Polarized parties, politics, and policies at the federal and state levels of government continue to affect the nature of federalism and intergovernmental relations in the United States. Although polarization and fragmentation are prevalent, there are important instances of cooperation and collaboration. But bottom-up state activism has yielded polarized policies across the states in important issue areas such as same-sex marriage and marijuana policy. And even as states collaborate on implementation of the Common Core standards for K-12 education, the rhetoric remains politicized. The effects of polarization have also been significant for fiscal policies and budgeting. We conclude that, even as states push forward their agendas in light of a gridlocked national government, federalism faces continued challenges, remaining fragmented in both theory and practice.

The State of American Federalism in 2013–2014 remains fragmented. The federal government has been unable to enact much legislation, and the laws that are passed in states with unified party control often result in polarized policies leading to fractures in the intergovernmental arrangements between states and in federal–state relations.

In the 2012 annual review of American federalism, Gamkhar and Pickerill highlighted state and local developments and argue(d) that political, economic, and judicial trends have strengthened the expression of a particular type of “bottom-up federalism,” characterized by states having to address pressing fiscal and social issues without federal assistance as well as state and local pushback against federal policy (257). In 2013, we argued that, “Policies, when agreement can be reached, are created by factions. Implementation occurs in fits and starts—fragments pieced together across and within conflicted institutions…polarized partisan preferences have created extreme policy responses…and intense pushback scenarios” (Bowling and Pickerill 2013, 316). These trends have extended into 2014.
Here, we further develop a framework of fragmented federalism fueled by intense partisanship and ideological polarization of decision-makers. Although polarization and fragmentation are still prevalent, we also recognize, as do some contributions to this issue, that there are important instances of “business as usual” in policy implementation as well as intergovernmental collaborations. First, we discuss the partisan landscapes of the national and state governments, with resulting impacts on legislative activities and intergovernmental relations. Next, we discuss how “bottom-up federalism” has especially yielded polarized policies across the states, using as our main examples several of the most prominent issues from the past year: same-sex marriage, marijuana policy and education policy, and Common Core Standards. Next, we highlight how party polarization has affected the federal budget process, creating some uncertainty for states even as the improving economy raises overall prospects for state spending. We then discuss major Supreme Court rulings and legal controversies in the context of intergovernmental relations. Finally, we conclude with a statement on party polarization and why we believe that, even as states push forward their agendas in light of a gridlocked national government, federalism faces continued challenges and federalism remains fragmented in both theory and practice. In our conclusions, we consider the factors that make bottom-up activism and fragmentation more likely to occur in the United States, as well as the consequences of that fragmentation.

Partisan Polarization and Intergovernmental Relations

Although we recognize that there have been several periods of intense polarization in U.S. history, the current situation must rank toward the top of any list compiled on the topic. At the same time, we also recognize that although partisanship and polarization characterize much of what has been occurring across all levels of government, it is important not to overstate the case or ignore areas such as implementation of policies that are not crippled by polarization. For example, in his contribution to this issue, John Dinan details the ways in which some state officials have been able to work and negotiate with the Obama Administration to accommodate state interests in the implementation of the Affordable Care Act (ACA). Priscilla Regan and Torin Monahan’s article on fusion centers for the sharing of information by criminal justice and national security agencies demonstrates that collaboration among and between different units of government is possible. Similarly, John Morris et al. show how collaborative networks of federal, state, and local governments with nonprofit groups can work together to improve outcomes in water quality control efforts.

Although cooperation and collaboration do occur, the predominant theme across the country for several years has been partisan gridlock at the federal level,
whereas state governments have been activist and more productive than their federal counterpart. This state of affairs, together with other factors, has made the nature of intergovernmental relations in the past several years complicated and difficult to generalize. In the 2013 Annual Review of American Federalism, Kirsten Nussbaumer theorized that various procedural mechanisms in the U.S. electoral system—especially the local administration of federal elections—provide motivations for federal officials to defer to state and local interests. In this issue, Doug Roscoe and Shannon Jenkins provide empirical evidence that local party activity affects the outcome of federal elections. Here, we theorize that the polarization and gridlock at the federal level, coupled with the effects of local election administration and party activity on national elections (as well as other “political safeguards” of federalism), have created the conditions under which states have more latitude to engage in bottom-up activism without fear or concern of reprisal from the federal government. Even as these conditions have led to more state activism, cooperation and collaboration can still occur, and the President has a range of administrative tools that may be leveraged to coerce state and local governments. The result is a fragmented system of federalism in which intergovernmental relationships vary significantly from state to state and issue to issue. In the remainder of this section, we review the current partisan arrangements and polarization in federal and state governments.

Polarization and the Federal Government
The 2012 federal elections again resulted in divided government. President Barack Obama won reelection with 51 percent of the vote, 332 electoral votes to 206 for the Republican candidate, Mitt Romney. The Democrats maintained control in the Senate with a 53-45 majority and two Independents who caucus with the Democrats. However, the GOP kept control of the House of Representatives with a 234-201 majority. These conditions left a divided government as well as a split party Congress. Further, the division in partisan control is compounded by the fact that those partisans are so ideologically polarized. Hare, Poole, and Rosenthal (2014) find that the ninety-seventh Congress contained only about 9 percent of House Republicans and 20 percent of Senate Republicans considered “ultra-conservative” (measured as 0.5 or more on a scale of –1 to 1, where 0 is considered the ideological center). In the 113th Congress, the mean position of all Republicans is outside this point, and over half of House Republicans and a third of Senate Republicans ideological position is outside this point. Democratic positions on the ideology scale have remained consistent, with most Democrats considered moderate, lying between 0 and –0.5 on the ideology continuum (Hare, Poole, and Rosenthal 2014).

A significant consequence of this state of affairs has been a lack of legislative productivity in Congress: The 112th and 113th Congresses have passed the fewest
number of laws in over half a century. Relying on data from *Vital Statistics on Congress*, Chris Cillizza (2013) noted in the *Washington Post* last July that the “112th Congress had passed just 561 bills, the lowest number since [Vital Statistics on Congress] began keeping these stats way back in 1947.” In contrast, that Congress had 1,607 recorded votes, the fifth highest of any Congress since 1947 (Cillizza 2013). Drew DeSilver (2013) of the Pew Research Center compared legislative productivity in 2013—the first year of the 113th Congress—with the first year of every Congress since 1994. He found that the first year of the 113th Congress resulted in the fewest number (65) of total laws enacted in the first year of any Congress since 1994. He classified only 55 of these laws as substantive. These findings are consistent with Dodd and Schraufnagel’s (2013) findings that throughout history, legislative productivity is more likely to decline with split control, low levels of civility, and high degrees of polarization in Congress (see also Binder 1999; Dodd and Schraufnagel 2012).

Thus, at the federal level, intense partisan polarization, combined with divided party control of institutions, has resulted in gridlocked governance. A budget agreement was reached only after a government shutdown, with parties arguing over politicized proposals to cut school lunch programs or military pensions. Partisan rhetoric over the problem-plagued implementation of the ACA insurance exchange continued. Schools and communities continue to be plagued by gun violence, with no concerted action from the federal government. The lack of legislative output has consequences for the delivery of federal policy, but it also affects intergovernmental relations, implementation of federal policy at the state and local level, and even the continuance of state and local programs (when sequestration results in reducing funds). President Obama sometimes acts unilaterally during the implementation of some policies, and administrators in education, health, and welfare departments create unique policy arrangements with states through waivers. The resulting federalism arrangements are fragmented by uncertainty on one side and state-specific makeshift policy on the other.

