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New Federalism and the Culture Wars

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Partisan warfare on the national level increasingly has been a part of federalism theory and practice. From the instant that President Barack Obama signed his signature domestic accomplishment of Obamacare into law, Republicans in nearly thirty states opposed it by immediately filing lawsuits challenging its constitutionality on state sovereignty grounds (Bulman-Pozen 2014, 1078). That litigation strategy ultimately proved to be futile (Banks 2017). Even so, when the Republicans' political fortunes reversed with repudiation of the Democratic party in the 2016 presidential and congressional elections, the nascent Trump administration similarly adopted states' rights political rhetoric as the basis for taking policy initiatives to strengthen the nation's borders (via executive orders) and Obama's health care legacy (via a congressional action), only to be thwarted by litigation filed by opponents in seventeen different states and, notably, a divided Republican party that thus far has shown little capacity to govern effectively (Rose and Yesko 2017; Thrush and Haberman 2017; Editor 2017). The common denominator in both examples is the underlying rhetoric and application of new federalism politics, albeit with a slightly different twist. As a mainstay political argument, new federalism traditionally has been understood to resist federal overreach and centralization by making anti-New Deal claims to states' rights and sovereignty that "promot[e] a free market system that relies heavily on individual incentive to solve social problems," an approach taken by conservative administrations dating back to the Nixon presidency (Takahashi 2003, 261; Banks and Blakeman 2012, 51-52). In contrast, today's new federalism theory and practice has evolved to encompass not only an emphasis on economic issues but also state policy responses that are increasingly conditioned on the most contentious social policy debates of our time in the nation's culture wars (Read 2016; Raynor 2015; and Bulman-Pozen 2014).

For judicial scholars, new federalism jurisprudence, as conceptualized by the U.S. Supreme Court in recent terms, often developed constitutional doctrine by treating federalism as a structural limit on federal power. That approach, not surprisingly, largely originated and was refined in the context of economic policy. Still, legal scholars and political scientists have begun to discover that many states were using the states' rights rhetoric of new federalism to insulate both progressive and conservative policies from federal oversight. For example, "blue state" federalism transcended the historically conservative impetus of states' rights in order to protect progressive economic and social policies; whereas, "red state" federalism maintained the classic notions of states' rights embedded in new federalism jurisprudence protect conservative economic and social policies (Shapiro, 2009; Sullivan, 2006; Bulman-Pozen, 2014)

As Banks and Blakeman (2012) show, attempts to expand new federalism to non-economic areas were potentially blocked by structural and institutional barriers at the local, state, and national levels. In contrast, the present analysis extends their work to see how it applies to current policy issues embedded in the culture wars. By employing a historical institutional approach and by examining three case studies on church-state issues, gun rights, and LGBTQ rights, the analysis explores the use of new federalism doctrine in current policy disputes that invoke deep political, historical, and cultural divisions. In particular, the research investigates how a range of progressive and conservative state policymakers extracted new federalism from the realm of economic policy and applied it to social policy with mixed results. Moreover, the structural and institutional barriers that ultimately have prevented new federalism doctrine from taking root in some culture war disputes are highlighted. As the case studies reveal, co-opting new federalism rhetoric for political gain in the culture wars distorts the original economic purpose of new federalism and potentially influences the strategic decision-making of the Supreme Court to use it in a fashion that promotes state sovereignty and rights. In some respects, the case studies demonstrate that federal power is increased, and not limited, by policy invocations of new federalism doctrine.

I. The Development of New Federalism

As a rhetorical term of art and a strategy for implementing political change, new federalism's origin is first often linked to the Nixon administration and later transplanted to other conservative leaning

and devolutionary legislative initiatives, presidencies, court decisions, and states' rights political developments. Its overriding conservative objective is to seek to scale back the federal government's role in administering economic and social policies vis-à-vis the states (Takahashi 2013, 261). In its original formulation, Nixon's political advisors saw it as a tool for constructing a domestic policy agenda that reconciles "the contradictory demands of dual sovereigns trying to coexist in one polity." (Banks and Blakeman 2012, 51). Still, neither Nixon nor his principal advisors thought new federalism represented a strict separation of co-equal federal and state sovereign spheres, as some "dual federalism" advocates, and sometimes the Supreme Court, insist upon. Instead, it was more in line with the ideals of "cooperative federalism" because it sought to forge a partnership between federal, state, and local governments through block grants, revenue sharing, and improved intergovernmental information systems (Walker 1995, 24). For William Safire (Nixon's special assistant and speech writer) and apparently for Nixon himself, new federalism replaced "true federalism" (decentralization) with a system of "administrative decentralization in which all significant policies will be made in Washington with their administration left in state and local hands." (Editor 1972, 95).

