

## **Federalism and Polarization in the United States**

By Richard E. Levy\*

University of Kansas School of Law

Four years ago, I had the pleasure to join this distinguished group of scholars from around the world to participate in a conference on national, state and local power in the developed nations. I am especially happy to have the opportunity to return to Kanagawa University and to continue the exploration of these important questions with my friends and colleagues. I would therefore like to offer a special thank you to Professor Yamada for organizing this conference.

Four years is a short time in the scheme of history, but much has happened in that time as a result of a global financial and economic crisis with profound social and political effects.<sup>1</sup> Then, the depth, scope, and intractability of the crisis were not fully realized and any assessment of its implications for national, state and local power was necessarily premature. Now, although the long term effects of the crisis have yet to unfold, we can venture a preliminary assessment of the implications of these events for centralization and decentralization in the allocation of governmental authority.

In the United States, centralization and decentralization are governed by constitutional principles of federalism under which the national government is limited to enumerated powers but supreme within its sphere, while the states retain residual authority and some attributes of sovereignty. This division of authority has been a constant source of constitutional debate since the founding of the nation, as the powers and scope of the national government have grown over time. In contrast to other countries, such as Japan, the question in the United States is not so much decentralization reform, but rather how the constitutional principles of federalism are interpreted and applied in the political and judicial arenas.

The implications of the financial crises for the allocation of authority in the United States are complex and difficult to assess. Most directly, the crisis prompted a massive federal effort to “bail out” financial institutions, automobile manufacturers, and other failing industries, and helped President Obama gain office with a Democratic majority in Congress that enacted new laws regulating the financial sector, health insurance reform legislation, and other measures. Conversely, these events also helped fuel the so-called “Tea Party,” a right-wing populist movement opposed to federal power that has become part of the Republican Party.

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\* J.B. Smith Distinguished Professor of Constitutional Law, University of Kansas School of Law. I am grateful for valuable research assistance provided by Michael Obermeier, Faculty Services Senior Researcher at the University of Kansas School of Law.

<sup>1</sup> For background on the financial crisis and the governmental response to it in the United States, see Michael Siam-Heng, *The Great Recession: History, Ideology, Hubris and Nemesis* (2010); Marcin Kacperczyk and Philipp Schnabl, *When Safe Proved Risky: Commercial Paper During the Financial Crisis of 2007–2009*, 24 *J. Econ. Perspectives* 29 (2010); Vincent Reinhart, *A Year of Living Dangerously: The Management of the Financial Crisis in 2008*, 25 *J. Econ. Perspectives* 71 (2011); Robert J. Samuelson, *Rethinking the Great Recession*, 35 *Wilson Quarterly* 16 (2011); Phillip Swagel, *The Financial Crisis: An Inside View*. Brookings Papers on Economic Activity 2009 (March 2009).

These developments accelerated and amplified an ongoing trend toward ideological polarization in the United States, by which I mean the gravitation of politics towards ideological extremes. The root causes of this polarization are too numerous and complex to catalogue or sort out here, but it is reasonably clear that the financial crisis and the election of President Obama have magnified it. Ideological polarization complicates the assessment of how the financial and economic crisis have affected the balance of national and state authority in the United States, because ideological polarization is shaped by and expresses itself through the medium of federalism.<sup>2</sup> In this paper, I will explore this relationship and consider its implications.<sup>3</sup>

The paper proceeds in four parts. Part I is a brief summary of the historical context and the constitutional structure of federalism in the United States. Part II provides an overview of the financial and economic crisis in the United States and its connection to ideological polarization and federalism. Part III discusses several current controversies that illustrate the ways in which polarization and federalism interact, including health care reform legislation, immigration, same-sex marriage, and gun rights. Finally, Part IV offers concluding observations concerning the relationship between federalism and polarization in the United States.

## **I. Federalism in the United States**

For practical purposes, all governments of any size must achieve a balance between central and regional authority. Even “unitary” states in which constitutional authority is vested entirely in the central government, must devolve some power to regional subunits for purposes of effective administration. Federalism, however, represents a distinctive structure in which the regional subunits, which we in the United States (confusingly) call “states,” have constitutionally protected sovereign authority. To lay the necessary foundations for further discussion, this section provides a brief overview of federalism in the United States.<sup>4</sup>

### **A. Origins and Evolution**

As in most federal systems, federalism in the United States results from the need to carry forward the pre-existing political units that comprise the larger nation-state. The preservation of some sovereignty and autonomy for the member states is essential to the compromise that enables them to combine into a larger state.

When the original thirteen colonies achieved independence from Great Britain, they entered into an agreement known as the Articles of Confederation. Although the Articles referred to the “United States,” the agreement was, in effect, an international convention through which independent states agreed to cooperate on certain matters, primarily in relation to foreign policy and common defense. The Articles soon proved inadequate, however, because the central

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<sup>2</sup> See generally see John Dinan, John, and Shama Gamkhar, *The State of American Federalism 2008 - 2009: The Presidential Election, the Economic Downturn, and the Consequences for Federalism*, 39 *Publius* 369 (2009).

<sup>3</sup> Because the topics covered in this paper are important and controversial, there is a wealth of available literature and it is difficult to locate objective accounts. Given the nature of the conference and the limitations of space, I will attempt to provide a few representative sources that approach the issue from various perspectives.

<sup>4</sup> See generally Richard E. Levy, *The Power to Legislate: A Reference Guide to the U.S. Constitution* (Praeger/Greenwood Press, 2006).

authority lacked authority in critical areas and was too weak to enforce its decisions even in those matters over which it had nominal authority.

A convention was called to amend the Articles of Confederation, but the delegates opted instead to draft an entirely new Constitution, which was ratified and took effect in 1789. Federalism was an essential political compromise that made it possible to expand and strengthen the powers of the national government. The states were assured of representation in the federal government, a reserved sphere of residual governmental authority, and certain attributes of sovereignty. In addition, the system was structured to balance the interests of different types of states—large and small, northern and southern, urban and rural.

Since the Constitution's adoption, federalism has often been at the heart of political, economic, and constitutional conflict. Many of the Supreme Court's early decisions concerned foundational principles of federalism, and established a broad scope for federal power. The early skirmishes over federal power, however, were only precursors to the Civil War, which had profound effects on the constitutional structure of federalism and illustrates the interplay between federalism and polarization in the United States.

The polarizing issue in the Civil War was, of course, slavery. As originally drafted, the Constitution acknowledged and even protected slavery in order to gain acceptance by Southern states. But the immorality of slavery was self-evident and opposition to it grew. Because slavery and its defenders were concentrated in the southern states, polarization on the slavery issue was also geographic. It therefore played out through the medium of federalism, first in Congress and eventually through secession and Civil War (1861-65). The Civil War brought important changes to the constitutional structure of federalism. In addition to confirming the power and supremacy of the national government, it established a new role for the national government: protecting individual rights against state interference.

Although a Bill of Rights was adopted immediately after the Constitution took effect, the Bill of Rights only applied to the federal government, not the states. After the war, a series of constitutional amendments did apply against the states. They prohibited slavery (13<sup>th</sup>), protected individual rights against state action (14<sup>th</sup>), and prohibited the denial of voting rights on account of race (15<sup>th</sup>). Ironically, perhaps, these amendments did not initially afford much protection to the newly freed slaves, as the federal government and the Supreme Court accepted segregation and turned a blind eye to many discriminatory practices.