**Polarization In and Among the States**

In contrast to the split party government and gridlock that characterize the federal government, notable in 2013–2014 is the predominance of unified party control in the states. In thirty-seven states, one political party enjoys unified party control of the executive and legislature. Republicans control both branches of government in twenty-three states, and the Democrats in fourteen states. Only twelve states have divided government.

This trend in unified state government has had significant effects on policy making at the state level and on intergovernmental relations. Writing for the *Washington Post*, Dan Balz (2013) argues, “Political polarization has ushered in a
new era of state government, where single party control of the levers of power has produced competing Americas.” In sharp contrast to national-level gridlock, “elected officials in these (unified party control) states are moving unencumbered to enact their party’s agenda” (Balz 2013). As demonstrated in policy areas from healthcare to same-sex marriage to election law, the governing party in states has been able to push their party’s agenda successfully through the legislative and executive processes.

In many cases, the political elites in a state are less moderate than citizens. In their analysis of thirty-nine policies across eight issue areas in the states, Phillips and Lax (2012, 148) find that “policy is congruent with public opinion only about half the time.” They conclude, “The net result is that state policy is far more polarized than public preferences,” which in turn has led to a “democratic deficit in many states” (149).

Highlighting the importance and impact of partisan polarization at the state level is the rise in prominence of the Republican Governors Association and the Democratic Governors Association. Although governors once joined forces to represent common state interests in the intergovernmental lobby group the National Governors Association (NGA), such is not the case today. According to Balz (2013):

The National Governors Association once was an arena where governors of both parties came together to find consensus. But Ray Scheppach, who spent three decades as the organization’s executive director, said the governors’ partisan organizations — the Republican Governors Association and the Democratic Governors Association — now dominate, producing a sea change in the way states are being governed. “They used to be governors first and Democrats or Republicans second,” Scheppach said. “Now they’re Democrats and Republicans first and governors second. In my mind, that’s a huge change.”

At the same time, and perhaps because of the divisions and gridlock at the federal level, governors appear to be enjoying stronger public support than federal officials. Writing in the New York Times, Nagourney and Martin (2013) report:

“Right now, governors are the most popular political players in the country, mainly because of the dysfunction in Washington and because the public perceives governors as being bipartisan, pragmatic and able to work things out,” said Bill Richardson, a former governor of New Mexico and Democratic candidate for president in 2008. … The difference is reflected in polling. In the latest CBS News poll, 85 percent of respondents expressed disapproval of the performance of Congress, and 49 percent expressed disapproval of Mr. Obama. By contrast, less than a third of respondents in a
variety of state polls said they disapproved of the performance of governors like Mr. Christie [of New Jersey]; Jerry Brown of California, a Democrat; Bill Haslam of Tennessee, a Republican; and Mike Beebe of Arkansas, a Democrat.

As a result, governors are often able to join with their party members in statehouses to enact legislation. It is not surprising that they do so and are seen as productive, when over three-quarters of the states have governors who share partisanship with the majority of legislators. Even if they are seen as pragmatic, many of the policies they enact would be more contested or not see the light of day under instances where both political parties wielded power in a state. This includes restrictions on abortions, the legalization of marijuana, same-sex marriage, tax decreases, immigration legislation, voter ID and other election laws, and refusals to expand Medicaid under the ACA. We discuss some of these policies in more detail. Coupled with policy gridlock at the federal level, this partisan state activism has helped to create a different framework of fragmented federalism in the states. Though some collaboration continues and President Obama continues to execute some policy implementation unilaterally, state-to-state and state–federal complexities arise as a result of the mix of polarized policies patch-worked across the state.

**Polarization and Policy Developments**

While all policy making yields passionate actors and actions in the process, “culture-war,” symbolic, or affective policy issues seem to evoke even more intense emotional responses from citizens and elected officials alike. When parties are polarized, elected officials are highly ideological (even more than the citizens they represent), and these affective issues may pervade the political agenda. When one party controls the legislative and executive branches of government, opportunities are created for passage of laws and policies favored by that party. Moreover, when the legislature is unified, even if the executive branch is held by the opposing party, bills have a better chance of becoming law (Bowling and Ferguson 2001). As citizens in more states have elected governors and legislators who share party affiliation over the last decade, more controversial policy alternatives have been able to rise on the governmental agenda and be acted on by legislative majorities.

A number of issues might fit this framework. For instance, many citizens feel that keeping weapons is a fundamental right for Americans; others, just as strongly, feel that safety comes from removing the most dangerous of these weapons. These ideological divisions are demonstrated when Democratic majorities have been able to pass gun-control laws in some states while Republican majorities have created laws that enable more citizens to carry guns, even to places where they were
previously restricted. In making abortion policy, right-to-life lawmakers and citizens have passed bills through majority-held legislatures to restrict access to abortion by passing stringent regulations on clinics or creating more requirements before women can undergo abortion procedures.

Other issues are controversial not because of normative moral values but rather because they reflect deeply held American values. For instance, states held by Republican majorities have, in some cases, been able to decrease taxes in their state based on shared beliefs about economic individualism and the promotion of capitalism. In part, Republican governors’ decisions to refuse Medicaid expansion is due to a belief that provisions specifically for the poor, like welfare and Medicaid, promote government dependence over self-reliance. Republican governors also refused Medicaid expansion to reduce federal intrusion into their states, another deeply held American value emphasizing limited federal power over citizens and states. The right to vote is also a deeply cherished value, the one that Democrats argue is under attack in Republican-led states enacting strict voter identification laws. Republicans counter that they are protecting democracy by ensuring only citizens are allowed to vote and reducing fraud in the voter process.

Perhaps the most important policy developments of 2013–2014 involved the highly politicized implementation of the ACA. In recognition of the importance of the ACA, the tremendous passions ignited on both sides of the aisle, and the complex intergovernmental implementation of the new health-care policy, several articles are included in this issue that analyze the ACA. For example, Frank Thompson and Michael Gusmano examine not only how the implementation of the ACA has strengthened the “Administrative Presidency,” but also how the implementation has contributed to a fragmented federalism. John Dinan, however, shows how states have been able to participate in the implementation process while protecting their own interests and concerns through bargaining and negotiation with federal officials. And Paul Nollette’s contribution on State Attorneys General reviews their role in litigation over the ACA. Because the ACA is covered extensively in this issue, we focus instead on other highly publicized policy issues at the state level in this article.

In this section and the next, we explore in more depth the issues of same-sex marriage, marijuana legalization, and the Common Core Standards in education. Each of these issues is linked by the strong affective nature of policy debate, the highly ideological divisions among citizens and elected officials alike, and the impact that the majority party has been able to have on policy because of unified party control across institutions. After looking at these three policy arenas, we elaborate on how federalism and intergovernmental relations have been or could be fragmented based on the focused control partisans have been able to wield on the passage and implementation of these policies.
Same-Sex Marriage Marches across the States

Over the last few decades, the civil liberties of homosexual Americans as well as same-sex marriage have been a hotbed of controversy. As GLBT activists pushed for antidiscrimination laws and marriage privileges across the country, the national government shied away from this cause. During the Clinton Administration, individuals faced the ambiguous “Don’t ask, don’t tell” policy regarding their sexual preferences when serving in the military even as the official policy required dismissal from the armed services. In 1996, Congress passed the Defense of Marriage Act (DOMA) by overwhelming majorities, effectively allowing the federal government to refuse acknowledgment of same-sex marriages that might eventually be allowed in some states. DOMA is particularly significant for federalism since it relates to the rightful authority of state government to pass laws regulating civil affairs and domestic relations. In 2013, the court emphasized state assignment when it overturned DOMA in *United States v. Windsor* (2013). Justice Kennedy delivered the opinion of the court explicitly addressing state preeminence in this area:

> The recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens. The definition of marriage is the foundation of the State’s broader authority to regulate the subject of domestic relations with respect to the“[p]rotection of offspring, property interests, and the enforcement of marital responsibilities... [and] the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce.”... Consistent with this allocation of authority, the Federal Government, through our history, has deferred to state law policy decisions with respect to domestic relations...

