diffusion, states even occasionally pass laws intentionally conflicting with federal statutes. Intergovernmental tensions are also evident in the implementation of federal statutes. In this Annual Review, Kenneth K. Wong analyzes such a case involving implementation of the Every Student Succeeds Act, which succeeded the No Child Left Behind Act.

In recent years, policy differences have generated a more visceral and vindictive type of response, where the federal government, and at times President Trump himself, retaliates against states for decisions and policies that conflict with the administration's preferences. This retaliation involves the federal government using its formal powers to punish states. We refer to this retaliatory behavior as "punitive federalism."

Punitive federalism has perhaps been most evident in environmental policy. This past year, the clearest example pertains to a dispute between the Environmental Protection Agency (EPA) and California. The clash began with a policy difference between the EPA and California over an August 2018 agency proposal to weaken an Obama-era rule strengthening fuel economy and greenhouse gas emission standards for cars and light-duty trucks. (These rules are jointly issued by the EPA and the National Highway Traffic Safety Administration (NHTSA).) California and several automakers thought the weakening went too far, but after negotiations over the proposed standards broke down, California reached an agreement with four automakers[1]—Ford, Volkswagen, Honda, and BMW—in which the companies voluntarily committed to meet a higher standard (Davenport and Tabuchi 2019). This voluntary agreement was a clear rebuke to the Trump administration that undermined its policy goal of weakening standards.

A few months later, the EPA responded with several measures seemingly motivated by retribution. First, the EPA issued a final rule in September 2019 that withdrew a waiver it granted California in 2013 allowing the state to pursue its own program for reducing vehicle emissions. California used this type of waiver from preemption clauses of the 1970 Clean Air Act (CAA) for nearly fifty years to regulate vehicle emissions at levels that exceeded federal standards. For many years, at least a dozen other states also adopted these higher standards.[2] The Trump administration justified waiver withdrawal by emphasizing its desire to create a nationwide standard to simplify compliance for automakers based on its lower standard, rather than a higher standard backed by California. In announcing the decision, EPA Administrator Andrew Wheeler said, "We embrace federalism and the role of states. But federalism does not mean that one state can dictate standards for the entire country" (Joselow 2019). Although the waiver withdrawal does not

invalidate the voluntary agreement California reached with automakers, it challenges other policies California has in place to address pollution emissions from cars and trucks.

The Trump administration's response was, however, just the beginning. Later the same month, the Department of Justice (DOJ) opened an antitrust investigation into the automakers agreeing with California, asserting that their actions might limit consumer choice. This investigation was closed without further action in February 2020 (Davenport 2020). The Trump administration also initiated a series of retaliatory measures against California, which extended into several additional areas of the state's environmental policy. First, the EPA threatened to cut off federal highway funding, accusing the state of failing to fully implement CAA provisions. In his letter to Mary Nichols, the Chair of the California Air Resources Board, Wheeler alleged that "California has the worst air quality in the United States," pointing to a large backlog of CAA State Implementation Plans as a key reason (Wheeler 2019a). In a response letter, Nichols indicated that the state had been working for years with the agency to clear this backlog, arguing that the slow progress was due to EPA delays, not the state (Nichols 2019).

As a second example, just two days later, Wheeler sent another letter to California, this time questioning the state's efforts to effectively implement the Clean Water Act (CWA) and Safe Drinking Water Act. This September 2019 letter specifically emphasized the impacts of homelessness in Los Angeles and San Francisco, indicating that the state and cities were not doing enough to mitigate risks to human health and the environment (Wheeler 2019b).[3] The EPA then sanctioned San Francisco with notices of violation for its three wastewater treatment plants, alleging that they were out of compliance with various CWA requirements (Wittenberg 2019b), even though three weeks prior agency officials expressed support for a new permit for one of the facilities. The EPA's actions toward California drew a response from the Environmental Council of the States (ECOS)—an organization that represents state environmental agencies. In a letter to Wheeler it stated: "ECOS is seriously concerned about a number of unilateral actions by U.S. EPA that run counter to the spirit of cooperative federalism and to the appropriate relationship between the federal government and the states who are delegated the authority to implement federal environmental statutes" (ECOS 2019).

As a final example, the DOJ filed a lawsuit against California's greenhouse gas cap and trade emissions program, asserting that it was unlawful because it included Quebec. Specifically, the DOJ argued that only the federal government is constitutionally permitted to enter into treaties or agreements with foreign governments. California Governor Gavin Newsom (D) characterized the DOJ case as a "political vendetta," suggesting that "[t]his latest attack shows that the White House has its head in the sand when it comes to climate change and serves no

purpose other than continued political retribution" (cited in Friedman and Benner 2019). These actions represent a pattern of response, and their timing suggests that federal officials intend to seek retribution against states that adopt policies or take actions contradicting its preferences.

Outside of environmental policy, the Trump administration's withholding of grant funds to "sanctuary" jurisdictions also exemplifies punitive federalism. New federal grant conditions require state and local governments to (i) implement a policy guaranteeing compliance with federal requests for advance notice of releasing any undocumented person; (ii) implement a policy guaranteeing federal access to undocumented people who are incarcerated; and (iii) certify compliance with a federal immigration law designed to coordinate vertical information sharing (see, e.g., *City of Providence v. Barr*, 19-1802). There is a federal circuit court split on whether federal law delegates power to the attorney general to impose these conditions. Absent a policy change, the Supreme Court will likely resolve this split.

The Trump administration's notice of violation to California for mandating private health insurers to cover abortion procedures may be another example of punitive federalism. This notice alleged that California was in violation of the Weldon Amendment, which prohibits interference with health care providers for refusing abortion coverage. Although several states have similar coverage requirements, the administration only targeted California. Strategically announced hours before Trump spoke at a March for Life rally, Governor Newsom responded, "Despite a federal opinion four years ago confirming California's compliance with the Weldon Amendment, the Trump administration would rather rile up its base to score cheap political points and risk access to care for millions than do what's right" (C. Dwyer 2020). The state formally responded that its law is consistent with the Weldon Amendment and the attorney general declared in part, "California has a sovereign right to protect women's reproductive rights" (Press Release 2020).

Concerns about punitive federalism also swirled with suggestions that the Trump administration made pandemic response decisions based in part on political allegiance. Responding to criticism from some Democratic governors, Trump said he told Vice President Pence, "[D]on't call the governor of Washington. You're wasting your time with him. Don't call the woman in Michigan" (Wilkie and Breuninger 2020). When Trump also said states "have to treat us well" more generally, it raised concerns "that loyalty and praise could be helpful for states seeking federal help" (Costa and Rucker 2020). Michigan Governor Gretchen Wilmer (D) claimed the federal response was "patchwork, based on whomever the governor is" (Kransz 2020). And when Florida received everything it requested from the federal stockpile while Democratic-led states like

Michigan received "only a fraction" of their requests, officials pointed to the close relationship between [Governor Ron] DeSantis and Trump' as well as Florida's 'electoral importance' (Olorunnipa et al. 2020).