As the 19<sup>th</sup> Century drew to a close, industrialization and its effects produced a certain degree of polarization on economic issues, with the emergence of the progressive movement, organized labor, and the regulation of economic and business activity. These divisions were less geographical in character, but they nonetheless raised issues of federalism as governments at all levels enacted laws to regulate industrial and business activity. From the 1890s to the 1930s, the Supreme Court stood against most government regulation, invalidating both federal and state laws.

Once again, the ideological debate—this time about preventing monopolies, protecting workers, and other “progressive” programs—manifested itself partly in terms of federalism, as

the Supreme Court often concluded that federal laws were invalid because the federal government lacked the authority to regulate activities such as agriculture, mining, or manufacture that were reserved to the state's police power.<sup>5</sup> In the 1930s, however, the Supreme Court changed course and began to uphold both federal and state authority to regulate economic and business activity. In the wake of this shift, the Supreme Court accepted broad federal regulatory authority on the theory that Congress could regulate any activity that, in the aggregate, affected interstate commerce.

Meanwhile, the Supreme Court became increasingly concerned with other Constitutional rights, especially racial segregation, which became a polarizing issue the 1950s and 1960s. In 1890s, the Supreme Court accepted racial segregation under the fiction that minorities were receiving "separate but equal" treatment. The moral indefensibility of this system became increasingly apparent, and the Supreme Court eventually ruled it unconstitutional in *Brown v. Board of Education*, 347 U.S. 483 (1954). Having no valid argument on the merits, defenders of this American system of apartheid resorted to federalism arguments based on "states' rights." Thus, federalism was at issue in the efforts to desegregate public schools (which are state, not federal institutions), and in the adoption of important civil rights legislation in the 1960s.

More recently, ideological polarization on social and economic issues has brought federalism issues to the forefront once again. By the end of the 20<sup>th</sup> Century, opponents of broad federal power had begun to gain traction both politically and legally, and many current controversies have key federalism components.

## **B. The Basic Structure of Federalism**

Federalism has vertical and horizontal dimensions. The vertical dimension of federalism concerns the relationship between the national government and the regional subunits. The horizontal dimension concerns the relationships among the regional subunits. Both kinds of relationships are critical to federalism in the United States.

### **1. Vertical Federalism**

Vertical federalism in the United States is governed by two essential principles that determine the balance of federal and state authority: enumerated powers and federal supremacy. The enumerated powers principle limits the federal government to those powers granted in the Constitution. The remaining powers are reserved to the states, as confirmed by the 10<sup>th</sup> Amendment. Under federal supremacy, federal law applies directly and "preempts" contrary state law. *See* Article VI, § 2. This arrangement ensures that federal authority is paramount, but protects states by reserving (at least in theory) residual authority in areas that are beyond the reach of federal power.

In general terms, it makes sense for the central government to address matters of national concern, while the regional subunits address matters of local concern. Although the Constitution contains an extensive list of federal powers these powers fall into three general areas of national

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<sup>5</sup> Paradoxically, at that time the Court itself often asserted the power to override the states' regulatory decisions on the theory that they violated property and contract the constitutional rights.

concern: (1) the conduct of external relations; (2) economic and other matters affecting multiple states; and (3) individual rights.

- The conduct of external relations, including national defense, diplomacy, and international trade, is the exclusive responsibility of the national government, and states are largely divested of power to conduct independent foreign relations.
- The federal government has authority to address various matters affecting more than one state, most prominently the power to regulate interstate commerce, although states generally retain concurrent authority in these areas.
- Authority to protect basic political and civil rights was vested in the federal government by the Civil War amendments, which prohibit state action abridging basic human rights and vested the federal government with authority to enforce those rights.

Congress has the authority to enact “necessary and proper” laws for the execution of any of these powers. The enumerated powers principle implies that federal powers are finite and that there are some powers that are exclusive to the states. In practice, however, federal powers have been construed so broadly that little is beyond the reach of federal authority.

Under the Articles of Confederation, the central government consisted entirely of “the United States in Congress assembled” whose limited powers acted only on states in their capacities as states. Put differently, Congress could not enact laws that directly affected the rights and duties of individuals, but rather imposed obligations on the states to enact laws in accordance with its decisions, which they often failed to do. The Constitution directly addresses this problem in the Supremacy Clause, Article VI, § 2 which explicitly proclaims that federal law is “the supreme law of the Land” and directs the state courts to apply federal law. It also created a federal executive to implement federal laws directly. The direct applicability and supremacy of federal law was essential to legal integration in the United States, just as similar principles have been essential to legal integration in the EU. Under these principles, when federal law and state law are inconsistent, the federal law “preempts” the state law; it is the federal law that is enforced and enforceable.

One important issue of vertical federalism concerns the extent to which the constitution protects states from federal laws that might impair their reserved sovereignty. For example, the Constitution protects state sovereign immunity under the 11<sup>th</sup> Amendment and related principles. One additional protection recognized by the Supreme Court in the 1990s is the so-called “no-commandeering” rule, under which the federal government may not compel states to implement federal programs. As will be discussed more fully below, this principle has been important in ideological controversies over health care reform and gun control.

## 2. Horizontal Federalism

Federal systems are, at bottom, a structural response to collective action problems among the member states. These collective action problems arise because individual member states have incentives to act in ways that are contrary to the interests of the states as a collective. Cooperation in matters such as external relations or interstate trade produces benefits for the whole, but these benefits are a species of “public goods” in the sense that everyone benefits

whether or not they contribute to their creation. Thus, each individual state has the incentive to be a “free rider”; that is, to let other states bear the costs of creating the collective good. These difficulties often plague interstate relations, raising issues of horizontal federalism.

For example, economic theory tells us that everyone benefits in the long run from a regime of free trade, which lowers the costs of goods and services and therefore produces “gains from trade.” Although free trade regimes thus benefit a collective of states, each individual state retains incentives to enact protectionist measures for particular industries, so as to gain the advantage of lower costs of goods they do not produce while protecting important or powerful segments of their own economies from foreign competition. Thus, the protection of free trade was an important goal of the Constitution (and a central impetus for the European Union).

The United States Constitution contains various provisions governing interstate relations. First, the Constitution vested power over interstate commerce in the national government, which has been interpreted by the Supreme Court as implicitly prohibiting states from enacting protectionist measures (like tariffs or quotas) or from obstructing interstate trade. Second, the Full Faith and Credit Clause, Art. IV, § 1, requires states to recognize the judicial decisions of other states and limits the ability of states to ignore the laws of other states as a matter of “choice of law” principles or private international law. In addition, other provisions prohibit discrimination against nonresidents and protect the right of citizens to travel freely throughout the country and to become a resident and citizen of any state.

Three basic principles underlie these constitutional provisions and related doctrines: nondiscrimination, freedom of movement, and territoriality. The nondiscrimination principle prohibits states from treating persons or things originating in other states worse than they treat persons or things from their own state. Freedom of movement prevents states from erecting barriers or enacting laws that obstruct the ability of people to travel from state to state, interstate transport or sale of goods and services, or otherwise erect internal borders. Third, states must respect the territorial sovereignty of other states, which limits the ability of states to assert extraterritorial legislative or judicial authority and requires them to recognize the legal authority of other states to act within their own territory.