Thus, over the last two decades, regulation of domestic relations was exactly what the states did. Thirty-three states, typically the states with more conservative citizens and elected officials, followed DOMA, passing constitutional (twenty-nine) and statutory (four) provisions defining marriage as a union between a man and a woman. However, in a fury of policy making over the last decade, though, seventeen states legalized same-sex marriage. Additionally, though same-sex marriages are banned, four states have legalized civil unions or domestic partnerships (Hall 2014; NCSL 2014a). (See table 1.)

What explains the rapid diffusion of same-sex marriage legislation and polarized state decisions in this area? In addition to intense activism from the GLBT community, some of which has resulted in state and federal court decisions in their favor, one would be hard-pressed to discount the effect of unified party control in some states discussed earlier. Obviously, with unified control comes the enhanced capability to pass favored legislation. In many cases, Republicans have taken the opportunity to pass conservative policy (Bowling and Pickerill 2013).
Table 1 Status of same-sex marriage and civil unions’ policy in the states

<table>
<thead>
<tr>
<th>State</th>
<th>Year adopted</th>
<th>Mechanism</th>
<th>Party control legislature</th>
<th>Party control governor</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legalization of same-sex marriage</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Illinois</td>
<td>2014</td>
<td>Legislation</td>
<td>Dem</td>
<td>Dem</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>2013</td>
<td>Legislation</td>
<td>Dem</td>
<td>Independent</td>
</tr>
<tr>
<td>New Mexico</td>
<td>2013</td>
<td>State Court ruling</td>
<td>Dem</td>
<td>Rep</td>
</tr>
<tr>
<td>New Jersey</td>
<td>2013</td>
<td>State Court ruling</td>
<td>Dem</td>
<td>Rep</td>
</tr>
<tr>
<td>Minnesota</td>
<td>2013</td>
<td>Legislation</td>
<td>Dem</td>
<td>Dem</td>
</tr>
<tr>
<td>Maryland</td>
<td>2013</td>
<td>Legislation, affirmed by referendum</td>
<td>Dem</td>
<td>Dem</td>
</tr>
<tr>
<td>Hawaii</td>
<td>2013</td>
<td>Legislation</td>
<td>Dem</td>
<td>Dem</td>
</tr>
<tr>
<td>Delaware</td>
<td>2013</td>
<td>Legislation</td>
<td>Dem</td>
<td>Dem</td>
</tr>
<tr>
<td>California</td>
<td>2013</td>
<td>Federal Court ruling</td>
<td>Dem</td>
<td>Dem</td>
</tr>
<tr>
<td>Maine</td>
<td>2012</td>
<td>Referendum</td>
<td>Rep</td>
<td>Rep</td>
</tr>
<tr>
<td>Washington</td>
<td>2012</td>
<td>Legislation, affirmed by referendum</td>
<td>Dem</td>
<td>Dem</td>
</tr>
<tr>
<td>New York</td>
<td>2011</td>
<td>Legislation</td>
<td>Split</td>
<td>Dem</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>2010</td>
<td>Legislation</td>
<td>Dem</td>
<td>Dem</td>
</tr>
<tr>
<td>Connecticut</td>
<td>2010</td>
<td>Legislation</td>
<td>Dem</td>
<td>Rep</td>
</tr>
<tr>
<td>Vermont</td>
<td>2009</td>
<td>Legislation, override of governor veto</td>
<td>Dem</td>
<td>Rep</td>
</tr>
<tr>
<td>Iowa</td>
<td>2009</td>
<td>State Court</td>
<td>Dem</td>
<td>Dem</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>2004</td>
<td>State Court</td>
<td>Dem</td>
<td>Rep</td>
</tr>
<tr>
<td>Civil unions or domestic partnerships</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Colorado</td>
<td>2013</td>
<td>Legislation</td>
<td>Dem</td>
<td>Dem</td>
</tr>
<tr>
<td>Nevada</td>
<td>2009</td>
<td>Legislation, override of governor veto</td>
<td>Dem</td>
<td>Rep</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>2009</td>
<td>Legislation</td>
<td>Dem</td>
<td>Dem</td>
</tr>
<tr>
<td>Oregon</td>
<td>2008</td>
<td>Legislation</td>
<td>Dem</td>
<td>Dem</td>
</tr>
</tbody>
</table>

Sources: Hall (2014) and NCSL (2014a, b).

marriage legalization is clearly correlated to unified government control by the Democratic Party.

Of the fifteen states that used legislation to set their policy shown in table 1, ten were democratically controlled unified governments and four states had Democrats in control of both houses of their legislatures. The remaining state’s legislature was under split party control and the governor was a Democrat. Two states with democratically controlled legislatures held enough of a majority to override Republican governors’ vetoes. In the remaining six states, courts ruled in three states with divided party control of the government and two with unified Democratic control. In Maine, when the unified Republican government would not act, the populace legalized same-sex marriage through a referendum.

Some might argue that, since domestic relations is an issue area within the purview of the states, and since same-sex marriage legislation is passed or banned
in states according to the predominant political culture or ideology held by both citizens and/or elected officials, federalism as intended by our founding fathers is functioning fully. After all, preferences are maximized by decisions made at the lower level (see Ostrom 1973 for this view) and states are exercising the freedoms associated with a decentralized system.

However, when policy choices vary enormously throughout the states, several issues might arise. The first, evident in the 2013 decision overturning DOMA is that federal guidelines and policies are elemental in the implementation of many state policies. An estimated 1,100 federal laws and policies relate to marriage (Apuzzo 2014). These policies concern federal benefits, tax returns and tax law, bankruptcies, criminal proceedings, and health insurance, to name only a few areas (Andrews 2013; Perez 2014). How to apply federal law to marriages legal in some states but constitutionally prohibited in others is problematic in implementing the laws and provisions.

Second, the implementation of federal law to marriages between same-sex couples is complicated by constitutional and statutory-based refusals by some states to give “full faith and credit” to same-sex marriages performed in other states. With thirty-three states banning recognition of these marriages, even if the federal government is willing to implement federal policies regarding marriage, some states are fighting to affirm their individual sovereignty to define marriage guidelines. For instance, what happens when federal tax laws allow a married couple to file their taxes jointly, but states not recognizing same-sex marriages require individual tax returns?

Third, the transience of the American populace across state lines also adds to the confusion. When a married couple of the same gender moves to another state, the equal protection and full faith and credit issues are at the fore. The refusal of some states to recognize same-sex marriages performed in other states raises more policy implementation issues. Social Security survivor benefits are recognized for same-gender couples in some states, but when individuals move to a less hospitable state, do these benefits disappear? In the last year, Utah, Kentucky, and Virginia defended their rights to refuse recognition of the marriages in their states, to no avail in federal district courts. When equal protection considerations are raised, these court rulings, essentially “legalizing” gay marriage in these more conservative states, make sense. However, these federal court rulings seem to contradict the Supreme Court’s admonition that domestic relations are traditionally and constitutionally the decisions of state. The state of Kentucky, vested with power through a Supreme Court decision, does not want to include same-sex marriage within their regulation of “domestic relations.” However, because other states have chosen to legalize these marriages, the lower court rulings essentially mean that the wishes of a majority of one state’s citizens (Kentucky) are superseded by the policy decisions in other states legalizing same-sex marriage.
Marijuana Legalization

Another important policy development at the state level over the last few years has involved marijuana. For well over a decade, more and more states have passed laws legalizing “medical marijuana,” or the use of marijuana for medicinal purposes. Illinois and Maryland recently became the twentieth and twenty-first states to do so, although the regulations in Illinois limit the use of marijuana for medical purposes more than many of the other states, and the Maryland law is so new it has yet to be implemented. The states that currently have medical marijuana polices are listed in table 2.