Punitive federalism may have also motivated other disaster relief positions. After wildfires ravaged California, Trump disparaged the state and its governor for seeking federal aid and threatened to withhold further assistance, prompting Representative Ted Lieu (D-CA) to respond that Trump was "the president for all Americans" and that "nature does not discriminate based on ideology" (Bacon 2019). Trump also withheld billions of dollars in congressionally allocated relief for Puerto Rico following a series of devastating earthquakes. Trump's associates reportedly relayed the president's view that "Puerto Ricans had complained too much," while the president expressed frustration that Puerto Rico received more disaster relief money than certain Republican-led states even though, in his view, the Puerto Rican "government can't do anything right [and] the place is a mess" (Karni and Mazzei 2019). Representative Nydia Velazquez (D-NY), a Puerto Rican native and the first Puerto Rican woman to serve in Congress, alleged that the withholding simply indicated "the administration's disdain for the people of Puerto Rico" (Booker 2020).

These examples provide anecdotal evidence consistent with punitive federalism. We are not asserting that this phenomenon is unique to the Trump administration, though it does seem particularly prevalent. Beyond these domestic examples, the administration has pursued retaliatory actions in foreign affairs (e.g., tariff threats and troop withdrawals) and personnel management (e.g., verbal attacks on or dismissals of officials involved in the Russian election interference investigation and impeachment proceedings). In this sense, the brand of punitive federalism that has emerged during the Trump administration may reflect the president's personality and idiosyncratic political approach, which involves rewarding friends and punishing adversaries. However, the roots of punitive federalism might lie deeper, and this type of retaliatory behavior may have been prevalent in past presidential administrations and may be common in other countries. These questions are ripe for further inquiry.

The Pandemic

On December 31, 2019, China alerted the World Health Organization (WHO) to a new coronavirus epidemic first detected in Wuhan. Later named the Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-COV-2) because of its genetic similarity to the coronavirus that caused the SARS outbreak, the virus causes a respiratory disease called Coronavirus Disease 2019 (COVID-19). On March 11, 2020, WHO categorized COVID-19 as a pandemic, reflecting global spread. Stock

markets then dropped precipitously. On March 13, President Trump declared a national emergency.

With the virus spreading rapidly, global economies collapsed and death tolls soar. The International Monetary Fund predicted a worldwide financial crisis unlike anything experienced since World War II (Rappeport and Smialek 2020). In the United States, the unemployment rate hit 14.7 percent in April—the highest level observed since the Great Depression (Long and Van Dam 2020). As this article goes to press in May 2020, there have been about 4.4 million confirmed infections and 297,000 resulting deaths worldwide, with more than 1.4 million infections in the United States and 84,000 resulting deaths.[4]

We cannot systematically chronicle the federalism implications of an ongoing crisis. Early returns range from thinking the U.S. "system of federalism is a huge problem in fighting [the] coronavirus" (Kilgore 2020) to "[t]he coronavirus response shows that federalism is working" (Dougherty 2020). Similar debates are playing out worldwide, with federalism hailed as a reason for Germany's relative successes (Oltermann 2020) and Italy's relative failures (Horowitz, Bubola, and Provoledo 2020). A coherent and effective federal policy would be ideal for reducing coordination costs, but absent that at least vertical power sharing allows willing jurisdictions to implement successful response strategies. In any event, our aim at this stage is simply to highlight some of the important federalism considerations guiding the intergovernmental pandemic response.

Governments have responded in numerous ways. At the federal level, the Trump administration implemented international travel restrictions and closed land borders. Congress passed emergency legislation appropriating trillions of dollars for purposes such as individual payments, small business loans, and corporate bailouts. The Federal Reserve loaned $500 billion to state and local governments, cut interest rates, deployed a quantitative easing initiative, eased bank borrowing under the discount window, and expanded dollar swap lines with other central banks. State and/or local governments issued stay-at-home orders, shuttered nonessential businesses, closed schools, commuted prison sentences, mandated paid sick leave, and curtailed evictions.

Criticisms of the Trump administration's response have been widespread. As global infections grew exponentially, Trump downplated the threat even as concern mounted inside the administration (Abutaleb et al. 2020; Haberman 2020; Qiu, Marsh, and Huang 2020). Shortly after the first U.S. case was confirmed, Trump said he was "not at all" worried (Leonhardt 2020). After the Department of Health and Human Services declared a public health emergency, Trump indicated the administration had "pretty much shut [the virus] down coming in from China," and later told governors, "Looks like by April, you know, in theory, when it gets a little warmer, it miraculously goes away" (Leonhardt 2020). On February 26, despite a lack of testing, Trump claimed confirmed cases were "going very

substantially down" (Leonhardt 2020). He later added that criticism of the federal response was a "hoax" perpetrated by Democrats (Abutaleb, Parker, and Dawsey 2020).

Meanwhile a lack of early testing precipitated viral spread. On March 5, Vice President Pence told reporters that testing capacity was limited (Liptak 2020). The next day, however, Trump said, "Anybody that wants a test can get a test" (Leonhardt 2020). Actually, testing was inhibited by factors such as faulty kits provided by the Centers for Disease Control and Prevention (CDC), regulatory hurdles slowing private lab deployment, delay in relaxing regulatory restrictions, limitations on who should be tested, production problems, and supply shortages (e.g., Fink and Baker 2020). Testifying before Congress on March 12, Anthony Fauci, head of the National Institute of Allergy and Infectious Diseases, called U.S. testing "a failure" (Stockman 2020). Further complicating matters, U.S. testing proceeded "in a patchwork fashion" such that "whether you're tested for coronavirus depends on where you live" (Loftus and Mathews 2020).

The federal government's strategy has been to let states lead the response. Trump told governors, "Respirators, ventilators, all of the equipment—try getting it yourselves" (Martin 2020). Although the federal government maintains a national stockpile of personal protective equipment, the president declared that the federal government was not a "shipping clerk" for states (Olorunnipa et al. 2020), while his son-in-law and adviser Jared Kushner said, "The notion of the federal stockpile was it's supposed to be our stockpile. It's not supposed to be the states' stockpiles that they then use" (Dale 2020). Trump also initially resisted invoking the Defense Production Act (DPA), which allows presidents to require private firms to prioritize federal contracts, for pandemic supplies, expressing concern about "nationalizing [the country's] business" despite regularly using it for border patrol and military purposes (Kanno-Youngs and Swanson 2020).

Gubernatorial response to the federal government's strategy has been mixed. Governors Michelle Lujan Grisham (D-NM) and Jay Inslee (D-WA) "reacted angrily to the administration's slow response," while Ron DeSantis (R-FL), whose state as previously noted initially received everything it requested from the stockpile, applauded the decentralized approach as a way to "cut out the federal bureaucracy and potentially get [supplies] quicker" (Martin 2020). Governors Larry Hogan (R-MD) and Gretchen Whitmer (D-MI) wrote a bipartisan op-ed indicating what "governors urgently need" from the federal government (Hogan and Whitmer 2020). And when the administration referred to the stockpile as a federal rather than state resource, Governor J.B. Pritzker (D-IL) said, "The president does not understand the word 'federal'" (Klar 2020).