## **II. The Financial Crisis, Ideological Polarization, and Federalism Issues**

Current issues concerning national and state power in the United States are the product of ideological polarization, which has been fueled in part by the financial crisis. Ideological division—left-right, liberal-conservative, Democratic-Republican—has long been a staple of the two-party system in the United States, but that division has become sharper and more intractable in recent years.

By the end of George W. Bush’s second term in 2008, he was widely unpopular. Wars in Iraq and Afghanistan continued with no apparent gains or end in sight. The financial crisis had begun and initial “bail out” efforts were insufficient to prevent the cascading collapse of various markets or the spread of unemployment and economic hardship. President Obama swept to office with Democratic majorities in the House and Senate, and his immediate legislative agenda included further legislation to bail out various industries, including the automobile industry. In

addition, the Obama Administration pushed for and ultimately obtained health insurance reform legislation (the Affordable Care and Patient Protection Act of 2010), over nearly unanimous Republican opposition.

These events seemed to galvanize a right wing populist uprising that coalesced into the Tea Party movement.<sup>6</sup> One focus of the movement is distrust of government, especially the federal bureaucracy, coupled with a strong anti-tax and anti-deficit stance. The “Tea” in Tea Party stands for Taxed Enough Already and alludes to the Boston Tea Party, a legendary pre-revolutionary protest against excessive British taxes. Another theme of the movement is cultural nationalism that responds to the decline of “traditional” social norms and values. For at least some in the movement, cultural nationalism has a distinctly racial component. The call for traditional values also resonates with the “religious right,” a fundamentalist Christian political movement that emerged in the 1980s.

Both the religious right and the Tea Party were “conservative” movements that became aligned with the Republican Party and moved it in a more conservative direction.<sup>7</sup> The Tea Party helped the Republican Party to recapture the House of Representatives in the 2010 midterm elections, but has proven difficult for the party establishment to control. President Obama won reelection in 2012<sup>8</sup> and the House and Senate remained in control of the Republicans and Democrats, respectively. Thus, the current situation in the United States is one of divided government. Ideological polarization has made it increasingly difficult for the parties to achieve compromise, resulting in “gridlock.”

Federalism has played an important role in the creation of gridlock because ideological polarization has a geographic component. In general terms, the middle of the country and the south are conservative states where the Republican Party is strong and the Tea Party movement has flourished. These states are commonly referred to as “red states.” Democrats generally have majorities on the east and west coasts and urban areas, in states that are conventionally referred to as “blue states.” Within red and blue states, respectively, conservative and liberal governments have solid majorities and battles for political control tend to be fought between the extreme and moderate factions within each party.

Ideological polarization produces results that may seem surprising in terms of the apparent incentives of red and blue states. Blue states that favor preserving and expanding federal programs are often wealthier states whose citizens provide more in taxes to the federal

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<sup>6</sup> It is especially difficult to identify objective accounts of the Tea Party movement, which itself has become a polarizing topic. The following sources may prove useful, however: Alan Abramowitz, *Partisan Polarization and the Rise of the Tea Party Movement* APSA 2011 Annual Meeting Paper (2011); Kevin Arceneaux, and Stephen P. Nicholson., *Who Wants to Have a Tea Party? The Who, What, and Why of the Tea Party Movement*, 45 *Pol. Sci. & Politics* 700 (2012); Nicole C. Rae, *The Return of Conservative Populism: The Rise of the Tea Party and its Impact on American Politics*, APSA 2011 Annual Meeting Paper (2011); Vanessa Williamson, Theda Skocpol, and John Coggin, *The Tea Party and the Remaking of Republican Conservatism*, 9 *Perspectives on Politics* 25 (2011).

<sup>7</sup> Although similar forces may have pushed the Democratic Party in a more “liberal” direction, the focus here is on the Tea Party movement whose effect has been, I believe, more pronounced.

<sup>8</sup> As of this writing, the federal government in the United States has been “shut down,” as a result of the inability of Republicans and Democrats to agree on an appropriations measure. For a brief overview of the shutdown, see <http://www.cnn.com/2013/09/30/politics/government-shutdown-up-to-speed/index.html>.

government than they receive in federal benefits. Conversely, poorer red states often oppose federal programs that provide them with net benefits. Because ideological polarization drives policy, it outweighs such mundane incentives as financial benefits for the state, which are often critical in other contexts. More broadly, both conservatives and liberals use the structure of federalism opportunistically to advance an ideological agenda.

Given the red state-blue state divide, federalism and ideological polarization interact. Red states elect conservative Senators and Representatives; blue states elect liberal ones. The political process within red and blue states, moreover, tends to favor candidates that appeal to the parties' most active voters—typically those with more extreme views. First, elections are winner take-all and the largest plurality wins. Second, parties select candidates using primaries in which turnouts are low and only the most dedicated members—typically the most ideologically committed—vote. Federalism has also contributed to the continuation of divided government. Although Democratic candidates won the majority of votes for the House of Representatives in 2012, the Republicans won the majority of districts, in part because they had used their control of state legislatures to gerrymander districts.

Ideological polarization also characterizes the federal courts, including the Supreme Court, which has five “conservative” Justices (Alito, Kennedy, Roberts, Scalia, and Thomas) and four “liberal” Justices (Breyer, Ginsburg, Kagan, and Sotomayor). Of course, some of the Justices are more conservative or liberal than others and the alignments do not hold for all issues. In addition, it is important to bear in mind that ideology manifests itself differently in the judicial and political arenas. Nonetheless, divisions within the Supreme Court mirror the ideological controversies in the country as a whole.

### **III. Federalism and the Expression of Ideological Controversies**

In this part of the paper, I will use four controversial issues that helped fuel the Tea Party movement to explore the relationship between ideological polarization and federalism in the United States: (1) Obamacare; (2) immigration; (3) same-sex marriage; and (4) guns.

#### **A. Obamacare**

Although Tea Party opposition to federal regulation encompasses numerous issues, including taxes, deficits, environmental protection, and welfare programs, the Affordable Care Act, which opponents dubbed “Obamacare,” has been a particular source of outrage on the right.<sup>9</sup> The resulting battle has been fought primarily in terms of federalism.

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<sup>9</sup> See generally Marcia Clemmitt, *Assessing the New Health Care Law*, Cong. Q. Researcher Vol. 22, No.33, p. 789 (Sept. 21, 2012); Neal Devins, *Essay: Party Polarization and Judicial Review: Lessons from the Affordable Care Act*, 106 NW L. Rev. 1821 (2012); Janet L. Dolgin and Katherine R. Dieterich, *Social and Legal Debate About the Affordable Care Act*, 80 UMKC L. Rev. 45 (2011); National Conference of State Legislatures, *The Affordable Care Act: A Brief Summary*, March 2011, <http://www.ncsl.org/portals/1/documents/health/HRACA.pdf>; Mark A. Peterson, *The Ideological and Partisan Polarization of Healthcare Reform and Tax Policy*, 65 Tax L. Rev. 627 (2012); Sara Rosenbaum, *Realigning the Social Order: The Patient Protection and Affordable Care Act and the U.S. Health Insurance System*, 7 J. Health and Biomed. L. 1 (2011); Steven D. Schwinn, *The Framers' Federalism and the Affordable Care Act*, 44 Conn. L. Rev. 1071 (2012).