Within the Nixon administration, Safire's reform ideas were intensely debated among the advisors closest to the President in a series of internal unpublished "federalist" papers (Editor 1972, 96). Critics included "Cato," a pseudonym adopted by Tom Huston (a lawyer and special assistant) and "Polybius" (Wendell Hulcher, Assistant Director of the Office of Intergovernmental Relations). Neither found administrative decentralization attractive, favoring instead classical notions of federalism; and both, tellingly, opted to leave the Nixon administration after the debate was settled (Editor 1972, 97; see also Cato 1972; Polybius 1972). While their voices were heard, the debate was ultimately resolved by the White House when it embraced the viewpoints of Safire and "Johannes Althusius" (or Richard P. Nathan, who wrote the essay while in the Office of Management and Budget). Thus, Publius and Althusius' ideas are a baseline for understanding new federalism's genesis because Safire ultimately became a principal voice in articulating Nixon's domestic agenda and Nathan later served as Under Secretary for the Department of Health, Education and Welfare, the agency in charge of effectuating

welfare reform, a defining administrative component of Nixon New Federalism policy practice (Editor 1972, 96-97).

In terms of theory, Publius characterized new federalism as a type of “national localism,” or a system of administrative decentralization that recognized the reality of centralization while returning power and governing decisions back to the states and its local citizens. Thus, federalism was not treated as a dichotomous relationship between centralization and decentralization. Similarly, divisive claims of states’ rights ceded to notions of state obligations that are fulfilled in a unified national interest; and, he hinted that the distribution of federal monies was an important element in preserving national unity and the diversity underlying state and local governance. As he explained, new federalism is

A sea-change in the approach to the limitation of centralized power- part of what is "new" in the new Federalism-is that "States' rights" have now become rights of first refusal. Local authority will now regain the right to meet local needs itself, *and gain an additional right to Federal financial help*; but it will not regain the right it once held to neglect the needs of its citizens.

States' rights are now more accurately described as States' duties; this is a fundamental change in Federalism, removing its great fault without undermining its essential local-first character, and provides the New Federalists with two of their prime causes: the cause of regaining control, and the cause of fairness (Publius 1972, 99-100, emphasis added)

As Nixon put it, “The essence of New Federalism is to gain control of our national destiny by returning control to the States and localities; [that is,] power, funds, and authority are channeled increasingly to those governments closest to the people.” (Publius 1972, 100). Relatedly, under new federalism a national conscience, or “what most people” in the nation “believe is ‘only fair’” emerges when administrative services are rendered in the States not only in accordance with local needs but also national purposes and goals. (Publius 1972, 100-106)

Within this conceptual framework, Publius gave several realistic examples of how New Federalism would operate through policy proposals and legislation favoring welfare reform, revenue sharing and grants-in-aid, unemployment insurance, and tax policy, among others. (Publius 1972, 106-

111). Althusius likewise extended Publius' analysis in defending New Federalism principles and showing how it would work in practice. After first observing that President first used the term "New Federalism" in the context of referencing the Administration's revenue sharing plan in an August, 1969 television address, Althusius wrote that the federal government is responsible for the type of welfare reform that allows for the transfer of income to those who need it in an equitable and need-based fashion, ostensibly through legislative proposals such as Family Assistance, Food Stamps, and a Family Health Insurance plan. For its part, the federal government assumes a predominant role in regulating the Post Office, the draft, student aid, and environmental pollution control. In contrast, States manage areas of "responsible decentralization" that primarily fall into the realm of traditional state functions involving government services and policymaking. These include, among others, education, manpower, and public health. For example, under one Nixon initiative, the Comprehensive Manpower Act (August, 1969), federal authority is consolidated into the federal Department of Labor, but state governors and local mayors are given more control to plan for, coordinate, and administer manpower programs with "flexible [federal] funding, sensitive to State and local needs." Finally, New Federalism embraces a robust revenue sharing component, a reform proposal that uses a refined federal income taxes and grants-in-aid program to give the states flexibility in determining its administrative policymaking priorities (Althusius 1972, 134-137). President Nixon echoed this sentiment when he said to the nation's Governors that, "It's not only what we spend that matters, it is the way we spend it." (Publius 1972, 100).

Notably, Nixon's New Federalism was designed to be pragmatic and not ideologically divisive. Its resolve "is not to wrap liberal principles in conservative clothing, or vice versa," and it posits that the "human needs" of the poor and minorities are best met through national policies and state administration favoring "economic advancement." (Publius 1972, 98, 108). In this light, as a government program that unites national priorities and local concerns, New Federalism's opposes "the artificial construction of regional, ideological, or ethnic blocs;" rather, it "seeks to fuse two elements: a greater respect for conscience deeply examined, and a more compassionate understanding of the concerns of the individual in its local application." (Publius 1972, 104, 106). While it is mindful that the national and local

“conscience” is not always in harmony, the “rules” set by the centralized government can be applied by States and localities in a fashion that best fits individual needs (Publius 1972, 105). In this sense, the neutrality of New Federalism principles work to let what the federal government does well—like raising or borrowing money and managing foreign affairs—while inducing the States and local governments to respond flexibly in deciding how to administer services—like implementing crime control and educational programs—that are attentive to national goals as well as local circumstances (Publius 1972, 100). In this way, under a New Federalism paradigm the “old liberal-conservative and centralist-localist calibrations will lose meaning when applied to a fusion of certain elements of liberalism and conservatism, of central concern and local consent.” (Publius 1972, 113).