Eighteen of the twenty-one states with these laws voted for President Obama in 2008 and 2012. Only Montana, Arizona, and Alaska voted for the Republican candidate. Nearly all of these states also have had Democrats dominate control of state government during the past decade. In table 2, we use the 2008 and 2012 presidential vote as an indicator of partisanship and ideology in states for several reasons. First, many of the medical marijuana policies were initially adopted by ballot initiative and not by the state legislature. Additionally, these states are technically in violation of federal law, and thus implementation of these policies proceeds in part because the administration has chosen not to enforce federal law in those states. We also note that there is significant overlap among states that have legalized same-sex marriage or civil unions and medical marijuana. Only four states (Minnesota, New York, Iowa, and Wisconsin) with same-sex marriage laws do not have medical marijuana programs, and conversely, only four states (Alaska, Arizona, Michigan, and Montana) and the District of Columbia that allow medical use of marijuana have not provided for same-sex marriage.

The variation in medical marijuana policies and the incremental adoption of these policies may be an indication of how horizontal policy diffusion and the role of the states still serve as laboratories of democracy in the U.S. federal system (see Pickerill and Chen 2008). Moreover, although many of these policies were adopted through ballot initiative processes instead of state legislatures, the popularity of these policies in Democratic strongholds and opposition in Republican states highlights the impact of ideological and partisan polarization on these salient, and often divisive, social policies. Additionally, as table 2 shows, many of the medical marijuana laws that were initially passed by ballot initiative were later enacted as legislation by the state legislature. This issue, like the other issues examined in this section, highlights the real and meaningful differences occurring in states with different party majorities.

Perhaps the more interesting development in the last two years has been the legalization of marijuana for recreational use in Washington and Colorado. Unlike same-sex marriage, recreational marijuana use was initiated and approved by citizen vote in 2012 (though both states were held by Democratic majorities).
In 2013, the states implemented the constitutional provisions, putting themselves in direct conflict with federal regulations under the Controlled Substances Act (CSA).

In Colorado, after Amendment 64 was passed to amend the state constitution to allow for recreational cultivation and use of marijuana, Governor John Hickenlooper (D) created an implementation task force. Pursuant to policy recommendations by the task force, the Colorado legislature passed a series of laws regarding the licensing of retail marijuana outlets as well as the cultivation, sale, and use of recreational marijuana. In sum, adults aged twenty-one and over may cultivate up to six marijuana plants and may possess up to one ounce at a time; public consumption is unlawful. Although retail stores must be licensed, the state has not limited the number that can be licensed. The first official retail stores began selling pot on January 1, 2014.

Table 2 States with medical marijuana policies

<table>
<thead>
<tr>
<th>State</th>
<th>Year adopted</th>
<th>Mechanism</th>
<th>Vote in 2008 Presidential Election</th>
<th>Vote in 2012 Presidential Election</th>
</tr>
</thead>
<tbody>
<tr>
<td>Maryland*</td>
<td>2014</td>
<td>Legislation</td>
<td>Obama (D)</td>
<td>Obama (D)</td>
</tr>
<tr>
<td>Illinois*</td>
<td>2013</td>
<td>Legislation</td>
<td>Obama (D)</td>
<td>Obama (D)</td>
</tr>
<tr>
<td>New Hampshire*</td>
<td>2013</td>
<td>Legislation</td>
<td>Obama (D)</td>
<td>Obama (D)</td>
</tr>
<tr>
<td>Connecticut*</td>
<td>2012</td>
<td>Legislation</td>
<td>Obama (D)</td>
<td>Obama (D)</td>
</tr>
<tr>
<td>Massachusetts*</td>
<td>2012</td>
<td>Ballot initiative</td>
<td>Obama (D)</td>
<td>Obama (D)</td>
</tr>
<tr>
<td>Delaware*</td>
<td>2011</td>
<td>Legislation</td>
<td>Obama (D)</td>
<td>Obama (D)</td>
</tr>
<tr>
<td>Maine*</td>
<td>1999, 2011</td>
<td>Ballot initiative, legislation</td>
<td>Obama (D)</td>
<td>Obama (D)</td>
</tr>
<tr>
<td>Montana</td>
<td>2004, 2011</td>
<td>Ballot initiative, legislation</td>
<td>McCain (R)</td>
<td>Romney (R)</td>
</tr>
<tr>
<td>Vermont*</td>
<td>2011</td>
<td>Legislation</td>
<td>Obama (D)</td>
<td>Obama (D)</td>
</tr>
<tr>
<td>Washington*</td>
<td>1998, 2011</td>
<td>Ballot initiative, legislation</td>
<td>Obama (D)</td>
<td>Obama (D)</td>
</tr>
<tr>
<td>Arizona</td>
<td>2010</td>
<td>Ballot initiative</td>
<td>McCain (R)</td>
<td>Romney (R)</td>
</tr>
<tr>
<td>New Jersey*</td>
<td>2009</td>
<td>Legislation</td>
<td>Obama (D)</td>
<td>Obama (D)</td>
</tr>
<tr>
<td>Rhode Island*</td>
<td>2009</td>
<td>Legislation</td>
<td>Obama (D)</td>
<td>Obama (D)</td>
</tr>
<tr>
<td>Michigan</td>
<td>2008</td>
<td>Ballot initiative</td>
<td>Obama (D)</td>
<td>Obama (D)</td>
</tr>
<tr>
<td>New Mexico*</td>
<td>2007</td>
<td>Legislation</td>
<td>Obama (D)</td>
<td>Obama (D)</td>
</tr>
<tr>
<td>Oregon*</td>
<td>1998, 2007</td>
<td>Ballot initiative, legislation</td>
<td>Obama (D)</td>
<td>Obama (D)</td>
</tr>
<tr>
<td>California*</td>
<td>1996, 2003</td>
<td>Ballot initiative, legislation</td>
<td>Obama (D)</td>
<td>Obama (D)</td>
</tr>
<tr>
<td>Hawaii*</td>
<td>2000</td>
<td>Legislation</td>
<td>Obama (D)</td>
<td>Obama (D)</td>
</tr>
<tr>
<td>Colorado*</td>
<td>2000</td>
<td>Ballot initiative</td>
<td>Obama (D)</td>
<td>Obama (D)</td>
</tr>
<tr>
<td>Nevada*</td>
<td>2000</td>
<td>Ballot initiative</td>
<td>Obama (D)</td>
<td>Obama (D)</td>
</tr>
<tr>
<td>Alaska</td>
<td>1998, 1999</td>
<td>Ballot initiative, legislation</td>
<td>McCain (R)</td>
<td>Romney (R)</td>
</tr>
</tbody>
</table>

Sources: NCSL (2014a, b).

Note. *States that are also listed on table 1 for having same-sex marriage or civil unions.
Washington took a more restrictive approach, limiting the number of sellers and advertising, and prohibiting cultivation for personal use. Washington Initiative 502 (I-502) passed in November 2012 by a margin of 56 to 44 percent. It legalizes the sale and use of marijuana for recreational uses, imposes a 25 percent excise tax on wholesale and retail sales, and calls for a ban on driving while under the influence of THC, similar to drunken driving laws. Although the Washington State Liquor Control Board, the agency in charge of implementing the law, had accepted applications for retail licenses until December 2013, as of late February 2014, it still had not issued any licenses. The Board voted in February to limit producers to growing only 70 percent of their capacity in a bid to limit the overall amount of pot grown in the state.