For historical and tax reasons, most people in the United States have health insurance through their employers. Many others are covered by government programs such as Medicare and Medicaid. For several decades, this system has been beset by a number of growing problems. The costs of health care and health insurance have been increasing faster than inflation for decades so the US spends a much larger portion of its Gross Domestic Product on healthcare than any other country. These costs burdened employers who provided health care and made it impossible for those that fell between the cracks to get affordable insurance, especially if a pre-existing condition made them a poor risk. The Affordable Care Act sought to respond to these issues by creating functional markets for health insurance, using a variety of strategies to do so.

I will focus on two components: the “individual mandate” and Medicaid expansion. The individual mandate requires people to have health insurance or pay a tax penalty. The idea is to create a large insurance pool with enough healthy people to make insurance affordable notwithstanding provisions requiring coverage for everyone regardless of pre-existing conditions. The mandate was also justified in part on the theory that uninsured individuals eventually do need medical care which is provided anyway (often in emergency rooms), with the costs passed along in the form of higher charges. Another important piece of the statute was the expansion of “Medicaid” a federal-state health program for the poor, to cover millions of people living just above the poverty line.

From, the Tea Party perspective, Obamacare—especially the individual mandate—represents a new and unprecedented interference with individual liberty. In so-called red states controlled by a Republican majority with strong Tea Party elements, opposition to Obamacare is especially vehement. As a matter of current constitutional doctrine, however, there is no plausible claim that this provision violates anyone’s constitutional rights. Instead, the constitutional debate has centered on questions of federalism, as the individual mandate epitomized “overreaching” by a federal government that had vastly exceeded the scope of its enumerated powers.

After its enactment, a flurry of lawsuits challenged the constitutionality of Obamacare on two distinct federalism grounds. First, opponents argued that the individual mandate was beyond the scope of the enumerated federal powers. Second, they argued that Medicaid expansion interfered with state sovereignty by coercing them to expand Medicaid. These issues eventually made their way to the Supreme Court. In *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012), the Supreme Court upheld the individual mandate, but limited the Medicaid expansion provisions.

Under the enumerated powers principle, the individual mandate is valid only if it falls within the scope of the enumerated powers, which means that it must be necessary and proper (generally understood to mean reasonably related) to the execution of a specific power. *See* Art. I, § 8, cl. 18. In this case the relevant enumerated powers are the power to regulate interstate commerce, *see* Art. I, § 8, cl. 3, and the power to tax, *see* Art. I, § 8, cl. 1. This issue split the Court along ideological lines. Four liberal Justices (Breyer, Ginsburg, Kagan, and Sotomayor) thought that the mandate was within the scope of the commerce power. Four conservative Justices (Alito, Kennedy, Scalia, and Thomas) thought the individual mandate was beyond the

scope of federal power and therefore invalid. Chief Justice Roberts cast the deciding vote to uphold the individual mandate, but his reasoning satisfied none of the other Justices.

Chief Justice Roberts agreed with the conservative Justices who thought that the mandate exceeded the scope of the commerce power, but concluded that the individual mandate could be sustained as a tax on those who do not have insurance. Although Congress had (for political reasons) deliberately avoided calling the penalty on uninsured individuals a tax, Chief Justice Roberts concluded that the individual mandate had the essential characteristics of a tax rather than a regulatory penalty and was therefore valid notwithstanding its regulatory purposes and effects. The other conservative Justices parted company with Chief Justice Roberts on this point, but he provided the crucial fifth vote to uphold the individual mandate—much to the surprise and dismay of Obamacare’s opponents.

While the individual mandate raised questions concerning the scope of federal power, the Medicaid expansion provisions raise issues concerning the residual sovereignty of the states. Under the no-commandeering rule, noted above, the federal government may not compel states to enact and administer federal programs because such laws subordinate states in a manner that violates their residual sovereignty. Notwithstanding this rule, however, the federal government may encourage states to participate in programs like Medicaid by providing funding for state programs on the condition that they meet federal requirements. Because such programs are voluntary for the states, they do not violate the no-commandeering rule, but the Supreme Court has often hinted that this sort of conditional spending might be unconstitutional if it is coercive.

In *National Federation of Independent Business v. Sebelius*, the Supreme Court concluded that Congress could not condition continued receipt of existing Medicaid on states’ expanding coverage as provided in the Act. With only Justices Ginsburg and Sotomayor dissenting, the Supreme Court concluded that the threat of losing existing funding—which represented a substantial portion of most states’ budgets—had the effect of coercing them to participate in a major expansion of the program. Thus, while Congress could condition the receipt of new funding on expanded coverage, states could decline those funds without fear of losing their current funding.

The Supreme Court’s decision has not ended the ideological debate over Obamacare or the role of federalism in fueling that debate. The Republican-controlled House of Representatives, for example, has repeatedly voted to repeal or defund Obamacare, a largely symbolic gesture given Democratic control of the Senate and a certain veto so long as President Obama is in office. Nonetheless, Tea Party members in the House may be able to block funding for Obamacare. In addition many red states have declined to expand Medicaid—even though the Federal government will provide the vast majority of funding.

## **B. Immigration**

For a number of reasons, not the least of which is its connection with race, ethnicity, and class, illegal immigration has also proven to be a controversial issue in the United States.<sup>10</sup>

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<sup>10</sup> See generally Graeme Boushey and Adam Luedtke, *Immigrants Across the U.S. Federal Laboratory: Explaining State-Level Innovation in Immigration Policy*, 11 *State Politics & Pol’y Quarterly* 390 (2011); Gary Reich and Jay

Throughout its history, immigrants have come to the United States seeking economic opportunities and individual liberties. Reaction to immigration has not always been welcoming. In the latter half of the twentieth century, illegal immigration became a growing cause for concern, as millions of people entered or remained in the United States unlawfully, creating a shadow population of undocumented aliens. The proper response to this problem has split the country along ideological lines.

Although economic libertarians often support immigration, many on the right see illegal immigration as nothing less than a foreign invasion by a lawless underclass that threatens the cultural fabric of the nation. From this perspective, the proper response is to close the borders, kick out (or imprison) everyone who is here illegally, and eliminate any incentive to come here illegally by shutting off jobs, housing, education, and other benefits for illegal immigrants or their families. Anti-immigration fervor often has a racial, ethnic, and religious component, especially in light of demographic trends that are eroding the dominance of the traditional white Christian majority. President Obama himself symbolizes these changes, as reflected in the so-called “birther” movement, which asserts that he was not born in the United States and is therefore ineligible to serve as President.

The federal government, however, is at an impasse. From the perspective of those on the left, undocumented immigrants are people who, like earlier generations of immigrants, are seeking a better life for themselves and their families. Thus, the left might recognize the need to limit illegal immigration, but are unwilling to take the steps sought by those on the right unless immigration reform also ameliorates the human costs by preserving families, preventing exploitation, and providing a path to citizenship for long-term residents. Compromise might be possible, but to this point neither side has been willing to budge.