Forced to bid for scarce supplies in the global marketplace, states have been further frustrated to have to compete against themselves and the federal government. As Governor Andrew Cuomo (D-NY) put it, "it's fifty states

competing against the states and the federal government competing against the states" (ABC News 2020). Moreover, the federal government confiscated state supplies purchased on the open market they were encouraged to utilize. After the federal government confiscated an order of masks placed by Massachusetts, Governor Charlie Baker (R) circumvented the administration by enlisting the New England Patriots team airplane to pick up a subsequent order from China and bring it back to the state (D. Dwyer 2020). Likewise, Maryland circumvented the federal government in securing supplies from South Korea, then ordered the state National Guard and police to protect the equipment from federal confiscation at an undisclosed location (Siu 2020).

The rancor characterizing federal-state relations has been remarkable. Responding to criticisms, Trump tweeted, "Some [states] have insatiable appetites [and] are never satisfied (politics?)," adding that "complain[ing governors] should have been stocked up and ready" (Jackson 2020). On Governor Whitmer he said, "We've had a big problem with the young, a woman governor," adding "she doesn't have a clue" (Karni 2020). After Trump said "governors ... shouldn't be blaming the Federal Government for their own shortcomings," Governor Pritzker responded, "You ... should be leading a national response instead of throwing tantrums from the back seat. Where were the tests when we needed them? Get off Twitter and do your job" (Smith 2020). Governor Inslee said the federal response "would be more successful if the Trump administration stuck to the science and told the truth," to which the president replied that Inslee was "a snake" and "not a good governor" (Choi 2020).

At the same time, vertical relations have been cooperative in some respects. Congress allocated funds to states for general pandemic response, child care, education, food security, law enforcement, mental health services, and unemployment insurance. The federal government has also been cooperative with respect to certain policy implementation issues. As Magdalena Krajewska details in this Annual Review, for example, the federal government extended the deadline for states to issue new identification for air travel in compliance with the REAL ID Act. Furthermore, one relief bill provided for an increase in the Federal Medical Assistance Percentage to states, though some officials objected to its lack of applicability to people who received Medicaid through the Affordable Care Act's program expansion (e.g., Young 2020).

Intergovernmental fiscal concerns have worsened. As noted previously, federal relief legislation provided money for state and local governments. Nonetheless, subnational budgets are cratering due in part to revenue losses stemming from a partially shuttered economy. With the bipartisan National Governors Association pushing for $500 million more in state relief, Senate Majority Leader Mitch McConnell (R-KY) expressed an unwillingness to "bail out state pensions," instead supporting reversing the prohibition on states filing for bankruptcy—a suggestion

that drew criticism from officials in both parties (Wagner 2020). Making McConnell's underlying partisan point more explicitly, Trump said considerable state relief would "not [be] fair to the Republicans, because all the states that need help [are] run by Democrats" (Hansen 2020).

Vertical relations have been strained within some states as governors and municipal officials sometimes disagreed on response strategy. Criticizing a perceived lack of action by Mississippi Governor Tate Reeves (R), Tupelo Mayor Jason Shelton (D) said, "[Reeves] abdicated [his] leadership role in a state of emergency, and we will no longer wait in Tupelo" (Judin 2020). In Texas, Governor Greg Abbott (R) was described as a "major holdout among the dwindling ranks of governors who have defended having a patchwork of different public health restrictions, which in Texas has varied starkly even between neighboring cities" (Weber 2020). "Reflect[ing] Texas conservatives' strong feelings about local control," Abbott said municipal officials "know their communities better than anybody else" (Weber 2020). Tracking a broader politically polarized response, a Democratic Dallas County judge unilaterally issued restrictions in the absence of gubernatorial action while pleading, "We need the state to come in and lay out some parameters" (Garcia 2020).

Other intrastate disputes centered on measures governors implemented. Some municipal officials expressed frustration that state officials preempted their authority to take more aggressive action (e.g., Greenblatt 2020). Alternatively, some Las Vegas officials criticized Nevada Governor Steve Sisolak (D) for closing casinos and other nonessential businesses. Las Vegas Mayor Carolyn Goodman (I) countered that the city "cannot survive any total shut down of the economy for any length of beyond the immediate week or two," adding: "The city of Las Vegas will seek ways for people and businesses to control their own lives, make their own choices, [and] create and follow their own destinies" (Mondaca 2020).

Horizontal federalism has also been on display. As concern grew about interstate travel from disproportionately impacted areas, officials imposed quarantines on incoming travelers. With reports of New York residents retreating to New Hampshire, for example, police in the latter stopped vehicles entering the state with New York license plates and "conduct[ed] house-to-house searchers" (Gopal and Sullivan 2020). More cooperatively, states formed regional coalitions to coordinate reopening and supply purchasing efforts in what Minnesota Governor Tim Walz (D) called "sort of a loose Articles of Confederation" (Strauss 2020). Illustrating the coordination dilemma, when Georgia Governor Brian Kemp (R) moved early to reopen certain businesses, Senator Lindsey Graham (R-SC) expressed concern, noting: "What happens in Georgia will impact us in South Carolina" (Johnson 2020). When Georgia proceeded in any event, cellphone tracking data revealed that "out-of-state visitors flocked" to the state (Shaver 2020).

Consistent with our polarized federalism theme, partisan politics has played a major role in the pandemic response. There have already been several election controversies. Many states postponed elections without incident. On a dramatic mid-March election eve in Ohio, however, partisan disputes erupted over whether to postpone and who held postponement power. Ultimately, polls were ordered closed after 10:00 p.m. and the Ohio Supreme Court rejected a final challenge to keep them open at 4:00 a.m. (Wartman and Balmert 2020). In Wisconsin, which had an April 7 election amidst a state-at-home order, Governor Tony Evers (D) acknowledged lacking postponement authority but nonetheless ordered polls closed on election eve after failing to reach a deal with Republican state legislators. Those legislators then challenged the order, which the Wisconsin Supreme Court subsequently voided (Viebeck et al. 2020).

The Wisconsin contest also initiated the U.S. Supreme Court's COVID-19 jurisprudence. By a five-four vote, the Court stayed a federal district court injunction that would have allowed Wisconsin absentee ballots postmarked by April 7 to be counted if they arrived by April 13 as opposed to the original April 7 deadline (*Republican National Committee v. Democratic National Committee*, 19A1016). The dispute arose after a pandemic-induced surge in absentee vote-by-mail requests overwhelmed election officials. Since thousands of ballots could not be delivered—much less returned—by the deadline, lower federal courts held that the extension alleviated a constitutionally impermissible burden on the right to vote.

The Ohio and Wisconsin controversies may preview impending election controversies. The fundamental concern is that the pandemic will render voting in person unsafe in November 2020. During negotiations over federal virus relief, Republicans rejected proposed Democratic reforms concerning early voting and vote-by-mail. Referencing these proposals, Trump said, "[Democrats] had [proposals]—levels of voting that, if you ever agreed to it, you'd never have a Republican elected in this country again" (Hulse 2020). With November less than half a year away, concern mounts regarding a number of issues, including access to alternative voting procedures, vote dispute resolution, vote counting delay, election infrastructure, and emergency plans (see Fair Elections During a Crisis 2020).