II. Polarized Federalism

The development of New Federalism encouraged and sustained a resurgence in state opposition to centralized federalism. States began actively to oppose what they perceived as federal overreach into traditional state police powers, and their activism took on many different institutional and political forms. For instance, state policymakers in conservative states opposed to specific federal policies, such as the Affordable Care Act or environmental regulations under the Clean Air Act, debated and passed legislation that hindered the implementation of the law at the state and local level. Conversely, more liberal policymakers who viewed the federal government as too slow and unable to address certain social issues such as same-sex marriage or the legalization of marijuana, passed laws that advanced the development of more progressive policies in their states. Other actors, such as state attorneys-general, followed their own political agendas too and used litigation to block federal policy, support federal policy, or get ahead of federal policy by supporting state laws that address issues the national government cannot. Considering the varied institutions, actors, and issues involved, federalism scholars have addressed this state revival from many different angles and based on different causal and explanatory factors.

One approach suggests that state activism against the federal government, while relatively new, is part of a longer standing division in American federalism between nationalists who favor greater centralization of government and policy at the national level, and federalists who prefer decentralized

policymaking. Much of the policy disagreement and rhetoric between states and the federal government is couched in nationalist or federalist terms. (Kincaid, 2014, 25) Thus, state activism against federal policy is part of a larger debate about the normative underpinnings and meaning of American federalism.

The division between federalists and nationalists does not necessarily reflect a partisan divide within a state, or between states, although it is the case that conservative states historically tend towards more states' rights and federalist responses to national policy, and more liberal states tend to support nationalist and centralizing approaches to federalism. As noted above state sovereignty arguments have been made by conservative states that sought to halt implementation of federal laws within their jurisdictions, and more liberal states have likewise invoked state sovereignty to protect their socially progressive laws that might be in conflict with national law and policy. These developments suggest that federalism is malleable or opportunistic, and "invocations of federalism tend to be spurred by specific substantive concerns" and debates over public policy and are less about theoretical or normative debates about the structure of federalism. (Raynor, 2015, 618) Thus, Red and Blue state views on federalism have emerged and are conditioned more by specific policy issues and less by historical and normative views on states' rights versus national power. (Sullivan, 2006; Shapiro, 2009)

Other causes for rising state opposition to federal law and policy are due to the increasing political polarization of national political institutions, growing partisanship of state policymakers, and the polarization of the structure of federalism itself. In the past, federalism used to provide a structure through which states reached agreement on the broad parameters of federal programs and then implemented them through bargaining over "modest differences in the pace and content of state implementation." Now, the structure of federalism is affected by "deep schisms between partisans who increasingly inhabit separate policy and media worlds." (Conlan and Posner, 2016, 21) Using the period of federalism under President Barack Obama, many scholars have analyzed how the partisanship and political polarization within states impacted federalism. Speaking to Red or Blue State federalism, scholars show how liberal leaning blue states used federalism and ties to the Obama administration to enact expansive policies that red states generally opposed. Environmental policy is one example, reflected by the Environmental Protection

Agency's stringent and contentious rules on clean power and greenhouse gas emissions. To counter, more conservative red states used litigation to frustrate federal policies that they disagreed with, with several states joining Oklahoma's lawsuit against the EPA to halt the Obama initiatives. (Read, 2016, 349-356) Republicans in Congress often spurred state opposition too through suggestions that states should oppose any Obama initiatives on the environment. (McConnell, 2015).

To be sure, other federalism scholars see the relationship between the states and the national government as conditioned by the levels of partisanship within and between both levels of government. Instead of states acting against the federal government to assert and protect a decentralized federalism, states now act in their own interests based on their partisan makeup. Therefore, federal politicians who support state power are often in alignment with state politicians opposed to federal power because they both come from the same political party, and that party is either in the minority at the national level or otherwise shut out of the national policymaking process. Federalism as an idea and structure serves to advance the partisan goals of some state and federal policymakers. (Bulman-Pozen, 2014, 1092)