Inaction at the federal level has prompted state and local responses that raise issues of federal supremacy and preemption. It is well accepted that control of immigration is a matter of federal concern, but states retain at least some authority to regulate matters that affect immigrants. In red states with substantial populations of immigrants, state and local governments have taken their own steps to discourage illegal immigration and encourage “self-deportation.” The precise content of such state and local laws vary, but they generally include provisions requiring public verification of lawful presence and prohibit hiring, leasing to, or providing services to aliens who are not lawfully present in the United States.

Although these state laws raise various issues, such as the specter of racial profiling, the key question has been federal preemption under the Supremacy Clause. When there is a direct conflict between laws or when the federal statute expressly preempts (or preserves) state law, the issue is clear and straightforward. But the Supreme Court has also recognized that, even when there is no direct conflict, state law may be implicitly preempted because federal law “occupies the field” so as to entirely displace state authority or because state law would obstruct the accomplishment of federal objectives.

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Barth, *Immigration Restriction in the States: Contesting the Boundaries of Federalism?* 42 *Publius* 422 (2012); Roger Jay Waldinger, Roger, *Immigration: The New American Dilemma*, 140 *Daedalus* 215 (Spring 2011).

Thus, the critical question is the extent to which state and local laws designed to encourage self-deportation are preempted. Supporters argue that these laws are not pre-empted because they enforce existing federal immigration requirements and that states have the inherent power to act in self-defense given the federal government's failure to protect them from illegal immigration. Opponents argue that federal immigration law has occupied the field, that states have no authority to act in this exclusively federal field, and that these kinds of state laws obstruct the objectives of federal laws. Many of these state and local laws have been challenged in court on preemption grounds, with mixed results.

Two of the cases, both involving an Arizona statute that was particularly sweeping and controversial, made their way to the Supreme Court. See *Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968 (2011), and *Arizona v. United States*, 132 S. Ct. 2492 (2012). *Whiting* upheld the state's authority to suspend or revoke the business license of employers who hire undocumented workers based on explicit language in the federal statute authorizing such laws. In *Arizona*, the Supreme Court struck down provisions that made it a crime to be unlawfully present in the United States or to seek work or work without authorization and that authorized warrantless arrests of aliens believed to be removable. The Supreme Court upheld another provision of the Arizona law that required state and local officers to verify the citizenship or alien status of people arrested, stopped, or detained.

The Supreme Court's decisions cast doubt on many provisions in many state and local laws, but they also indicate that states retain some authority to regulate in the area and that some laws of this kind may be valid. Meanwhile, the flurry of state and local laws targeting illegal immigration has subsided somewhat for a variety of reasons. Illegal immigration has declined, in part as a result of the economic crisis, which produced high unemployment and reduced the incentive to come to the United States. The adoption of laws targeting illegal immigrants and the general political climate may also have played a role. At the same time, it has become clearer that these laws have significant costs for the governments that enact them, including litigation costs from defending them against constitutional challenges, economic costs from the loss of cheap labor, and boycotts by minority groups.

### **C. Same-sex Marriage**

A third area of ideological polarization concerns what we might call conventional morality. Although various issues fuel this divide, such as abortion and contraception or religion in the public schools, the discussion here will focus on homosexuality and same-sex marriage.<sup>11</sup> This issue highlights the ways in which federalism permits variation in member states' laws and the resulting problems of horizontal federalism. Moral issues, especially the Supreme Court's recognition of a constitutional right to abortion in *Roe v. Wade*, 410 U.S. 113 (1973), fueled the emergence of the religious right as a powerful force, especially in red states.

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<sup>11</sup>See generally John G. Francis and Leslie P. Francis, *Rights Variation Within a Federalist System: Understanding the Importance of Mobility*, 64 *Political Res. Quarterly* 82 (2011); Kim Forde-Mazrui, *Tradition as Justification: The Case of Opposite-Sex Marriage*, 78 *U. Chi. L. Rev.* 281 (2011); Robert J. Hume, *State Courts and Policy Legitimation: An Experimental Study of the Ability of State Courts to Change Opinion* 42 *Publius* 211 (Spring 2012); Jeffrey R. Lax and Justin H. Phillips, *Gay Rights in the States: Public Opinion and Policy Responsiveness*, 103 *Am. Pol. Sci. Rev.* 367 (August 2009).

The religious right became closely aligned with the Republican Party and moved the party to the right on “social” issues. The Supreme Court became an issue in presidential politics, as Republican Presidents sought to appoint more conservative Justices who might overturn *Roe* and other liberal precedents. Although the Supreme Court has not overturned *Roe*, it has become much more conservative since the 1970s, and there has been a conservative majority on most issues since the 1990s. Nonetheless, some of the nominally conservative Justices have parted company with the religious right on abortion and other issues.

Although the religious right initially focused on other issues, homosexuality has moved to the foreground as the “gay rights” movement gained visibility, political influence, and legal protection. Despite early successes, opposition to the gay rights movement has been eroding over time, as reflected in changing judicial precedents and political responses. In *Bowers v. Hardwick*, 478 U.S. 186 (1986), the Supreme Court upheld a state law making consensual sexual relations between persons of the same sex a crime, declining to extend any constitutional protection to such relationships. In *Bowers*, the majority considered it self-evident that moral objections to homosexual conduct provide a sufficient basis to make same-sex intimacy a crime. After *Bowers*, things began to change.

Having lost in the Supreme Court, gay rights advocates turned to the state level, achieving both judicial and legislative successes. A number of state supreme courts interpreted their states’ constitutional right of privacy to include homosexual relationships (rejecting the reasoning of *Bowers*). Local and state governments in some areas adopted laws prohibiting discrimination on the basis of sexual orientation. Unlike immigration, these developments did not implicate federal preemption because states may ordinarily provide greater protections for their citizens than the minimum set by federal law (unless the federal law occupies the field).

The successes of the gay rights movement brought a response from the religious right, which introduced measures to preserve traditional morality. One early example of this sort of measure was a constitutional amendment in Colorado invalidating laws prohibiting discrimination on account of sexual orientation. In *Romer v. Evans*, 517 U.S. 620 (1996), the Supreme Court held that this law violated equal protection because it imposed a substantial burden on homosexuals based on nothing more than “animus” against them. Justice Scalia wrote a strongly worded dissent claiming that the decision was inconsistent with *Bowers* and asserting that moral disapproval of homosexual conduct was a valid basis for the amendment.

As Justice Scalia recognized, *Romer* implicitly rejected religiously-based moral objections to homosexual behavior as a legitimate basis for laws targeting homosexuality, and thus represented a fundamental shift from *Bowers*. In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Supreme Court completed the transformation, overruling *Bowers* and holding that the state may not criminalize same-sex relationships in the privacy of the home. This change mirrored a broader shift in public attitudes about homosexuality. The next battleground was the right to marry, which had taken center stage by the time of *Lawrence v. Texas*.

Some state courts (including courts in otherwise red states) had held that their own constitutions protected the rights of same-sex couples to marry and others concluded that laws

prohibiting same-sex marriage violate equal protection under the rationale of *Romer v. Evans*. Notwithstanding changing attitudes about homosexuality, such decisions were still met with strong opposition, especially in red states. Many states adopted constitutional amendments by popular referendum declaring that marriage is exclusively between one man and one woman and Congress adopted the “Defense of Marriage Act” (DOMA), which specified that same-sex marriages would not be recognized for purposes of federal law and that states did not have to recognize same-sex marriages from other states.