Partisan divisions have also prevalent outside of the election context. People are divided along ideological lines, for example, on perceptions regarding the extent of the pandemic threat (Gadarian, Goodman, and Pepinsky 2020) and efficacy of the federal government's response (Linzer 2020). Controlling for confirmed infections and geographic diffusion, preliminary evidence also suggests that conservative states were slower to adopt social distancing measures (Adolph et al. 2020). Furthermore, preliminary findings from studies using GPS location data indicate that people in more conservative were social distancing less (Allcott et al. 2020) and traveling more, including to nonessential businesses (Barrios and Hochberg

2020). With respect to specific policies, liberal and conservative states differed over whether to consider gun stores and abortion providers "essential" and thus exempted from mandatory closure orders (Allyn 2020; Bazelon 2020).

As this article goes to press in May 2020, officials debated reopening plans. Trump first claimed that "numerous provisions" of the Constitution afforded him "total" authority to guide reopening before conceding that governors could "call [their] own shots" (Baker and Shear 2020). On April 16, Trump issued guidelines for state and regional re-openings emphasizing testing, contact tracing, and case reduction benchmarks. Despite many areas not meeting these standards, the following day he encouraged protestors in three states with Democratic governors to "liberate" themselves. Governor Inslee responded, "The president is fomenting domestic rebellion ... even while his own administration says ... we have a long way to go before restrictions can be lifted" (O'Sullivan 2020). Governor Hogan said it wasn't "helpful to encourage demonstrations," adding that "to encourage people to go protest the plan that you just made ... doesn't make any sense" (Knutson 2020).

Legal disputes over reopening are also percolating. Attorney General William Barr sent a memorandum to U.S. attorneys directing them to "be on the lookout for state and local directives that could be violating the constitutional rights and civil liberties of individual citizens."[5] In a suit filed by the state legislature, the Wisconsin Supreme Court invalidated a state health official's stay-at-home order on the grounds that it did not follow proper rulemaking procedures and otherwise exceeded the scope of authority delegated by the governing communicable diseases statute (*Wisconsin Legislature v. Palm*, No. 2020AP765-OA). And the Texas attorney general's office sent letters to officials in three cities threatening litigation over orders that were stricter than the state's on matters such as restricting opened businesses, church services, wearing masks in public, and sheltering in place (Platoff 2020).

Federalism is not the lead story in the midst of a worldwide catastrophe. Nonetheless, in the U.S., politics has been pervasive in shaping the contours of this public health crisis. As we have outlined, the pandemic has highlighted nearly every dimension of federalism relevant for understanding how intergovernmental relations influence political outcomes, including vertical power sharing, horizontal spillover costs, and fiscal dynamics. Moreover, despite noteworthy elements of cooperation, most of the important political decisions are playing out against a backdrop of partisan polarization and punitiveness. Much of the story is, of course, yet to be written, but it is already clear that the pandemic has brought on, in addition to immense human suffering, the federalism event of the century.

Public Policy

The Environment

The Trump administration's environmental policy continues to consist mostly of a deregulatory agenda, using existing executive authorities rather than pursuing congressional legislation to generate policy change. By one accounting, over the course of the first three years of the Trump presidency, federal offices and agencies initiated nearly 100 policy rollbacks (Popovich et al. 2020). In some instances, the rollbacks are reversals of Obama-era policies. In others, the rollbacks are intended to fundamentally change the way policymaking is done at the EPA, the Department of Interior, and other federal agencies.

Among the key recent developments is a proposal to limit the applicability of the National Environmental Policy Act (NEPA). NEPA, enacted in 1970, requires federal agencies proposing major actions with significant environmental impacts, such as highways, pipelines, and other infrastructure projects, to first complete an environmental impact statement (EIS) assessing consequences and alternatives. Under the Trump administration's proposal, fewer projects would require EISs, and agencies would face strict deadlines for completing them when required. Moreover, the proposed rule does not mandate considering greenhouse gas emissions as part of EISs despite contrary federal court rulings (Friedman 2020). In a related measure to speed up infrastructure projects, President Trump signed an executive order diminishing state authority granted under the CWA to slow down, if not stop, the development of oil and natural gas pipelines and other projects deemed to risk the quality of their water resources (Krauss 2019). These and other policies are designed to diminish present and future consideration of climate change in federal policymaking and to promote the accelerated development of fossil fuel extraction and infrastructure.

Writing in last year's Annual Review, Goelzhauser and Konisky (2019) highlighted three key regulatory policy reversals in process at the EPA: greenhouse gas emissions limitations for coal-fired power plants, determining which U.S. waterways fall under federal jurisdiction, and fuel economy standards for cars and light-duty trucks. The EPA has now finalized action on these regulations, each of which has important federalism implications.

In June 2019, the EPA formally rescinded its previous Clean Power Plan (CPP) and replaced it with the Affordable Clean Energy (ACE) rule. The CPP was a central pillar of the Obama administration's strategy to reduce greenhouse gas emissions in the electricity sector, and it aimed to reduce carbon dioxide emissions 32 percent below 2005 levels by 2030. To achieve these goals, the CPP was designed to accelerate efforts to transition state electricity portfolio policies away from "dirty" fossil fuels (i.e., coal) to renewables and "cleaner" fossil fuels (i.e., natural gas). As part of the CPP, the EPA established state-by-state emissions reductions

targets, then gave states discretion to choose among three broad compliance options—improving efficiency at existing coal plants, shifting to more natural gas, and/or deploying more renewable energy technologies. This cooperative federalism approach is deeply embedded in U.S. environmental policy (Engel 2015; Konisky and Woods 2016, 2018b).

The Trump-era ACE replacement rule seeks to limit carbon dioxide emissions at existing coal plants through modest improvements in their heat-rate efficiency. The EPA's own analysis found that the ACE rule will result in very modest decreases in CO_2 emissions—0.7 percent below 2005 levels by 2030—falling well short of the 32 percent that the agency estimated would result from the prior CPP (Chemnick and Farah 2019; U.S. EPA 2015). The ACE rule is designed to technically comply with the EPA's legal mandate to regulate carbon dioxide, but not to seriously address electricity sector emissions.

Six months later, in January 2020, the EPA finalized its replacement of the Waters of the United States (WOTUS) rule, and in so doing significantly modified a regulation that the agency put in place in 2015 during the Obama administration. The purpose of the WOTUS rule is to clarify which U.S. waterbodies are subject to federal jurisdiction under the CWA. This is a crucial determination for implementation of the federal CWA, since it demarcates the scope of jurisdiction for the EPA when issuing permits for pollution discharges and for the U.S. Army Corps when issuing permits for filling or dredging wetlands. Although the CWA is nearly fifty years old, this key jurisdictional question has been unsettled from the outset, and it became even more uncertain following a divided Supreme Court decision in *Rapanos v. United States*, 547 U.S. 715 (2006). The new rule, known as the Navigable Waters Protection Rule (NWPP), is estimated to eliminate federal protections for more than half of the country's wetlands and nearly a fifth of its streams that do not have relatively permanent surface water connections to nearby waterways (Wittenberg 2019a, 2020). The Obama-era WOTUS rule would have protected these resources, which include ephemeral streams and isolated wetlands. Without federal protection, the task of protecting these resources falls to states, which is likely to result in a varied response, with some states working to fill the gaps and others leaving resources unprotected (Konisky and Woods 2018a).