Legalization of recreational marijuana in Colorado and Washington creates an awkward situation for federal drug enforcement. There is no question that producers and consumers alike are running afoul of the federal CSA and related regulations, and thus could be subject to federal prosecutions despite legality under state law. In fact, in *Gonzalez v. Raich* (2005), the U.S. Supreme Court held that the CSA could be applied by the Justice Department against individuals using marijuana for medicinal purposes in California, pursuant to state law, and that the federal law preempts state law on the issue. However, the Obama Administration has decided not to pursue marijuana sellers and users who are complying with state law because it claims the federal government does not have the resources to do so. On August 29, 2013, the Justice Department issued a statement revising its marijuana enforcement policy:

For states such as Colorado and Washington that have enacted laws to authorize the production, distribution and possession of marijuana, the Department expects these states to establish strict regulatory schemes that protect the eight federal interests identified in the Department’s guidance. These schemes must...include strong, state-based enforcement efforts, backed by adequate funding. Based on assurances that those states will impose an appropriately strict regulatory system, the Department has informed the governors of both states that it is deferring its right to challenge their legalization laws at this time. But if any of the stated harms do materialize—either despite a strict regulatory scheme or because of the lack of one—federal prosecutors will act aggressively to bring individual prosecutions focused on federal enforcement priorities and the Department may challenge the regulatory scheme themselves in these states (Department of Justice 2013).

Such is the precarious state of affairs. University of Denver Law Professor Sam Kamin (2013) calls this scenario (under which both medicinal and recreational marijuana remain criminal under federal law but legal under state laws)
“unsustainable” from a criminal law and federalism perspective. In the short term, it contributes to the fragmented nature of federalism, and it is worth noting that it is a Democratic administration choosing not to enforce federal law over liberal state laws in predominantly Blue states who voted for President Obama in the 2008 and 2012 elections.

Common Core Standards

While intergovernmental relationships are fragmented in some policy arenas, the state of American education policy can be cautiously considered more cooperative or collaborative. In a vacuum created by lack of federal leadership as No Child Left Behind (NCLB) fades away, states have led the way to new standards and unprecedented interstate cooperation—a collaborative effort in its infancy that may be threatened by the politicized rhetoric surrounding its implementation.

When President Bush left office, the Obama Administration was left with the legacy of a policy that was swiftly becoming untenable—no state could meet the 100 percent math and reading proficiency standard in 2014. However, no other federal policy was adopted, leading to a series of waivers granted to the states by the federal Department of Education (see Nicholson-Crotty 2012). In 2010, partly in response to the lack of federal policy, forty-five states joined together to adopt the Common Core Standards created jointly by the NGA and the Council of Chief State School Officers (CCSSO). This was a state- and local-led effort to adopt clear shared standards and goals focused on college and career readiness as well as critical thinking skills. Ideally, the Common Core provides a set of consistently high standards across the states and allows states to collaborate on the development of textbooks, teaching materials, assessment systems, and teacher development opportunities (corestandards.org).

The Center on Education Policy (CEP) at George Washington University has conducted surveys related to the implementation of the Common Core since its adoption. In the 2013 surveys, forty of the forty-five states adopting the standards responded. The CEP report found that a majority of the states are undertaking a variety of activities—curriculum and teacher development, technical assistance, and assessment, among others. The 2013 survey also found that twenty-three states had already begun teaching at least some curriculum aligned to the Common Core Standards. Eighteen states at the time of the survey, and fifteen more during the 2013–2014 school year, are reviewing and revising state assessments to better reflect the standards. Moreover, a majority of the states are already working with universities to align teacher training with skills necessary to teach the Common Core Standards (Rentner 2013b).

The implementation of the Common Core Standards has led to increased collaboration between the state and local education authorities. A majority of the
CEP-surveyed states are carrying out state-wide developmental programs for teachers and principals, providing local school districts with assistance from state-supported consultants, and actively sponsoring initiatives to help low-performing school districts transition to the common core. Additionally, the widespread adoption of the Common Core is increasing collaboration among the states; nearly all of the survey states (37) reported collaborating with other states on implementation with positive benefits including increased staff expertise, the adoption of best practices from other states, and shared costs. And many states are participating in a testing consortium (Rentner 2013b).

Funding for Common Core implementation, however, has been problematic. While a majority of states saw increases to state education funding, only eight saw increases for the state education agency (NASBO 2013; Rentner 2013b). Over three-fourths of the states assert that sufficient funding for Common Core implementation is a major or minor challenge for them, and twelve states report reducing some implementation activities because of resource limitations (Rentner 2013b). The impact of the Great Recession on state budgets is one reason monies have been limited; however, the politicization of the Common Core by elected partisans has also contributed to a lack of effort in some states.

It is important to emphasize the state-led development of the Common Core. Many states prickle at the very idea of the federal government intruding into this state and local domain. The federal government has participated in the implementation of the Common Core through two funding mechanisms, neither of which directly required the adoption of the Common Core. First, some of the stimulus funding was provided to two multistate-led consortia, which received about $360 million total to develop shared assessments for progress of the states toward college and career readiness (Rentner 2013a; parcconline.org 2014; smarterbalanced.org 2014). The Smarter Balanced Assessment Consortium and the Partnership for Assessment of Readiness for College and Careers both represent a group of states working together. Second, the Race to the Top (RTTT) grant program provided funds to individual states. Both the RTTT and waivers granted to the states required the adoption of high-quality assessments and benchmarked standards, though not specifically the Common Core (Rentner 2013a).

Since the 2010 adoption of Common Core Standards, many opponents to the Common Core and/or funding in support of the Common Core have emerged. These opponents, though, did not include a majority of the state education executives who responded to the CEP survey in spring 2013. A majority of these education leaders reported a desire for more federal funding to improve implementation of the standards as well as changes to the Elementary and Secondary Education Act (ESEA)/NCLB federal laws allowing for more federal funding to assist in teaching to these standards in high-poverty areas. Overall, the states highlighted areas where the federal government could adapt federal policy to
aid state standards. Finally, thirty-seven of the forty state education administrators surveyed reported that it was very unlikely their states would repeal adoption of the Common Core Standards (Rentner 2013a).

Nonetheless, opposition to the Common Core among partisans has not receded. In fact, many states have had or are having legislative showdowns over the standards’ repeal (Bidwell 2014). In early 2014, both Colorado and Indiana saw anti-Common Core bills introduced in their legislatures (Bidwell 2014; Simpson 2014). In Colorado, one state senator argued that “Common Core was developed using a top-down approach...It was pushed onto Colorado with too little debate and no parental input...We want to keep our education decisions local” (Simpson 2014). And by the end of March 2014, the Indiana legislature enacted legislation to halt implementation of the standards with the support of the Governor. In 2013 and 2014, attempts to stop Common Core implementation were introduced in the Alabama, Georgia, Missouri, Kansas, and South Dakota legislatures; they all failed (Bidwell 2014). Despite these legislative losses, politicized rhetoric continues as other states continue to battle over the Common Core.

Much of the opposition comes from Conservatives who have emphasized the tie to the federal government. Others argue that even state consortia and state collaboration lead to a loss of local education decision-making (Rentner 2013a). On the other side, teachers’ unions have also begun to oppose the Common Core, specifically the testing of Common Core Standards that is to be tied to teacher evaluations (Resmovits 2014). Still others oppose the Common Core Standards because of misinformation about data collected from students in the states, where attention has focused on “massive” information that will be gathered for the federal government, including information on party affiliation and religion (politifact.com 2014).