The Supreme Court in *Lawrence* was careful to leave the question of same-sex marriage open, and the issue continued to percolate through the state and federal courts as well as the political systems of the states. Ten years after *Lawrence*, public opinion appears to have shifted and the momentum favors the recognition of same-sex marriage. As more courts have held that laws against same-sex marriage were unconstitutional, the public response softened and constitutional amendments to ban same-sex marriage lost steam. In some blue states, recognition of same-sex marriages was accomplished through legislative change. The result is a patchwork of conflicting state laws: some states recognize same-sex marriages, while others have constitutional provisions limiting marriage to one man and one woman.

Two cases involving same-sex marriage eventually made it to the Supreme Court, but the resulting decisions did not resolve the issue. Although one of the cases, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), dealt directly with a state constitutional ban on same-sex marriage, the Supreme Court dismissed the case on procedural grounds, leaving the question open. The other case, *United States v. Windsor*, 133 S. Ct. 2675 (2013), invalidated the provision in DOMA denying federal recognition to same-sex marriages that are legally valid under state law. Drawing on the reasoning in *Romer* and *Lawrence*, the Supreme Court concluded that there was no legitimate reason for Congress to depart from the ordinary practice of recognizing all marriages that are valid under state law for purposes of federal programs.

Although *Windsor* casts further doubt on laws against same-sex marriages, it does not fully resolve the issue. Consequently, the patchwork of state laws remains in effect, raising thorny questions of horizontal federalism. Ordinarily, states must recognize valid marriages from other states under the Full Faith and Credit Clause, even if they would not be valid under the state’s own marriage laws. For example, the minimum age for marriages varies from state to state, but a state with a minimum age of 18 would recognize a marriage between 17 year olds from a state where the minimum age was 16.

Nonetheless, states may be able to refuse recognition to same-sex marriages from other states on various grounds. First, under choice of law rules, the validity of a marriage turns on the residency of the couple, so a state might determine that it is not required to recognize marriages of couples who travel to another state to get married. Such a result would be a radical departure from current practice, as states routinely recognize such marriages when opposite sex couples travel for “destination” weddings. Second, a state may sometimes decline to recognize another state’s laws that violate the state’s public policy. States with constitutional provisions outlawing same-sex marriage might refuse recognition on that ground as well.

These issues are further complicated by DOMA, which contains a provision specifying that states do not have to recognize same-sex marriages from other states. The constitutionality of this provision is doubtful after *Windsor*. Although *Windsor* dealt with a different provision, this provision also singles out same-sex couples for adverse treatment based solely on moral disapproval. In addition, there are potential federalism issues, insofar as DOMA may be in conflict with the Full Faith and Credit Clause itself.

#### **D. Guns**

Guns are also a polarizing issue in the United States.<sup>12</sup> For those on the left, the country faces an epidemic of gun violence—epitomized most dramatically by mass shootings in schools and other public settings. The problem of gun violence is especially acute in urban areas, and many cities and blue states have strict gun control laws. For those on the right, however, gun ownership for purposes of hunting and self-defense is a fundamental right that must be protected. This view is especially powerful in red states and rural areas. Ideological polarization on guns also has important federalism implications for the scope of federal power, federal protection of gun rights against state and local laws, and the problem of “nullification.”

Under the principle of enumerated powers, any federal laws regulating gun ownership must be necessary and proper to an enumerated power. The most common source of authority for such laws is the commerce clause. Many federal laws concerning gun ownership, such as those prohibiting possession by felons or prohibiting certain kinds of weapons, are linked to interstate commerce by a provision limiting the statute’s scope to guns that have moved in interstate commerce. This sort of “jurisdictional nexus” requirement means that a prosecution under these statutes must establish that the weapon in question moved in interstate commerce as an element of an offense.

While the authority for gun control statutes with a jurisdictional nexus requirement is not in doubt, the Supreme Court’s emerging conservative majority invalidated two federal gun control laws on federalism grounds. First, in *United States v. Lopez*, 514 U.S. 549 (1995), the Supreme Court held that the Federal Gun-Free School Zones Act, which prohibited the possession of a gun in or near a school, exceeded the scope of the commerce power. The law did not regulate commerce itself or any form of economic activity, and its connection to interstate commerce was thus too tenuous. Second, in *Printz v. United States*, 521 U.S. 898 (1997), the Supreme Court held that a federal statute requiring local law enforcement officers to conduct background checks on gun purchasers infringed on state sovereignty in violation of the no-commandeering rule.

Since the time of *Lopez* and *Printz*, the gun rights lobby has become increasingly powerful and can apparently block any gun control regulation. The current stalemate at the federal level has left a regulatory vacuum for state and local governments to fill—with divergent

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<sup>12</sup>Philip J. Cook, *The Great American Gun War: Notes from Four Decades in the Trenches*, 43 *Crime and Justice* 19 (2013); *Gun Control Overview: Prevalence of Gun Use and the Regulatory Response*, 92 *Congressional Digest* 3 (March 2013); David B. Kopel, *The Great Gun Control War of the Twentieth Century—And Its Lessons for Gun Laws Today*, 39 *Fordham Urb. L.J.* 1527 (2012); Barbara Mantel, *Gun Control*, 23 *CQ Researcher* 233 (March 8, 2013).

approaches in red states and blue states. State and local governments in blue states often have very strict gun laws, especially in densely populated urban areas. In red states, the legislative trend has been to expand and protect gun rights, such as regimes authorizing permits for individuals to carry concealed weapons. Each of these divergent results presents federalism questions.

Strict gun control laws raise the issue of federal protection of gun rights against state and local interference. The Second Amendment provides that “[a] well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.” For most of its history, the assumption has been that this provision concerns state militias, and does not protect an individual right to “keep and bear arms.” In *District of Columbia v. Heller*, 554 U.S. 570 (2008), however, the Supreme Court held that the amendment protects an individual’s right to possess a handgun in the home for purposes of self-defense.

Because the District of Columbia is a federal enclave, *Heller* applied only to federal laws and the question remained whether the Second Amendment applies to the states on the theory that it is part of the “liberty” protected by the Due Process Clause of the Fourteenth Amendment. Most of the provisions of the Bill of Rights have been “incorporated” into the Fourteenth Amendment under this theory, and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), added the Second Amendment to the list. Although the Supreme Court was careful in *Heller* and *McDonald* to limit the scope of the right and preserve traditional laws against possession by felons or persons with mental illnesses, as well as limitations on unusual or especially potent weapons, the precise scope of the newly recognized right is the subject of ongoing litigation.

From a federalism perspective, *Lopez* and *Printz* seem inconsistent with *McDonald*. *Lopez* indicates that regulation of gun ownership is a matter for the states and *Printz* indicates that the federal government should not be allowed to force states to conform their gun laws to federal policies. In *McDonald*, however, the Supreme Court itself asserted authority to dictate limits on what states may do. Ultimately, one might suspect that the Supreme Court’s decisions involving guns have less to do with the allocation of federal and state powers and more to do with what that policy is and who in the federal government gets to decide.