Environmental organizations and many governors criticized the NWPP, which is already subject to legal challenges. One legal issue is whether the EPA had scientific justification for the exclusion of many water resources that it had five years prior argued should be covered by the CWA. The agency's independent Science Advisory Board concluded that the rule lacked scientific support, specifically noting that the EPA neglected its own prior analysis of watershed systems and processes and that the rule "lacks a scientific justification, while

potentially introducing new risks to human and environmental health" (U.S. EPA Science Advisory Board 2020).

As discussed previously, a third major policy reversal finalized by the EPA is a measure to weaken Obama-era fuel economy and greenhouse gas emissions standards. The replacement rule, known as the Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule, requires an approximately 1.5 percent annual increase in the average fuel economy of passenger cars and light trucks, compared to the previous version requiring about a 5 percent increase. (The new rule would generate an estimated 44.1 miles per gallon (mpg) by model year 2030, compared to 54.5 mpg by model year 2025 (EPA/NHTSA 2020).) By the EPA's own estimates, relative to the Obama-era rule, the SAFE Vehicle Rule would result in more pollution of criteria air pollutants from tailpipes and more greenhouse gas emissions. The first part of the SAFE Vehicle Rule, completed on September 19, revoked permission previously granted to California to establish its own mobile source pollution standards that are more stringent than those set by the EPA. 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.

The revocation of California's waiver set off an intense dispute between California and the EPA, with U.S. automakers caught in the middle. Although many automakers urged the Trump administration to loosen the 2012 rule to provide more compliance flexibility, several disagreed with the extent of the proposed policy rollback. In September 2019, Ford, Volkswagen, Honda, and BMW negotiated a voluntary agreement with California in which they agreed to a more stringent standard than that proposed by the EPA in its 2019 proposed replacement rule. This voluntary agreement escalated tension between California and the Trump Administration, leading to the punitive federalism measures discussed previously.

California's effort to forge ahead with a separate agreement with several automakers is just one illustration of how some states are responding to the Trump administration's environmental policy retrenchment. As Rebecca Bromley-Trujillo and Mirya R. Holman (2020) discuss in this Annual Review, some states continue to pursue actions in other areas in light of federal rollbacks. For example, several states have enacted or updated greenhouse gas emission targets and renewable energy goals. Although some states have pulled back from such targets, often due to intense lobbying from electric utilities and energy companies (Stokes 2020), the actions of states to fill the void left by federal inaction (and retrenchment) is similar to a pattern that emerged during the George W. Bush administration (Rabe 2011). In addition to going their own way on policy, state governments have aggressively pushed back against the Trump administration's deregulatory actions in the courts. By the end of 2019, state attorneys general had filed an estimated 300

lawsuits in areas such as climate change, air and water pollution, and public lands and wildlife (State Energy and Environmental Impact Center 2019).

Health Care

Health care featured prominently during this year's Democratic primary campaign, with candidates debating the merits of expanding the Affordable Care Act (ACA) or adopting new approaches, such as the "Medicare for All" program. The debate's contours focused on how to provide insurance coverage to more people, and whether this should be done primarily through private insurance markets or by shifting to more public options. In the meantime, many states and the Trump administration continued efforts to challenge the ACA's legality and undermine its reach through administrative measures such as Medicaid eligibility requirement waivers.

A case concerning the ACA's constitutionality is pending before the Supreme Court (*California v. Texas*, 19-840). In 2018, a federal district court made two important rulings (*Texas v. United States*, 340 F. Supp. 3d 579 (2018)). First, it held that the individual mandate could no longer be read as a tax after the 2017 Tax Cuts and Jobs Act reduced the amount people had to pay for compliance failure (i.e., the "shared responsibility payment") to zero. In *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012), Chief Justice Roberts provided a pivotal fifth vote for the proposition that the individual mandate was constitutional under Congress's taxing power, but only after adopting a savings construction finding that it could plausibly be interpreted as a tax even though in his view it more closely resembled what would have been an unconstitutional penalty.

Arguing that the individual mandate could no longer plausibly be interpreted as a tax given that compliance failure no longer generates revenue, the federal district court held that the taxing power could no longer be invoked as the constitutional source authorizing implementation. In turn, the court's second important ruling was that the individual mandate could not be severed from the ACA to save the broader statute, thus rendering the entire ACA unconstitutional. Subsequently, the Fifth Circuit agreed that the individual mandate could no longer be considered a tax and was thus unconstitutional but remanded for additional analysis on whether it could be severed from the ACA (*Texas v. United States*, 19-10011, (2019)). The Supreme Court, however, agreed to review the case absent the remand.

Invalidating the ACA in its entirety would have important policy and federalism implications. From a policy perspective, elimination would remove protections for people with pre-existing conditions, federal subsidies for purchasing health insurance, Medicaid expansions, and insurance coverage for people up to the age of 26 years under their guardian's policy. From a federalism perspective, competing

state coalitions have lined up on different sides. Texas and seventeen other states—all represented by Republican attorneys general or governors—brought the challenge alongside the federal government (two states—Maine and Wisconsin—withdrew from the plaintiffs' side after Democrats took control of key statewide offices in the 2018 midterm elections). On the other side, California led sixteen additional states in opposition.

Pending the resolution of *California v. Texas*, controversy surrounding other ACA implementation issues continues. State Medicaid expansion is one area of ongoing policy dispute. Under the ACA, states can extend health coverage under Medicaid to nonelderly adults with income up to 138 percent of the federal poverty level. To finance this program, the federal government pays 90 percent of the costs in the year 2020 and beyond (in earlier years, the federal government paid higher shares). Over the past year or so, Idaho, Maine, Utah, and Virginia expanded Medicaid, with the first three states passing ballot measures in 2017 and 2018. Nebraska voters also approved Medicaid expansion through a November 2018 ballot initiative, but it has not yet enacted implementing legislation.[6] As of this writing, with new additions, thirty-six states and the District of Columbia have expanded Medicaid under the ACA (KFF 2020b).

As Lilliard Richardson (2019) analyzed in last year's Annual Review, an ongoing controversy regarding Medicaid implementation concerns state efforts to seek section 1115 waivers to incorporate work requirements into their eligibility standards. State legislatures in Idaho and Utah passed laws requiring their states to seek work requirement waivers from the Centers for Medicare & Medicaid Services (CMS), and this is also the main reason for Nebraska's expansion delay (KFF 2020b; Meyer 2019). In total, twenty states have sought section 1115 waivers to mandate work requirements for Medicaid eligibility. As of March 2020, six states (Arizona, Indiana, Ohio, South Carolina, Utah, and Wisconsin) have had waivers approved (although none have been implemented), four states (Arkansas, Kentucky, Michigan, and New Hampshire) have had waivers judicially invalidated, and ten states (Alabama, Georgia, Idaho Mississippi, Montana, Nebraska, Oklahoma, South Dakota, Tennessee, and Virginia) have waivers pending before CMS (KFF 2020a). In Kentucky's case, after a federal court invalidated work requirement (as well as other eligibility and coverage) waivers, a newly-elected Democratic governor signed an executive order in late December 2019 rescinding them altogether (KFF 2020b).