Despite opposition from many sides, states are still implementing the Common Core. In many states, though, political and symbolic moves have been made to separate the state program from Common Core Standards. For instance, Florida calls its standards the “Next Generation Sunshine State Standards” (Bidwell 2014). Alabama withdrew from the initial memorandum of understanding with the Common Core group, and calls its standards the “Alabama College and Career Readiness Standards,” though the standards are in essence the Common Core. In many ways, the Common Core represents the most pure advancement of state-led standards in years, following the national mandates set by NCLB. It is ironic, and perhaps symbolic of the cleavages in the political and federal institutions, that the federal government is once again portrayed as the “devil” in the details.

**Fiscal Showdowns and Shutdowns**

Since 2008, the latest economic recession has sent waves of financial crises through the national, state, and local governments. The national government has been
through a series of budget showdowns, caught between Democrats who have generally wanted to maintain social spending throughout the economic slowdown, and Republicans who insist that taxes remain constant while the federal deficit is decreased. Though aided by federal stimulus packages, states were forced to make large cuts in their budgets until 2011, when state revenues slowly began to improve their budget outlooks. Local governments were also forced to tighten their belts during the downturn, at which time many localities (and some states) were forced to take notice of declining pension fund balances in what were often overly generous and underfunded retirement plans. All in all, there are signs that the economy is recovering and government budgets may begin to return to “business as usual;” however, doubts remain as to how federal officials will negotiate over the budget, and some states and localities still must deal with issues that have been building for many years.

The Federal Budget Landscape
Fiscal year 2013 was plagued with many starts and stops—from disagreements on budget priorities, arguments over deficit reduction, debt-limit showdowns, and a flurry of automatic spending cuts that went into effect when the Republicans and Democrats could not reach a budget agreement (Bowling and Pickerill 2013). In March 2013, through a process called sequestration, across-the-board spending cuts of $87 billion began affecting nearly all federal agencies, amounting to about a 9 percent decrease across nondefense expenditures and 12 percent within defense agencies (Stein and Terkel 2013). Perhaps the most obvious effect from the sequestration was a series of unpaid furloughs that affected over 800,000 federal workers (Samuelsohn 2013b). In May 2013, almost all employees of four government agencies were forced to take an unpaid vacation leave around the Memorial Day holiday—the Internal Revenue Service, Environmental Protection Agency, the Housing and Urban Development Office, and the Office of Management and Budget closed their doors for a day (Samuelsohn 2013a). Congress made exceptions for furloughs that might have impacted the public, shifting funds so that federal employees like meat inspectors and air traffic controllers could stay on the job.

More noticeable to the average citizen, however, were sequestration cuts in federal monies typically transferred to state and local authorities and organizations. Through shifting budget funds, localities avoided feeling the sequestration pinch for a short while, but eventually no tricks could reduce the sting. Schools on military bases went to four-day schedules. Food banks closed. Housing vouchers for low-income citizens were eliminated. Scientific research spending was decreased, with researchers losing their jobs. Head Start and Early Intervention programs closed. College students on federal work–study programs lost their jobs. Medical centers
reduced their services. And the list continues (Stein and Terkel 2013). While the Department of Defense, especially its civilian workforce, certainly felt the sting of layoffs, furloughs, and reduced activities, much of the sequestration impacted tens of thousands of low-income citizens and families. Further, pundits acknowledged that the effect of sequestration was less in 2013 than it would be in the next nine years if the process stays in effect (Brannen 2013; Samuelsohn 2013b).

Partisan polarization continued to affect the budget process throughout the summer and fall of 2013. As FY 2013 drew to a close in September, the continuing resolution that had funded the government ended, and the debt ceiling once again approached in mid-October. With the economy edging upward, and most of the sequestration effects felt far from Washington, Congressional Republicans attempted to tie budget and debt ceiling negotiations to repeal of funding for the Affordable Healthcare Act. When neither the President nor congressional Democrats yielded, the first widespread government shutdown since the Clinton era occurred. While many government activities kept going—commercial planes flew, social security checks sent, mail was delivered, and troops paid—almost a million government employees stayed home. The shutdown lasted over two weeks, when the House voted to end the shutdown, followed by a Senate vote where more moderate Republicans joined all fifty-two Democrats to reopen the federal government (Cameron and Andrews 2013). It was a temporary reprieve, though, requiring a budget agreement by December and postponing a debt ceiling limit until early February 2014.

In December 2013, a budget compromise was reached between the Budget committees in the House (led by Republican Paul Ryan) and the Senate (led by Democrat Patty Murray). Some political observers called it a “truce” (Montgomery 2013). The agreement set a spending limit of $1.012 trillion, adding back about $62 billion in sequestered cuts but increasing revenue through a variety of mechanisms, including increased fees and military pension reductions (Kim 2013). While moderate Republicans help pass the bill, more conservative legislators did not. As one of the most conservative Senators, Rand Paul of Kentucky told the Washington Post, “The consensus is we gave up on budgetary restraint with this budget deal. And it doesn’t leave me any hope that all of a sudden… we’re going to have a spine on the debt ceiling” (Montgomery 2013). The overall spending limitation was affirmed in January 2014 by the passage of twelve annual spending bills. It was a budget deal that no one loved. Less moderate Republicans were disappointed that federal spending, especially on safety net programs and the ACA was not decreased further. Democrats achieved some increases in these programs but not nearly enough, some argued (Mascaro and Memoli 2014; Welna 2014). After the truce in December 2013, both the budget bills passed in January and the debt ceiling was raised without incident in 2014, with the Republican leadership pushing forward over conservative objections.
Has the federal government entered into a new, if uneasy, peace with waning impact from the most conservative and moderate Republicans in Congress negotiating in good faith? (Montgomery 2013; Mascaro and Memoli 2014). Maybe. However, it could also be only a temporary lull until the Midterm 2014 elections when the federal debt, budget deals, and the ACA as fodder come to the fore again (Montgomery 2013). Most interesting is an assertion from Hare, Poole, and Rosenthal (2014), who argue:

Indeed, it is noteworthy that Speaker John Boehner (R-Ohio) broke the “Hastert Rule” and pushed forward several major pieces of legislation despite opposition from a majority of his own party in the 113th Congress (including the vote to end the government shutdown and raise the debt ceiling last October and again this week). These internal Republican splits reflect the increase in polarization rather than the moderation of polarization; namely, just how far the Republican Caucus stretches between the center-right to the far-right.

If this is only a brief respite, we can expect the federal budgeting process to remain polarized and fragmented in the future, with a resulting impact on intergovernmental transfers and ripple effects of uncertainty throughout all levels of government.

In the States

Unlike the continuing budget drama unfolding at the federal level, state budgets continue their recovery from the recession. FY 2014 budgets in most states represent the fourth year in a row with aggregate revenue and spending increases. Revenues are expected to increase by a small margin of less than 1 percent. This contrasts with the much larger 5.7 percent increase in aggregate revenue in 2013. The smaller revenue growth in 2014 is at least partially attributable to the larger than expected increase from personal income taxes (almost a 10 percent increase in 2013) in the previous year. This one-time bump in tax collections probably occurred due to the passage of the American Taxpayer Relief Act of 2012 (NASBO 2013). Some taxpayers, to avoid federal tax rates increasing as of January 1, 2013, shifted capital gains, dividends, or other personal income to the 2012 tax year. The result of this shift, as well as a slow economic recovery from a prolonged recession, will likely be an overall decline of 0.3 percent in income tax collections. In some Republican controlled states, income tax cuts also contributed to this decrease. In contrast, collections from sales taxes are expected to increase by 4.5 percent. As of the end of 2013, three-quarters of the states reported that revenue projects were either on or above target (NASBO 2013).