In red states, gun rights are sacred and fear of federal gun control legislation is a powerful force. Even measures such as registration or permit requirements are seen by some on the extreme right as the first step in an effort to take away their guns and thus pave the way for a federal takeover. In some cases, these fears have led to legislative enactments that raise a third kind of federalism issue: nullification.

Notwithstanding the Supremacy Clause (which provides that federal law is the supreme law of the land), states have, from time to time, asserted the right to nullify or disregard federal law. Historically, there was a “nullification crisis” in the 1830s that was thought to settle the issue as a legal matter and the Civil War settled the issue as a practical matter. Efforts to defy court-ordered school desegregation in the 1950s were met with federal force. Nonetheless, legislation to nullify federal gun laws has been introduced in some states and passed in my home state of Kansas.



The Kansas “Second Amendment Protection Act” declares federal laws that violate the second amendment or exceed federal authority under the commerce power to be “null and void” and makes it a crime for federal officers to enforce any such federal law within the state. Such statutes are clearly unconstitutional under Supreme Court precedent and are unlikely ever to be enforced. Their principal function seems to be symbolic and political, but they reflect growing tension between the states and the national government as a result of ideological polarization. Nullification issues have also arisen in response to Obamacare, as some opponents have sought state legislation to defy its mandates.

State defiance of federal law is not confined to red states or gun rights. A similar example of defiance from the left is decriminalization of marijuana. Federal law makes the possession or sale of marijuana a crime and recognizes no legitimate medical uses. Nonetheless, a number of states legalized the possession and use of marijuana for medical purposes. Supporters of medical marijuana challenged the authority of the federal government to regulate the cultivation and possession of marijuana for personal use, but in *Gonzalez v. Raich*, 545 U.S. 1 (2005), the Supreme Court held that a ban on possession of marijuana is within the scope of the commerce power.

Notwithstanding *Raich*, the trend toward legalization in the states has continued. In 2012, two states legalized marijuana entirely by means of popular initiative. These laws do not seek to nullify federal law directly (they do not prohibit enforcement of federal laws), but they do fly in the face of federal policy and mean that state and local enforcement will no longer supplement federal efforts in those states.

Both guns and marijuana reflect a final reality of federalism. As a result of free movement of people and goods across state lines, individual states may have a difficult time controlling goods that are easily available in other states. Strict gun control laws in some states are undermined by lax rules in others. Likewise, efforts to control marijuana in some states are undermined by its ready availability in others.

#### **IV. Concluding Observations**

These examples illustrate one essential consequence of federalism: ideological issues are contested at two levels. Those who lose at one level may be successful at the other, where the ideological balance may be different. This dynamic is particularly stark in times of ideological polarization, because the battles are especially fierce and the losers at the national level are likely to persist at the state level. The examples discussed in this paper illustrate the dynamic, as in each case the ideological issues are contested at both the state and national levels and those who have lost at the national level have achieved some success in those states where they enjoy strong support. The examples discussed also suggest three further observations about the relationship between federalism and ideological polarization in the United States today.

First, in the present circumstances, federalism and ideological polarization are mutually reinforcing. Like sound waves that emanate from different sources, federalism and ideological polarization may tend to dampen or enhance each other’s effects. When federalism and ideological polarization cut in different directions they may ameliorate conflict. As the examples

discussed in this paper suggest, however, when ideological divisions align with federalism, as they do now, they resonate so that ideological polarization and federalism divisions amplify each other's effects.

Second, the structure of federalism means that the current ideological polarization in the United States has produced a divided federal government, and divided government prevents action on controversial issues. Either side of the ideological divide has the ability to block policy changes that would move in the other direction. Individual states, by way of contrast, are less likely to be frozen into inaction, and have more room to act when the federal government is at an impasse. This is one potential advantage of federalism, which allows individual states to pursue different policies, acting as "laboratories" for policy development.

Third, when ideological polarization aligns with geography, as in the case of the red state/blue state divide, states will tend to take more radically extreme approaches to controversial problems—especially when the federal government is divided and in gridlock. In states where one side of the polarized divide dominates, the states policy choices on controversial issues are likely to be more extreme—especially when viewed from the other side of the divide. The emergence of states with more extreme laws and policies challenges the structure of federalism, including both federal-state relations and the horizontal relations among states.

Of course, many factors contribute to divided government and ideological polarization in the United States, whose causes and effects are far too complex and nuanced to fully explain using any one approach. Nonetheless, it is reasonably clear that the interplay between federalism and ideological polarization has played a significant role in the current state of governance in the United States. While federalism may at times help to ameliorate the effects of polarization and help to produce compromise, in the present alignment federalism and ideological polarization are mutually reinforcing forces that complicate the search for policy solutions to difficult social problems.

# Federalism and Ideological Polarization in the United States

by

Richard E. Levy

J.B. Smith Distinguished Professor of Constitutional Law  
University of Kansas School of Law

**Kanagawa University**

Yokohama, Japan

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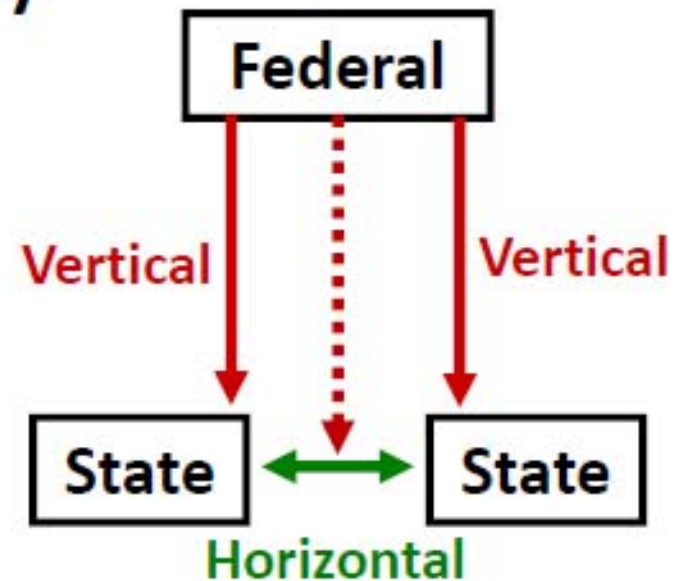


# Origins and Evolution of US Federalism



# Basic Structure of Federalism

- **Vertical Federalism**
  - Principle of “Enumerated” Powers
  - Supremacy of Federal Law
  - Residual State Sovereignty
- **Horizontal Federalism**
  - Nondiscrimination
  - Freedom of Movement
  - Territoriality