Despite legal uncertainty surrounding the ACA, the number of U.S. residents who purchased health insurance on either federal or state exchanges held steady in 2020. In response to COVID-19, eleven states and the District of Columbia reopened exchanges to allow sign-ups after the initial enrollment period ended (Sanger-Katz and Abelson 2020). The Trump administration decided against doing the same for the federal exchange (Sink 2020). According to data compiled by

CMS, 11.4 million people bought insurance, which was approximately the same number as in 2019, and the average premium cost declined for consumers purchasing on the federal exchange (CMS 2020). The number of insurers offering plans in 2020 also increased, suggesting that exchanges have stabilized after years of turbulence (Goodnough 2019). Overall, health insurance coverage rates in the United States have increased somewhat over the past couple of years. In 2019, nearly 27.9 million residents did not have coverage. Although this number has increased by about 1.2 million since 2016, it is well below the 46.5 million from before the ACA's enactment (KFF 2019).

Immigration

After percolating for years, several of the Trump administration's immigration measures are pending before the Supreme Court or percolating in lower courts. As *USA Today* put it, "President Trump's immigration crackdown [is] inundat[ing the] Supreme Court" (Wolf 2020). In *Kansas v. Garcia*, 17-834 (2020), the Court held five-four that federal immigration law does not preempt state prosecutions of undocumented residents who use false identities to secure employment and complete tax withholding forms. Every justice agreed that the federal Immigration Reform and Control Act of 1986 does not expressly preempt such prosecutions, but the dissenting coalition argued that the statute impliedly preempts states from prosecuting fraud involving federal work authorization.

With respect to federalism implications, one legal commentator noted that the case "highlights a growing tension with respect to what states can and can't do with regard to aiding federal immigration enforcement, with some states attempting increasingly aggressive measures to supplement federal enforcement, and others attempting increasingly aggressive measures to not cooperate with federal authorities" (de Vogue and Cole 2020). To this end, in this Annual Review, Lina Newton analyzes the mix of federal-state conflict and cooperation surrounding recent state legislation involving immigrant labor.

The Supreme Court's 2019 term also includes a case concerning the Trump administration's effort to repeal the Deferred Action for Childhood Arrivals (DACA) program, which was instituted by the Obama administration to protect undocumented immigrants brought to the U.S. as children from deportation. In 2017, the Trump administration moved to rescind the program, arguing that it was illegal. The Supreme Court will decide whether rescission is judicially reviewable and if so whether it is valid under the Administrative Procedure Act (APA). An amicus brief filed by numerous subnational governments argues DACA "directly benefits the health, safety and welfare of all of our residents" and that its elimination would deprive them of workers in critical professions (Brief of Amici Curiae 109 Cities et al. 2019, 2-3).

Litigation concerning the "public charge" rule also continues. Under the Immigration and Nationality Act (INA), visa applicants deemed "likely … to become a public charge" are "inadmissible" (8 U.S.C. 1182(a)(4)(A)). Inadmissibility is determined by "age; health; family status; assets, resources, and financial status; and education and skills" (8 U.S.C. 1182(a)(4)(B)). A 1999 regulation defined "public charge" for admission and deportation purposes as one who is "primarily dependent on the government for subsistence, as demonstrated by either (i) the receipt of cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense" (64 Fed. Reg. 28689).

In 2019, the Trump administration adopted a regulation broadening the interpretation to include people who receive "designated public benefits for more than 12 months in the aggregate within any 36-month period," with public benefits defined "to include cash benefits for income maintenance, [the Supplemental Nutrition Assistance Program], most forms of Medicaid, [and certain] forms of subsidized housing" (84 Fed. Reg. 41295). A variety of subnational governments challenged the regulation as inconsistent with the INA and arbitrary and capricious under the APA. Federal courts have split on these questions and the broader dispute will likely be settled by the Supreme Court if the regulation remains in effect after the 2020 election.

Three of the Trump administration's asylum measures have also been challenged. First, U.S. asylum seekers who transit through a third country must seek asylum in that country before being eligible for consideration in the United States. A preliminary injunction was issued against the policy on the understanding that it likely violates the APA, but the Supreme Court granted a stay allowing the rule to remain in effect. Second, asylum seekers must enter the United States at a designated port of entry to be eligible. A preliminary injunction has been issued against this policy on the understanding that it likely violates the APA and INA. Third, the Migrant Protection Protocols (MPP) dictate that many non-Mexican asylum seekers arriving at a U.S. port of entry along the southern border wait in Mexico during their immigration proceedings. A preliminary injunction has been issued against this policy on the understanding that it likely violates the INA and the country's anti-refoulement obligations, which prevent migrants from being returned when facing threats of discrimination and violence. The Supreme Court, however, granted a stay, allowing the MPP to remain in effect.

Gender Identity, Reproductive Choice, and Sexual Orientation

Here we consider issues involving gender identity, reproductive choice, and sexual orientation—each of which encompasses sexuality (see, e.g., Wilson and Burgess 2007). Numerous states passed laws restricting reproductive choice this year. Many set limitations based on fetus development, including six, eight, and eighteen week

restrictions. Alabama banned nearly all abortions. As Joshua C. Wilson discusses in this Annual Review, although many of these laws flout Supreme Court precedent, they are often adopted in part to provide the Court a vehicle for revisiting its prior decisions in the wake of Brett Kavanaugh replacing Anthony Kennedy. Upon signing the Alabama bill, for example, Governor Kay Ivey (R) said, "[W]e can all recognize that, at least for the short term, this bill may ... be unenforceable [but] sponsors ... believe that it is time, once again, for the U.S. Supreme Court to revisit this important matter, and they believe this act may bring about the best opportunity for this to occur" (Kelly 2019).

The Supreme Court is set to decide two important reproductive choice questions: (i) whether a law requiring providing physicians to have admitting privileges at a local hospital is constitutional and (ii) whether providers have third-party standing to challenge regulations on behalf of patents (*June Medical Services v. Russo*, 18-1323). Although *Russo* is an unlikely vehicle to overturn *Roe v. Wade*, 410 U.S. 113 (1973), the Court could restrict reproductive choice in at least two ways. First, holding that providers lack standing to challenge regulations would put the onus on women to bring lawsuits. Second, the Court could overturn *Whole Woman's Health v. Hellerstedt*, 136 U.S. 2292 (2016), in which Justice Kennedy provided a fifth vote to invalidate a comparable admitting privileges law as an undue burden on women. More broadly, to the extent *Hellerstedt* suggested that lower courts should engage in a stringent undue burden inquiry, the Court could signal a new approach leaving states more flexibility to restrict abortion.

A Trump administration regulation promulgated under Title X of the Public Health Service Act that "would shift tens of millions of dollars from Planned Parenthood toward faith-based clinics" (Cha 2019) has been challenged by numerous subnational governments. Two provisions are at issue. First, the regulation "draws a bright line between permissible services provided with Title X funds and prohibited abortion services" (84 Fed. Reg. 7766). Second, the regulation includes, in what is colloquially referred to as the "gag rule," a "prohibition on referral for abortion" dictating that projects funded under Title X "not perform, promote, refer for, or support abortion as a method of family planning, nor take any other affirmative action to assist a patient to secure such an abortion" (84 Fed. Reg. 7788-7789). Thus far one federal circuit court has upheld the regulation under the APA, ACA, and Supreme Court precedent (*California v. Azar*, 19-15974).