State policymakers pursue different approaches too (Raynor 2015). Some policymakers will simply refuse to implement federal policy when given a choice. Thus, many conservative states refused to expand Medicare under the Affordable Care Act, even though they would receive compensation from the national government. (Bulman-Polzen, 2014, 1050) Some states refused federal stimulus money for "shovel ready" projects during the Great Recession in part due to partisan opposition to Obama administration policies. Other states have more aggressively passed "sovereignty laws" that reflect legislative and regional resistance to federal laws regulating firearms, drugs, immigration, and health care, to name a few. (Raynor, 2015; Dinan, 2011). Such laws assert that a state may protect its own citizens from an overreaching federal law or policy, and while not a nullification of federal policy per se, sovereignty laws seek to impede the implementation of national policies with which the state disagrees. Sovereignty laws are rare, and interestingly reflect both red and blue state policies too. For example, red states have passed expansive firearms ownership laws designed to circumvent federal policy, and blue

states have passed laws asserting the rights of the citizens to use medicinal marijuana in contravention of federal policy.

Given the polarization of national and state politics and its broad impact on the structure of federalism, and its encouragement of states to use federalism to oppose national policy, other scholars have focused attention on types of state policymakers. Studies show, for example, that a state's opposition to federal policy correlates with the professionalization of state legislators. (McCann, et al, 2015) A state's political culture, constitution, and statutes might also direct or prompt policymakers, like attorneys general, to protect actively the interests of citizens against the national government. (Prakash, 2015) State supreme court justices and judicial federalism likewise create yet another avenue through which policymakers within a state can oppose (or support) national policy. (Zschirnt, 2016) Finally, State Attorneys General are prominent too. (Nolette, 2015) State AGs have historically been active litigants in the U.S. Supreme Court, both as direct participants in lawsuits or as amicus friends of the court. (Provost, 2010, 2011) Indeed, state AG litigation has become much more coordinated over the past thirty years, with AGs from several often joining in multistate lawsuits to both oppose and support federal policies. Attorneys-general often respond to state business demands for economic policy litigation, or to interest group demands to address social issues through litigation, and AGs act upon their own ideological interests too. The federal government and Congress have also encouraged state AGs to take on more enforcement of federal policy, and some national policymakers have encouraged states to oppose and litigate against national policy. (Nolette, 2015, 198-219)

III. Federalism and the Culture Wars

As scholars of the Court's development of New Federalism and its political impact, we are interested in how it has been used in this new resurgence of state opposition to federal policy. On the one hand, it seems likely that new federalism signaled the Court's interest in protecting state power, and emboldened states to seek ways to confront and oppose federal power. The Court's changes to federalism jurisprudence sent clear cues to state policymakers that federal courts will be receptive to state challenges to federal policy. On the other hand, recent scholarship linking political polarization at the national and

state levels to the changing structure of federalism suggests that structural considerations play a prominent role in explaining state behavior. Polarization now inheres in national and state institutions prompts the political group out of power at one level to seek avenues at the other national or subfederal level to enact favorable policies anyway. While changes in federalism jurisprudence might have encouraged more state activism to preserve a states' rights approach to national policymaking, the partisanship embedded in political institutions suggests that the structure of federalism itself encourages policymakers in both red and blue states to oppose federal policies due to their own partisan leanings. Thus, policymakers use federalism in more utilitarian terms and as another outlet to establish policies to which they are ideologically committed, and are less concerned with asserting states' rights due to normative constitutional principles. As one federalism scholar puts it, federalism has allowed policymakers to shift political initiative away from "paralyzed national institutions" to subfederal institutions, and instead of diffusing polarization, as theories of federalism stipulate, the shift to state and local institutions has guided polarization and political division in new directions. (Read, 2016, 338)

We seek to add to this debate by investigating the prominence of federalism doctrine in policy areas in which states are active, and which concern culture wars issues. We are interested in the extent to which the Court's new federalism facilitated or encouraged policymakers and others to use federalism arguments to shift debate over intractable culture wars disputes. Our prior research on new federalism suggested that even though it was developed in the context of national economic regulations that affected states, attempts to extend it to non-economic issues soon followed. One example discussed in more detail below was the use of new federalism by interest groups and states to encourage the Court to adopt a federalism reading of the Establishment Clause that viewed the clause as a structural and jurisdictional limit on federal power and not as a rights-granting provision. (Banks and Blakeman, 2012, 133-38) The attempt to extend new federalism to religious policymaking was unsuccessful (so far), but it raises several questions about the applicability of new federalism outside of economic policymaking, and questions about federalism and morality policy in general. As other federalism scholars have pointed out, economic policy and morality policy might "behave differently" in federal systems. Thus, policies over the

distribution and redistribution of economic resources may be more diverse among the states, and it may be easier for states to maintain and experiment with a range of economic policies. Morality policies, in contrast, involved deep-seated and fundamental beliefs and attitudes and are more typically less amenable to compromise than economic policy. (Mooney, 2000; Hollander and Patapan, 2016, 4)