With some revenues recovering in FY 2014, forty-three states were able to enact budgets with higher spending levels than in 2013. However, accounting for
inflation, most states’ aggregated expenditures remain below prerecession years. Funding increases were most evident in the areas of K-12 education and Medicaid. Forty-two states enacted increased funding for education, and thirty-five increased Medicaid spending. Some states, though, still lag behind in economic recovery and total spending, and several states were forced to trim spending in education (five states), Medicaid (eight), corrections (eight), and transportation (seven) (NASBO 2013).

Generally, the states’ budget processes have not been as controversial as the federal process. Most states were more concerned with restoring spending to parts of the budget previously cut, especially the two largest areas of state spending—education and Medicaid. Many increased corrections spending as threats of court-required actions loomed. However, there was still room for partisan maneuvering. Republicans in some states pushed through tax cuts. Republican-led legislatures continued to decrease the power of public service unions to negotiate for better pay and pensions; some actively sought to reduce pension payments in light of saving fund shortfalls. Alternatively, Democratic-controlled states were more concerned with restoring funds for public assistance and education. Relatedly, many Democratic-controlled states (Minnesota, Connecticut, and California) have passed laws raising the minimum wage in the near future, despite conservative claims that it will hinder economic recovery (NCSL 2014b).

Also important to state recovery and future state budgets are elements beyond state control. Federal funds account for almost a third of the average state budget; actions (or inaction) of the federal government matter greatly for states. At almost one-quarter of total state spending, Medicaid expenditures are constantly on the minds of state officials. Taking into account states planning to expand Medicaid through the ACA, as well as increases in other state Medicaid program, enrollment growth is anticipated at almost 9 percent (NASBO 2013). Though some of this growth will be completely covered by federal funds for a few years, states will need to anticipate increased expenditures as well as enact more cost-containment measures—neither of which has proven easy. Delays in enrollment in state or national health-care exchanges also create uncertainty.

There is also increased budgetary pressure on states enacting the Common Core Standards (or their state equivalent) in education budgets, as well as the need to provide additional assistance to low-performing schools or districts. The pressure of failing infrastructure (and several years of deferred maintenance) also increases budget needs. With some of the federal sequestration cuts still occurring, and, indeed, a federal budget that must eventually roll back intergovernmental transfers, the outlook for state budgets is uncertain. Even modest increases in state expenditures could quickly be revoked if economic recovery slows and/or unemployment increases, sending states back into a cycle of declining revenue and increased demand for public assistance. Decisions by the federal government might
help states plan—sending out guidance on applying for and using federal monies for education (ESEA guidelines) or even a national policy by which states could capture taxes for online purchases. For now, though, the outlook for states is cautiously optimistic in spite of their dependence on federal expenditures and policies.

The U.S. Supreme Court and Fragmented Federalism

There have been a number of recent legal and judicial developments with important implications for federalism. As Paul Nollette chronicles in his contribution to this issue, one interesting development on the legal front has been state Attorneys General who refuse to defend the constitutionality of state laws. One such example involved the same-sex marriage ban in California in Hollingsworth v. Perry (2013), discussed below. In this section, we focus on some of the key U.S. Supreme Court decisions with implications for federalism and intergovernmental relations. In many respects, the current Court continues down the path that started with the Rehnquist Court’s renewed efforts to safeguard state and local governments from federal encroachments in the 1990s. In other ways, however, the Court strongly supports federal preemption of state laws, especially in disputes involving tort claims against businesses.

Voting Rights

One case with significant potential impact on states is Shelby County v. Holder (2013), where a divided Court struck down a key part of section 4 of the Voting Rights Act of 1965. That section created the formula for determining which counties and states were subject to the “preclearance” provisions in section 5 of the Act. Essentially, the formula in section 4 established which state and local units of government had a history of discriminating against voters based on race. Under section 5, those state and local governments had to seek and secure approval from the U.S. Attorney General or a three-judge panel in the District of Columbia before changing any of their election laws or voting regulations. Congress had reauthorized the law in 2006 for an additional twenty-five years.

Writing for a 5-4 majority, Chief Justice John Roberts (joined by Justices Scalia, Kennedy, Thomas, and Alito) concluded that the formula used to identify which state and local governments would be subject to preclearance was outdated and did not reflect “current conditions” in the states. The original 1965 formula had most recently been modified in 1975 to cover state and local governments that as of 1972 still maintained certain indicators of discrimination in voting (such as tests for registering to vote or less than 50 percent of its population who was registered to vote or actually voted in a presidential election). Roberts noted that conditions in many states have changed since that time and that, if Congress were to have
devised the formula “from scratch” when it reauthorized the law in 2006, it would not have adopted the same formula. He further argued that the outdated formula violated principles of “equal state sovereignty” and federalism. Justice Ruth Bader Ginsburg (joined by Justices Breyer, Sotomayor, and Kagan) wrote a dissent which accused the majority of gutting one of the country’s most important pieces of civil rights legislation.

On the one hand, the decision can be viewed as fairly narrow. Chief Justice Roberts explicitly stated that Congress was free to amend the legislation with “another formula based on current conditions.” Moreover, the majority left section 5 intact, despite being urged to strike it down, and so the decision can be viewed as striking one small section of the overall statute while unambiguously stating that Congress can revive that section through legislation (see Ward and Pickerill 2013). On the other hand, many commentators have noted that in the current political environment Congress is not likely to amend the Voting Rights Act. Additionally, some see section 5 as potentially vulnerable to future attacks. Indeed, Justice Thomas wrote a concurring opinion that he would strike down section 5. In any event, the Shelby County decision has effectively stripped the federal government of preclearance powers in the short term, leaving all state and local governments—whether included in the previous section 4 list or not—the ability to modify voting laws without preclearance.

Federal Preemption

One area of federalism jurisprudence in which the Roberts Court has been particularly active in recent years involves questions of federal preemption of state laws. These cases typically do not get the type of media coverage or commentary as higher profile decisions like Shelby County or National Federation of Independent Business v. Sebelius (the 2012 case in which the court upheld most of the ACA). From 2013 through the first part of 2014, the Roberts Court handed down several preemption decisions with implications for federal–state relations.

In Mutual Pharmaceutical Co. v. Bartlett (2013), the high Court ruled for a pharmaceutical company in a product liability tort claim. The claim was brought in New Hampshire under state tort law by Karen Bartlett, who suffered substantial injuries from the side effects of the generic drug sulindac. A jury awarded her $21 million in damages. The company appealed the verdict arguing that it was impossible to satisfy both the Food and Drug regulations regarding design and labeling of generic drugs and New Hampshire law. In another 5-4 split along ideological lines, the majority ruled for the manufacturer, holding that federal generic drug laws preempted state product liability, “failure to warn” laws. Writing for the majority, Justice Samuel Alito rejected arguments by the Plaintiff and the dissents, and contended that the pharmaceutical company could have simply
stopped selling in New Hampshire to comply with both federal law and the state law.

In 2013, the Court also decided two cases involving the Federal Aviation Administration Authorization Act (FAAAA), a 1994 statute that preempts state “law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier... with respect to the transportation of property.” In Dan’s City Used Cars v. Pelkey, a used car dealer had towed Robert Pelkey’s car from his driveway and auctioned it. Mr. Pelkey sued under New Hampshire consumer protection laws. The car dealer claimed that state law was preempted by the FAAAA. A unanimous court ruled for Pelkey. Justice Elena Kagan wrote the opinion of the court, and argued that Pelkey’s claims were not related to a “service” a motor carrier provides its customers, nor did they involve “the transportation of property.” The decision may seem like a narrow one, but it could have broader implications. According to Deepak Gupta (2013), “The straightforward statutory analysis – the heart of the opinion – will make it much harder for the transportation industry to seek shelter from preemption in cases involving generally applicable state laws that were not aimed at transportation.”