The Supreme Court's 2019 docket includes two cases concerning Title VII of the Civil Rights Act of 1964. Title VII prohibits employment discrimination on the basis of "sex" (42 U.S.C. 2000e-2(a)(1)). The questions at issue include whether Title VII prohibits discrimination (i) on the basis of sexual orientation (*Bostock v. Clayton* County, 17-1618) and (ii) against transgender people (*Altitude Express v. Zarda*, 17-1623). A coalition of twenty-one relatively liberal states urged an inclusive interpretation, citing an interest in "combatting employment

discrimination against the millions of our residents who identify as lesbian, gay, bisexual, or transgender" (Brief for States of Illinois et al. as Amici Curiae 2019, 1). Fifteen relatively conservative states, meanwhile, countered: "When a federal court rewrites a federal statute rather than deferring to Congress, it deprives the States of the opportunity to weigh in on that question through the political process. It also impedes state-level efforts to develop solutions in the absence of congressional action" (Brief for States of Tennessee et al. as Amici Curiae 2019, 2).

This Title VII litigation may provide important signals about how courts will resolve the wave of litigation likely to follow from recent or pending federal and subnational policy enactments. Several of these recent developments are discussed in Susan Gluck Mezey's article on state transgender policymaking in this Annual Review. The Trump administration banned transgender people from military service, revoked federal guidance concerning gender identity recognition in public schools, jettisoned inclusive census questions, removed gender identity and sexual orientation from nondiscrimination statements, and proposed a rule abolishing nondiscrimination protections in the implementation of federal health care programs (see, e.g., Berg and Syed 2019). Numerous states are considering bills regarding transgender rights, including proposals limiting public school facility use based on birth sex, restricting public school sports participation based on birth sex, banning LGBTQ+ sex education in public schools, forbidding gender identity recognition on government documents, preempting local government protections, and prohibiting the provision of or counsel regarding medical services for transitioning minors (e.g., Levin 2020).

Other states considered or are expanding LGBTQ+ protections. For example, several states considered enacting nondiscrimination protections and permitting recognition of gender identity on government documents. Although few of these measures passed in divided state governments, Virginia—after Democrats gained unified control of the legislative and executive branches for the first time since 1993—passed a wave of reforms. Most prominently, the Virginia Values Act prohibits discrimination on the basis of sexual orientation and gender identity in housing, credit access, and public accommodations. Virginia also passed laws banning conversion therapy for minors and requiring education officials to develop rules concerning transgender student treatment.

Recent Supreme Court Decisions

The Supreme Court's 2018 term yielded numerous decisions with important federalism implications. In *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), the Court held five-four that partisan gerrymandering claims are nonjusticiable political questions. Writing for the majority, Chief Justice Roberts argued, "There are no legal standards discernible in the Constitution for [evaluating these claims],

let alone limited and precise standards that are clear, manageable, and politically neutral" (p. 2500). Justice Kagan wrote for the dissenters, arguing that these claims should remain cognizable on the understanding that vote dilution implicates the Equal Protection Clause. Although eliminating the federal judicial remedy has significant electoral implications, state courts can still adjudicate partisan gerrymandering claims under state law.[7] In 2019, for example, a three-judge North Carolina trial court held that partisan gerrymandered state maps violated the state constitution (*North Carolina v. Lewis*, 18-CVS-014001).

Another Supreme Court redistricting case concerned alleged racial gerrymandering in Virginia. The federal district court invalidated eleven of twelve challenged districts and the state's attorney general refused to appeal, leaving the Virginia House of Delegates as the sole defendant. In *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019), the Court ruled five-four that "a single chamber of a bicameral legislature has no standing to appeal the invalidation of the redistricting plan separately from the state of which it is a part" (1950). The dissent concluded that the Virginia House suffered a cognizable injury for standing purposes, arguing that "it seems obvious that any group consisting of members who must work together to achieve the group's aims has a keen interest in the identity of its members, and it follows that the group also has a strong interest in how its members are selected" (1957).

The Court's decision in *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019), also has important electoral implications. It considered the validity of the Trump administration's effort to add a citizenship question to the 2020 census. The case yielded several holdings. First, the Court unanimously held that states had standing to challenge the question's addition on the understanding that expected population undercounts would impact population-based funding allocations. Second, the Court held five-four that the Enumeration Clause permits including a citizenship question. Third, the Court held five-four that the decision to add the question was not impermissibly arbitrary and capricious under the APA because it was supported by sufficient evidence that doing so would yield more accurate citizenship data than using administrative records alone. With respect to the question of pretext, however, five justices held that the administration's expressed justification of wanting to improve enforcement of the Voting Rights Act "seems to have been contrived" (2575).

In *Tennessee Wine v. Thomas*, 139 S. Ct. 2449 (2019), the Court invalidated a Tennessee law requiring liquor license applicants to have resided in-state the previous two years. The case is especially notable from a federalism perspective because of its bipartisan reaffirmation of an operative dormant component to the Commerce Clause. Writing for seven justices, Justice Alito concluded, "[I]t would be strange if the Constitution contained no provision curbing state protectionism, and at this point in the Court's history, no provision other than the Commerce

Clause could easily do the job" (2460). Dissenting, Justice Gorsuch, joined by Justice Thomas, argued that the Twenty-First Amendment left states "to regulate the sale of liquor free of judicial meddling" (2481). The dissent also called this jurisprudential area "peculiar" because "unlike most constitutional rights, the dormant Commerce Clause doctrine cannot be found in the text of any constitutional provision but is (at best) an implication from one" (2477).

Two important federalism cases overturned longstanding precedents. In *Franchise Tax Board of California v. Hyatt*, 139 S. Ct. 1485 (2019), the Court held five-four that states enjoy sovereign immunity from private suits filed in out-of-state courts. The case arose when a Nevada resident sued a California state agency in Nevada state court. Overturning *Nevada v. Hall*, 440 U.S. 410 (1979), Justice Thomas wrote for the Court arguing that interstate sovereign immunity is structurally embedded in the Constitution. Agreeing "that the Constitution contains implicit guarantees as well as explicit ones," Justice Breyer argued in dissent that nothing in "the Constitution converted what had been the customary practice of extending immunity by consent into an absolute federal requirement that no State could withdraw" (1503).

In *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019), the Court overturned *Williams County Regional Planning Commission v. Hamilton Bank*, 545 U.S. 323 (1985), which held that plaintiffs cannot sue a municipal government for a takings violation in federal court without a state court first denying the claim under state law. Writing for the five-justice majority, Chief Justice Roberts concluded that abandoning the rule "restor[ed] takings claims to the full-fledged constitutional status the Framers envisioned when they included the [Takings] Clause ... in the Bill of Rights" (2170). Justice Kagan countered in dissent that the "decision sends a flood of complex state-law issues to federal courts[,] makes federal courts a principal player in local and state land-use disputes[, and] betrays judicial federalism" (2189).