Three Case Studies: Religion, Gun Rights, and LGBTQ Rights

a. Case study methodology

Our analysis centers on three purposive case studies that each address one policy area of the “culture wars.” We define culture wars as ongoing conflicts over deeply felt moral, religious, or other foundational values, and these conflicts are more than just “politics as usual.” Policy issues bound up in the culture wars are less manageable for policymakers, and political compromises are more difficult to reach. Culture wars disputes involve individuals and groups that are mobilized in “uncompromising clashes over values” that concern more than just economic interests. Those uncompromising clashes tend to eschew resolution through the political process and instead seem to last through several political cycles without much resolution at all (see Clayton 199x). As well, such disputes over values often occur when one group, or level of government, seeks to use legal and constitutional authority “to replace community values, moral practices, and norms of interpersonal conduct with new standards of behavior.” (Sharp, 1999, 3; Hunter, 1991)

Federalism theory suggests that intractable conflicts over moral values can be dampened in a federal system that allows subfederal units to serve as laboratories that establish their own normative outcomes on divisive issues, even though one community or state’s moral judgment may well differ from the others, and might also differ from a national consensus. The wide range of state and local approaches to obscenity, gambling, abortion, and LGBTQ rights illustrate the ability of federalism to accommodate a wide range of policy outcomes on divisive issues. But, federalism scholars also show that culture wars policies that are so resistant to negotiation and compromise may hinder federalism’s tendency to accommodate policy diversity and experimentation. That is, intractable cultural wars issues might disrupt the structure of federalism. (Hollander and Patapan, 2016)

The three cases in our study hold as constant federalism disputes over deeply felt and inflexible values. That will allow us to more fully address the extent to which New Federalism is used in an array of cultural war disputes. Yet, each case presents unique public policy issues. One case concerns religious liberty and the place of religious values in policymaking. A second case focuses on the often intractable and typically secular disputes over the regulation of firearms and the extent to which states can regulate guns free from federal constraint. A third and final case focuses on debates over LGBTQ rights that invoke both deeply felt religious and secular values, both in favor and against expanding those rights.

All three cases jointly present the opportunity to study New Federalism outside of the economic context in which it was created. Moreover, we can initially determine whether New Federalism “behaves” the same in culture wars disputes implicating different substantive issues, or whether the issues themselves somehow drive New Federalism to a successful or unsuccessful outcome. For these purposes, pursuing a similar case strategy allows us, at this stage of our investigation, to focus more on the hypothesis-generating aspect of case studies that hold one broadly defined element constant and less on case control criteria. (Gerring, 2008, 668-670; King, Keohane, Verba, 1994, 45-48)

Within each case we focus on the constitutional and federalism arguments made by actors who are engaged in federalism disputes and are stakeholders and participants, to varying degrees, in the structure of American federalism. (Read, 2016, 340) Actors such as state Attorneys General, interest groups, and others are situated at several different points in the structure of American federalism and capable of influencing disputes over that structure through litigation. As stakeholders, they are concerned with specific, substantive outcomes in certain policy areas, and they are also concerned with the definition and redefinition of the structure of federalism. In sum, federalism participants will use the structure of federalism to seek policy outcomes in certain areas to which they are ideologically committed, and will also in parallel seek to interpret federalism a certain way to achieve that outcome.

For instance, state AGs can initiate litigation directly against the national government or can join with others AGs to oppose or sustain federal policy through litigation. AGs can also serve as amicus—friends of the court—in federalism lawsuits, through which they make their preferences known to judges

even though they are not direct litigants. Interest groups and groups of legislators and governors can serve similar functions by either sponsoring federalism litigation directly, or more likely by serving as amicus in cases in which they have an interest. By considering actors within the structure of federalism, we are better able to see how New Federalism doctrine resonates throughout the legal process by considering how it is used in constitutional argumentation and disputes over intractable values and beliefs.

(Scheingold, 2010)

Case One: New Federalism and Religious Policymaking

The Court under Chief Justice William Rehnquist's leadership solidified New Federalism jurisprudence in a series of rulings in the 1990s. Cases such as *New York v. U.S.* in 1992, *U.S. v. Lopez* in 1995, *Printz v. U.S.* in 1997, and *Morrison v. Olson* in 2000 showed that a consistent majority of Justices were willing to place limits on federal power in order to protect state sovereignty. Coinciding with the Court's relative clarity on new federalism was its opacity on the First Amendment's Establishment Clause. Even though the Rehnquist Court was relatively united on matters of federalism, it remained divided over the scope and meaning of the establishment of religion and the extent to which the main Establishment Clause precedent, *Lemon v. Kurtzman* (1972), should be followed. To be sure, the coalitions supporting *Lemon* as a precedent were constantly shifting from one Establishment Clause case to the next, and even though the Rehnquist Court was more deferential to state and local religious policymaking, and overturned fewer state and local laws concerning church-state issues than the Burger and Warren Courts, the Justices were unable to reach a lasting agreement on the interpretation of the clause as it applied to states and localities. (Banks and Blakeman, 2012, 138-144)