Justice Kagan also wrote the opinion for a unanimous Court in American Trucking Association, Inc. v. City of Los Angeles, involving the FAAAA. There, the Port of Los Angeles required trucking companies that moved cargo at the port to enter into “concession agreements.” As part of a “Clean Truck Program” and in response to concerns from local citizens, the trucking companies had to agree to have placards on their trucks displaying a phone number that could be called to lodge safety or environmental complaints, and the companies had to file plans for off-street parking of their trucks. The American Trucking Association sued and asked for an injunction against enforcement of the provisions, claiming that they were preempted by the FAAAA. All parties agreed that the issue involved “price, route, or service of any motor carrier with respect to the transportation of property.” But Los Angeles argued that it was acting as a market participant, and therefore the agreement did not have the force of law. The Supreme Court disagreed, however, and found that the Port was acting as a regulator, in part because allowing unauthorized trucks into the Port could result in criminal penalties, and therefore the FAAAA preempted the local port and thus prohibited the concession agreements.

In Tarrant Regional Water District v. Herrmann (2013), Texas wanted to enter Oklahoma to divert water from the Red River basin for the Dallas–Ft. Worth region. Oklahoma sought to prevent Texas from doing so. Texas claimed it had the authority under the congressionally sanctioned Red River Compact that gave equal water rights for the Red River basin to Texas, Oklahoma, Arkansas, and Louisiana. Writing for a unanimous Court, Justice Sonia Sotomayor held that the Compact did not preempt Oklahoma state law. Although Texas had a legal claim to
25 percent of the water, and could sue Oklahoma if it could prove Oklahoma was taking more than its share, Texas did not have the legal authority to enter Oklahoma without Oklahoma’s consent under its state laws.

**Same-Sex Marriage**

Although the U.S. Supreme Court has not weighed in on the merits regarding constitutionality of state bans on same-sex marriage, it did decide two highly anticipated cases with implications for the issue in 2013. In *Hollingsworth v. Perry*, the Court heard a challenge to California’s Proposition 8—a ban on same-sex marriage passed by the voters of California. When the ban was challenged in the courts, the California Attorney General refused to defend the law. As a result, supporters of Proposition 8 stepped forward to defend the law. The Supreme Court ruled 5-4 that the supporters of Proposition 8 did not have Standing in the case, and therefore their appeal had to be dismissed. Chief Justice Roberts wrote the majority opinion of the Court, but the split in the Court did not fall strictly along typical ideological lines. Justices Scalia, Ginsburg, Breyer, and Kagan joined the Chief Justice, while Justices Kennedy, Thomas, Alito, and Sotomayor were in dissent. As a result of the decision a lower court ruling that had invalidated the ban was reinstated and same-sex marriages in California could resume.

In a related case, *United States v. Windsor*, a 5-4 Court invalidated provisions of the federal DOMA. DOMA essentially defined marriage as between one man and one woman for the purposes of other federal laws and regulations. Thus, same-sex couples married legally in states that allow same-sex marriage would not be treated as married couples under federal laws. Writing for the majority, Justice Anthony Kennedy, joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan, found that “DOMA writes inequality into the entire U.S. Code.” The Court did not rule on the merits of a substantive claim regarding the constitutionality of same-sex marriage (or a ban on same-sex marriage). Nonetheless, the practical results of both cases seem to benefit same-sex couples and proponents of same-sex marriage, contributing to the “marriage equality” movement discussed earlier.

**Conclusions**

The state of American federalism in 2013–2014 has been dominated by patterns of partisan and ideological polarization. The 2012 elections resulted in divided government and gridlock at the federal level. But at the state level, we have predominantly unified government. In some policy areas, we see cooperation and collaboration, especially in the implementation of policy. However, in a wide range of salient policy areas, polarization in the federal government helped create the conditions for bottom-up state activism and state policy that seems to be more ideologically extreme than the electorate at large—and for much fragmentation.
Our reviews of American federalism over the past several years suggest conditions under which state bottom-up activism is more likely to occur: (i) polarization and legislative gridlock at the federal level; (ii) polarization and unified government at the state levels; and (iii) strong safeguards of federalism for states and local governments such as the local administration of elections and the influence of local party activity on federal elections. These factors give states the capacity and incentives to pass ideological laws without regard for federal law or prerogative, and even in blatant violation of federal law. And fragmented federalism results when states have particularized relationships with the federal government and other states.

However, calmer, more cooperative forms of intergovernmental relations still exist. As several articles in this volume highlight, along with our discussion of the Common Core Standards, cooperation and collaboration between the federal government and the states, among the states, and across the public, private, and nonprofit sectors still occur in numerous policy areas, and for good reasons. Additionally, the development and reinforcement of an administrative presidency further complicates the matter. The President has administrative tools that allow him to act in more top-down coercive ways. Consequently, the proliferation of bottom-up state activism has not displaced other forms of intergovernmental relations; rather, it has added complexity to an already complicated and tangled federal system. We encourage federalism scholars to continue to develop how these complicated arrangements work.

In addition to trying to better understand (i) the various forms of intergovernmental relations affecting the formulation and passage of laws as well as the implementation of policy, and (ii) the causes for the types of fragmentation that have occurred in patterns of federal and state relationships, our analysis suggests various types of consequences when bottom-up activism and fragmentation occur at the recent levels. The three policies we reviewed in this article suggest at least three types of consequences. First, in the case of same-sex marriage, state laws have consequences for the implementation of federal laws, but probably more importantly, the variation in marriage laws creates a number of issues across states. Second, the legalization of marijuana has a very different type of effect by complicating and arguably compromising the enforcement of federal criminal laws. Finally, the Common Core Standards and the federal use of education waivers suggest that where there is broad policy agreement, intergovernmental collaboration can occur—even in the face of polarized politics. The variation in the consequences of state activism is likely a result of differences across the particular issue areas and the nature of the current partisan polarization in and across the states. Our analysis of the form, causes and effects of bottom-up activism and fragmented federalism also calls into question recent arguments by Malcolm Feeley and Edward Rubin (2008), among others, that a unified national identity in the twenty-first century
has made federalism obsolete in the United States. Again, we encourage scholars to conduct further research regarding these effects of state activism.

Following our premise from last year’s annual review of American federalism, we reiterate that the federal system is unusually chaotic and contentious. The federal government leads in some areas but negotiates and collaborates with states in others. However, it also seems to be increasingly sitting on the sideline as states pursue their own agendas. It is possible that the country is in a transition period in which issues are being defined and redefined in ways that will eventually lead to new partisan coalitions and arrangements. If that is the case and a new majority coalition reemerges, we would expect intergovernmental relations to stabilize and perhaps normalize into something scholars recognize, such as cooperative or coercive federalism. In the meantime, the nature of American federalism and intergovernmental relations seems to take shape largely in an ad hoc manner, dependent on the issue and the partisan orientation of individual states.

Notes

We would like to thank Carol Weissert and the anonymous reviewers for their helpful comments and suggestions. We would also like to thank all of the participants of the Federalism Conference within a Conference at the January 2014 annual meeting of the Southern Political Science Association in New Orleans, LA, especially the organizer, Ann Bowman. Their comments on our 2013 Annual Review article and the ensuing discussion regarding current issues in federalism were very helpful for writing this article.

1 For the official Colorado report, see http://www.colorado.gov/cs/Satellite/Rev-MMJ/CBON/1251592984795.

References


Dan’s City Used Cars v. Pelkey. (2013). __U.S.__.


*Shelby County v. Holder*. (2013). 570 U.S.__.