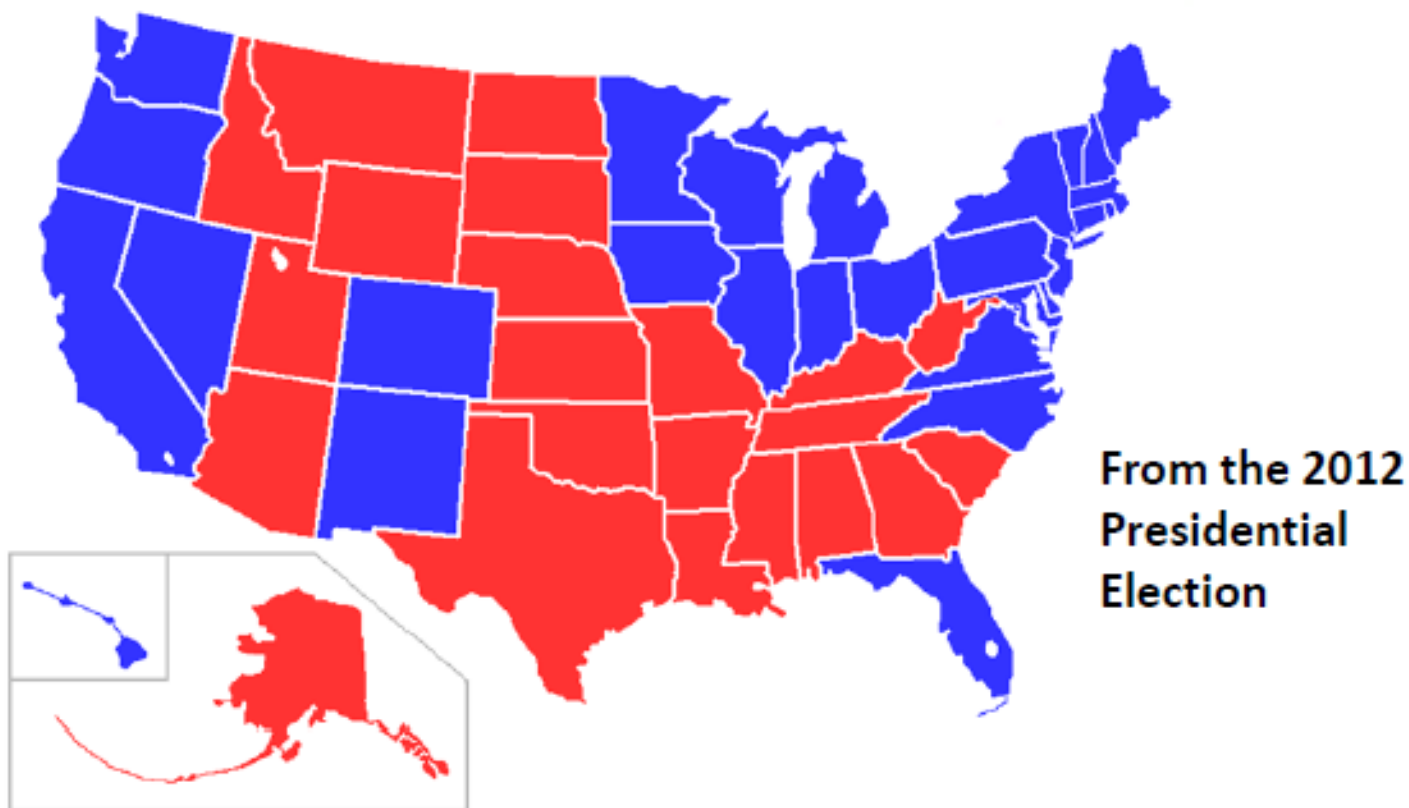
# The Financial Crisis and Polarization

- **Complex Roots of Ideological Polarization**
  - Geographic, Sociological & Demographic
  - The Civil Rights Era and Racial Politics
  - The “Culture Wars” and the Religious Right
  - Polarizing Events (e.g., the Viet Nam War)
- **The Crisis**
  - Collapse of Markets & the “Great Recession”
  - Impact on Budgets and Governmental Response
  - Political Implications for the 2008 Elections
- **Obama Presidency as Lightning Rod**
  - Symbolic of Cultural Change (Racial Undertones)
  - Big Government (Bail Out, “Obamacare”)
  - The Rise of the “Tea Party” and the 2010 Elections



# Alignment of Federalism and Ideology

- The Red State/Blue State Divide
- Divided Congress & Federal Gridlock
- Some States Are Very Red or Very Blue



# Ideological Issues as Federalism Issues

Issue	Ideological Divide	Federalism Issues
“Obamacare”	Big Government Budget & Entitlements	Scope of Federal Power Commandeering
Immigration	National Identity Define Political Community	Broad Federal Power Federal Preemption
Same Sex Marriage	“Culture Wars” Religion and Morality	Fed. Rights & State Power Interstate Recognition
Gun Control	Urban/Rural Individualism Guns Themselves	Fed. Rights & State Power Scope of Federal Power Commandeering Nullification Laws



# “Obamacare”

1. **Particularly Controversial (e.g., Shut Down)**
  - a. Symbol of Federal Overreaching
  - b. Opposition to Entitlements/Costs
  - c. *Nat’l Fed. Ind. Business v. Sebelius*
2. **Individual Mandate & Federal Power**
  - a. Chief Justice Roberts Opinion
  - b. Not w/in “Commerce Power”
  - c. But Valid as a Tax
3. **Medicaid Expansion**
  - a. “Commandeering” and State Sovereignty
  - b. Coercive Conditions on Spending
  - c. Practical Impact

# Immigration

## 1. Federal Immigration Authority

- a. Primary & Exclusive Responsibility
- b. Problem of Illegal Immigration
- c. Federal Response Gridlocked

## 2. State Responses

- a. Self-Deportation Strategy (Verification & Benefits)
- b. Enactment of State and Local Laws

## 3. Preemption Issues (Mixed Results)

- a. *Chamber of Commerce v. Whiting* (Savings Clause)
- b. *Arizona v. United States* (Mostly Preempted)
- c. Loss of Momentum

# Same Sex Marriage

- 1. Culture Wars & the Religious Right**
  - a. Emergence in the 1970s & 80s
  - b. Abortion, School Prayer, and Traditional Values
- 2. Changing Attitudes on Homosexuality**
  - a. Sexual Intimacy (*Bowers & Lawrence*)
  - b. Protection Against Discrimination (*Romer*)
  - c. Same Sex Marriage (Red States and Blue States)
- 3. Last Year's Supreme Court Cases**
  - a. *Hollingsworth v. Perry* (Avoided Issue)
  - b. *US v. Windsor* (DOMA Federal Provision Invalid)
  - c. Conflict of Laws & Horizontal Federalism Issues

# Gun Rights

## 1. Peculiar American Problem

- a. Cultural Affinity & Symbol of Individualism
- b. Plague of Gun Violence

## 2. Federal Authority to Regulate Guns

- a. Limited in *Lopez* (power) & *Printz* (Commandeering)
- b. Current Gridlock on New Legislation

## 3. State and Local Gun Control Laws (Blue States)

- a. Individual Right to Possess (*Heller*)
- b. Applied to States (*MacDonald*)

## 4. Gun Rights (Red States)

- a. Concealed Carry
- b. Nullification Laws

## 5. Horizontal Federalism Issues

# Assessment and Implications

- **Resonance**
  - Ideology
  - Federalism
- **Effect on Federal and State Governments**
  - Federal Government is Divided & in “Gridlock”
  - States Are Often Dominated by One Party
- **Results**
  - Status Quo is Frozen at the Federal Level
  - Ideological Dominance Within Some States
  - Conflict Between Federal and State Laws (Vertical)
  - Variations in State Policy (Horizontal)