The Court's inability to clarify the meaning of the establishment of religion encouraged some federalism constituents to press for a radical redefinition of the Establishment Clause as a federalism provision and not as a rights granting provision (unlike the companion Free Exercise clause). They were motivated in large part by conservative arguments that sought a more accommodationist reading of the Establishment Clause that allowed significant leeway for state and local governments to accommodate

religious interests in policymaking affecting schools and other public institutions.¹ A more accommodationist reading of the clause would significantly change the Court's historical interpretation that emphasized the separation of government and religion. Federalism stakeholders found support for this view in Justice Clarence Thomas, who signaled his preference for a return to pre-New Deal dual federalism that emphasized state sovereignty. Thomas in a series of opinions announced his support for a federalism reading of the Establishment Clause too, a reading that was generally consistent with his negative view of post-New Deal federalism cases. (Banks and Blakeman, 2012, 133-146)

A federalism reading of the Establishment Clause sees it as primarily limiting the powers of the federal government, but not the states. The clause is therefore a jurisdictional provision that ultimately limited national power over state religious policymaking. Taken to its logical end, reading the clause through a federalism lens would overturn decades of precedent and, more radically, the incorporation of the clause against the states. Establishment Clause federalism arguments were not new by the 1990s and had been developed by legal and constitutional historians throughout much of the 20th century. The interpretation had been litigated too in 1983 in the moment of silence case *Jaffree v. Board of School Commissioners of Mobile County*. Indeed, in that case federal district judge William Brevard Hand ruled that the clause should be considered a federalism provision, and subsequently not only upheld the school district's moment of silence law, but also overturned the Supreme Court's incorporation of the clause against the States (and by implication approximately 40 years of church-state jurisprudence). The Supreme Court decided an appeal in *Wallace v. Jaffree* in 1984, and unanimously overturned Judge Hand's new reading of the First Amendment. However, the justices were very divided on the substantive issue of whether the Establishment Clause prohibited moments of silence policies in public schools. A concerted effort to press the Court to adopt it a federalism reading of the Establishment Clause nonetheless developed after the Court rejected the interpretation in *Jaffree*. That effort was prompted by

¹ A separationist reading of the Establishment Clause views the clause as erecting a wall of separation between church and state. To be sure separationist and accommodationist interpretations of the clause are broad categories and do not capture the full extent of the range of the Justices' opinions on church-state relations.

several federalism constituents: State Attorneys-General, interest groups, and a high court Justice. All of the actors were responding to the Court's consistent interest in redefining state-federal relations, the desire for change in Establishment Clause jurisprudence, and partisan politics at the state level.

In two cases, *Zelman v. Simmons-Harris* (2002) and *Elk Grove United School District v. Newdow* (2004), Justice Thomas signaled in his concurring opinions an interest in developing a federalism reading of the Establishment Clause. *Zellman* concerned state vouchers for private schools, including religious ones, and *Newdow* concerned whether the words "under God" in the Pledge of Allegiance violated the establishment of religion. In *Zellman* Thomas argued that the clause protects a separate regulatory role for states in matters of religion, and in *Newdow* he directly claimed that the clause "is best understood as a federalism provision—it protects state establishment from federal interference." (J. Thomas, concurring, *Elk Grove USD v. Newdow*, 2004, 51)

Two conservative interest groups, the Pacific Legal Foundation and the Claremont Institute, both presented federalism arguments in amicus briefs in *Newdow*. The Claremont brief, submitted by former Attorney General Ed Meese, made a clear and concise argument for Establishment Clause federalism. Other cases after *Newdow* saw other conservative groups arguing for the same interpretation of the clause, and using New Federalism precedents to bolster their claims. The Eagle Forum, also a conservative group, submitted a brief in the Ten Commandments cases *Van Orden v. Perry* (2005) and *McCreary Co. v. ACLU* (2005) in which the group argued that the Establishment Clause should be interpreted as a federalism provision that protects state policy, and cited Justice Thomas's concurrence in *Newdow* in support. The groups Judicial Watch and the Pacific Legal Foundation did the same. None of the Justices, including Justice Thomas, referred to the argument in the Court's opinions. What is notable about the briefs in *Perry* and *McCreary* is that the groups specifically relied on the key New Federalism precedents *Lopez*, *Morrison*, and *Printz* to support their reading of the establishment of religion.