The *Hyatt* and *Knick* disputes about precedent—both of which were decided along party lines—could be proxy battles for impending showdowns over potential post-Kennedy precedent alterations in areas such as affirmative action, reproductive choice, school prayer, and equal protection on the basis of sexual orientation. Justice Breyer wrote in *Hyatt* that it is "dangerous to overrule a decision only because five Members of a later Court come to agree with earlier dissenters on a difficult legal question," concluding, "Today's decision can only cause one to wonder which cases the Court will overrule next" (1506). Echoing these remarks, Kagan lamented in *Knick*, which was decided about a month after *Hyatt*, that "the entire idea of stare decisis is that judges do not get to reverse a decision just because they never liked it in the first instance," concluding with reference to Breyer's prior wonderment: "Well, that didn't take long. Now one may wonder yet again" (2190).

The Court considered three Native American federalism cases. First, the Court held over *Sharp v. Murphy*, 17-1107 (2018), for reargument. This case considers whether a man convicted of murder and sentenced to death in state court should have been tried in federal court, which in turn depends on whether the crime occurred within "Indian country" as that phrase is defined by federal law. More broadly, the case could settle how to determine whether Congress has disestablished or diminished a reservation. Second, in *Herrera v. Wyoming*, 139 S. Ct. 1686 (2019), the Court rejected Wyoming's contentions that a treaty provision enacted with the Crow Tribe granting hunting rights expired upon admission to statehood, and that the national forest land on which the hunting took place was rendered occupied under the treaty when it was set aside as a federal reserve. Third, in *Washington State Department of Licensing v. Cougar Den*, 139 S. Ct. 1000 (2019), a five-justice majority agreed on a split-opinion disposition that a treaty with the Yakama Nation exempted members from a Washington state tax on fuel importers traveling by highway.

Three criminal cases have important implications for subnational governments. First, in *Gamble v. United States*, 139 S. Ct. 1960 (2019), the Court reaffirmed that the Double Jeopardy Clause does not prohibit state and federal governments from separately charging someone based on the same underlying conduct. Second, in *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019), the Court held that the exigent-circumstances exception to the Fourth Amendment's warrant requirement generally permits obtaining a warrantless blood test when an unconscious driver is suspected to be under the influence of alcohol. Third, in *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019), the Court held that reversal of a murder conviction was warranted for a prosecutor's racially motivated peremptory juror strikes.

The Supreme Court's 2019 term has already yielded two decisions with important federalism implications. In *Ramos v. Louisiana* (No. 18-5924), the Court held six-three that the Sixth Amendment's unanimous verdict guarantee applies to the states. This decision invalidated laws in Oregon and Louisiana allowing for convictions by ten-two jury votes. Since the Court previously refused to incorporate the unanimous verdict guarantee against the states in a 4-1-4 decision (*Apodaca v. Oregon*, 406 U.S. 404 (1972)), *Ramos* is also illustrates the Court's conflict over when to overrule precedent. Shortly after its decision the Court granted cert in a case questioning whether *Ramos* applies retroactively (*Edwards v. Vannoy*, 19-5807).

In *New York State Rifle & Pistol Association v. City of New York* (No. 18-280), the Court sidestepped what could have been one of the 2019 term's most important subnational policy cases. The merits question concerned the constitutionality of a New York City ordinance prohibiting handgun transportation outside of city limits as applied to taking unloaded and container-locked handguns outside of the city to a second home or shooting range. More broadly, the case could have

been a vehicle for clarifying the constitutional standard by which federal courts should analyze firearm regulations—a question that has remained open since the Court's landmark decision recognizing an individual right to bear arms under the Second Amendment (*District of Columbia v. Heller*, 554 U.S. 570 (2008)).

After granting certiorari in *New York State Rifle*, New York City amended its ordinance and the state preempted the original measure. By a six-three vote, the Court held that these actions rendered the case moot. The dissenters alleged the Court's docket had been "manipulated" (split op. at 1, Alito dissenting), presumably on the understanding that the city and state strategically mooted the case knowing that it could serve as a vehicle for adopting an analytical framework that would be used to invalidate other firearm regulations.[8] The dissent determined that the case was not moot in any event, and that the initial ordinance was unconstitutional. Hinting at the broader search for a vehicle to clarify the test for adjudicating Second Amendment claims, the dissenters concluded by noting "cause for concern" at "the way *Heller* has been treated in the lower courts" (slip op. at 31, Alito dissenting).

The Supreme Court's 2019 term includes a number of additional cases with important federalism implications and new ones are on the horizon. We previously discussed pending cases concerning immigration, health care, gender identity, reprodctuve choice, and sexual orientation. Other notable pending cases include challenges to state laws prohibiting or punishing "faithless" presidential electors (*Colorado Department of State v. Baca*, No. 19-518; *Chiafalo v. Washington*, No. 19-465) and the president's insulation from subpoenas seeking records, including one issued in connection with a state's grand jury proceedings (*Trump v. Vance*, 19-635). More generally, governmental responses to COVID-19 will generate an extensive pandemic jurisprudence, some of which may reach the Court.

Conclusion

The COVID-19 pandemic will be 2020's defining federalism event. For the first time in U.S. history, a state of emergency was simultaneously in every state, and the economic downturn will likely have implications for years to come. Government responses have been varied, reflecting decentralized power, differential attention to science, disproportionate impact on marginalized groups, and mixed perceptions of purported tradeoffs between economic well-being and public health. As the crisis unfolds, important federalism concepts are on display, including cooperation and conflict through vertical and horizontal relations. Moreover, the pandemic has reinforced the themes of polarization and punitiveness governing contemporary intergovernmental conflict.

The partisan divide continues to permeate most dimensions of American federalism. Positions on public policy and legal questions are ideologically divided.

Tensions have seemingly increased during the last year with the Trump administration's partisan rancor and retaliatory action against divergent subnational governments. Specifically, in what we term "punitive federalism," the federal government has regularly used threats and punishment to attack state and local governments that depart from its policy preferences. Whether punitive federalism is a short-term phenomenon idiosyncratic to the Trump administration or a more lasting feature of American politics remains to be seen.

Notes

1. A year later, on the same day after the Trump Administration finalized its weakening of the standards, Volvo joined the agreement with California.
2. The 1970 CAA contains a provision that allows California to seek a waiver from federal standards, because at the time the law was enacted, the state already had standards the exceeded those in the law. The 1990 CAA Amendments permitted other states to adopt California's standards.
3. Earlier in the month, President Trump had alleged in a tweet that San Francisco was allowing waste from homeless people to contaminate the Pacific Ocean.
4. Infection and death statistics were obtained from https://coronavirus.jhu.edu/map.html.
5. The memorandum is available at https://www.justice.gov/opa/page/file/1271456/download.
6. Ballot measures for Medicaid expansion are percolating in several additional states, including Florida, Missouri, and South Dakota, and there has been active legislative activity in other states, including Kansas, North Dakota, Oklahoma, and Wyoming. Montana's Medicaid expansion was set to expire on June 30, 2019, but the state legislature passed a bill a month prior to continue the program until 2025 (KFF 2020b).
7. For a discussion on the importance of state constitutional law in evaluating restrictive voting laws and partisan gerrymandering claims, see Martorano Miller et al. (2019).
8. For more on the strategic use of justiciability doctrines such as standing, ripeness, and mootness to avoid underlying merits questions, see Goelzhauser (2011).

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