Three other legal cases, *Cutter v. Wilkinson* (2005), *Hein v. Freedom from Religion Foundation* (2007), and *Arizona Christian School Tuition Organization v. Winn* (2010) round out this policy area. At issue in *Cutter* was the constitutionality of the Religious Land Use and Institutionalized Person Act

(RLUIPA) a federal statute passed after the Religious Freedom Restoration Act was in part declared unconstitutional by the Court. RLUIPA created federal regulations over the powers of local and state governments to regulate religious institutions, often in the context of zoning, and regulations affecting government policies on the religious rights of institutionalized persons. The state of Ohio challenged the constitutionality of RLUIPA, as did the Commonwealth of Virginia in a similar case. Ohio's case was accepted for review by the Court and Virginia with eight other states² filed an amicus brief. Ohio argued in part that "the Establishment Clause's federalist aspect blocks Congress from imposing its choices on States regarding how to accommodate religion," thus RLUIPA was an unconstitutional interference with state religious policymaking. Virginia in its brief echoed that argument, and both states referenced New Federalism precedents in support of their federalism reading of the first amendment. Conservative interest groups like the Eagle Forum and Pacific Legal Foundation again filed briefs advocating for a federalism interpretation in *Cutter*, but for the first time other religious interest groups, such as the National Association of Evangelicals and Union of Orthodox Jewish Congregations, also filed amici briefs and argued against a federalist reading of the clause, with the NAE asserting that the federalism claim was "ambitious and dubious." (Brief of the National Association of Evangelicals, 2003, 25) Thus, unlike in prior cases, opposing interest groups argued over Establishment Clause federalism and demonstrated that religious groups were certainly not of one mind on the issue.

Cutter is also noteworthy since the U.S. Government argued against a federalism interpretation too. The Bush administration's brief to uphold RLUIPA specifically addressed Ohio's argument. President George W. Bush's Solicitor General, Paul Clement, contended that "it is too late in the day to argue that the federal Constitution contains two different Establishment Clauses with varying levels of potency" depending on whether federal or state policymaking is at issue. (Banks and Blakeman, 2012, 157). Clement's argument against a federalism reading of the clause effectively foreclosed the development of Establishment Clause federalism, and by extension the use of the Court's New

² Virginia was joined by Alaska, Idaho, Iowa, Nebraska, North Dakota, Oklahoma, U.S. Virgin Islands, and West Virginia.

Federalism to restrain federal oversight of state religious policymaking. Justice Thomas penned a concurring opinion in *Cutter* in which he suggested that Ohio and Virginia overstated the federalism component in the first amendment, although he did not support a specific principle of law in response.

In *Hein* an interest group challenged the constitutionality of the White House Faith-Based Initiatives Program established by President George W. Bush, and a corollary issue focused on Article III standing to challenge executive branch policy. The state of Indiana, joined by eleven other states³, submitted a brief in which it argued that federalism concerns justify more stringent restrictions on standing, and especially so in Establishment Clause cases “which increasingly threaten to put state-government bodies under federal-court supervision.” (Brief filed by the State of Indiana; Banks and Blakeman, 2012, 161)

In *Winn* the issue was the constitutionality of state tax credits for private religious schools. Indiana, again joined by several states⁴, submitted a brief in which it argued that the Court should “adhere to...principles of federalism...to limit federal courts to their proper role in Establishment Clause cases.” (Brief for the State of Indiana, 2011) The states’ brief did not advocate for a federalism interpretation of the Establishment Clause, but instead followed the same argument in *Hein* and sought to limit standing to bring lawsuits against states, thus effectively limiting federal court oversight over state religious policymaking. Other interest groups did press a federalism reading of church-state relations. The Center for Constitutional Jurisprudence, the Rutherford Institute, and the Becket Fund argued on federalism grounds. The Center pressed for a federalism reading of the Establishment Clause, and the Rutherford Institute and Becket Fund emphasized a more traditional federalism argument that states are laboratories and should be allowed more room to experiment with religious policymaking.

The briefs from *Winn* discussed above suggest that some groups and states altered their federalism arguments as regards the Establishment Clause and religious liberty in general. (Banks and

³ Indiana was joined by Alabama, Florida, Nevada, Oklahoma, Texas, Washington, Colorado, Michigan, North Dakota, South Carolina, and Virginia.

⁴ Indiana was joined by Michigan, Alabama, Colorado, Florida, Georgia, Louisiana, Mississippi, Pennsylvania, South Carolina, Texas, Utah, and Washington.

Blakeman, 2012, 176-177) Thus, instead of arguing for a reinterpretation of the clause as a federalism provision, the groups seek to affect the Court's view of state religious policymaking through more customary and established principles of federalism. Instead of protecting state policymaking from federal oversight through a reinterpretation of the Establishment Clause as a jurisdictional and federalism provision, the groups' arguments now suggest that state policymaking can simply be insulated from federal oversight through the application of traditional federalism principles that safeguard the ability of states to experiment with policy outcomes and also limit federal court oversight of how state laws are administered.

One recent case suggests that Establishment Clause federalism is effectively dead. In *Town of Greece (NY) v. Galloway* (2014) the Court upheld a local government board policy of opening its meetings with a prayer by clergy. In determining that the practice did not violate the Establishment Clause the Court noted it was consistent with the traditional use of prayers by Congress and state legislatures, practices that had also been approved by the Court in prior decisions. It is notable that only two amicus briefs were filed that advocated for a federalism reading of the Establishment Clause in the case. One brief was submitted by the Center for Constitutional Jurisprudence, a group that had long advocated for a federalism approach to church-state issues. The other groups, the Southeastern Legal Foundation, seems to be a relative newcomer to church-state litigation. Since the dispute concerned local religious policymaking similar to *Perry* and *McCreary County* it would seem likely that if interest groups or even state AGs were still interested in pursuing a federalism reading of establishment, they would have done so in greater numbers.

Several reasons for the failure of new federalism to lodge in the Establishment Clause can be suggested. One reason is the opposition by the national government. President George W. Bush's administration did not support the federalist turn for church-state relations under the Establishment clause, and displayed its strong opposition in arguments to the Court in *Cutter*. Another reason comes from division among State Attorneys General. Very few states gravitated to a federalism reading of the Establishment Clause and consistently supported it over several cases at the Supreme Court. It may be

that few state AGs were really aware of the debate to begin with, and state legislators and governors were probably very ambivalent about it—if they were even aware of the debate too. Another reason concerns interest groups that are engaged in religious lobbying and church-state issues. Many well-known religious interest groups did not actively support a federalism interpretation of church-state relations, and pragmatically it made little sense for them to do so. Many liberal and conservative groups are both deeply engaged in national policymaking and maintain lobbying offices in Washington and cultivate relationships with members of congress and administrators in the White House and federal agencies. Thus, they typically have a national view of religion issues, and federalizing religious policymaking by allocating more power to states and municipalities does not fit with how they use the national political process to further their own interests.

Finally, the lack of support among the Justices for a federalism reading of the Establishment Clause was likely the most important factor. The Court was not receptive to it, and even Justice Thomas, who initially supported a federalism reading of the clause, modified his stance over the course of several years. The Justices of course will not be very willing to upend decades of Establishment Clause jurisprudence either.

Case Two: Firearms and Firearm Freedom Laws

Gun control and gun rights are not typically considered a culture wars issues and are not usually mentioned in research on culture wars conflicts. Yet, American politics has become increasingly polarized over the regulation of firearms, with advocates for more gun control or for expansive gun rights seemingly less interested in working towards compromise, with policy positions on both sides now deeply entrenched and fundamental. Recent polling data from the Pew Forum shows that although Americans are in relative agreement over certain types of gun control policies such as background checks or limits on certain weapons modifications, the past 20 years has seen a widening gulf between liberals and conservatives over gun control versus gun rights. (Pew, 2016) Polarization over firearms policy has increased since the 1990s, and in this sense guns are akin to other culture war issues in that one's views on firearms are likely to be deeply entrenched and not easily amenable to compromise.

Throughout much of the twentieth century federal power over gun control increased, with Congress using its powers over interstate commerce to pass several omnibus statutes that regulated the manufacture, distribution, and possession of firearms. Those regulations ranged from outright prohibition of certain types of guns to the use of taxing and licensing schemes to control gun manufacturers and merchants at the point of sale. However, federal laws coexisted alongside state and local laws, and states maintained a history of regulating firearms in conjunction with federal law (Vissard 2015).

Two key new federalism cases, *U.S. v Lopez* (1995) and *Printz v. U.S.* (1997), were decided in the context of firearms policy. In *Lopez* the issue was the constitutionality of the Gun Free School Zones Act, in which Congress could rely on its interstate commerce powers to ban the possession of firearms near schools. A divided Court ruled 5:4 that Congress could not use commerce clause power as a “general police power” to ban the intrastate possession of firearms. In *Printz* the issue was whether Congress could require states to conduct background checks on behalf of the federal government for handgun sales. The Court ruled that Congress cannot commandeer the states to enforce federal policy. Both cases heralded the new federalism jurisprudence of the Rehnquist Court, and also prompted interest groups to initiate organized litigation campaigns to get the Supreme Court to address and expand Second Amendment rights. As Thomas Keck has noted, gun rights advocates up to the 1990s had typically lobbied Congress to block legislation restricting gun rights, but as Congress became more receptive to federal gun control policies those groups turned to litigation. Gun rights groups and criminal defense attorneys hoped to build upon the *Lopez* precedent to attack a range of federal restrictions on gun ownership. (Keck, 2014, 86) By and large the gun rights groups were successful, since in two key cases, *District of Columbia v. Heller* (2008) and *Chicago v. McDonald* (2010), the Supreme Court ruled that the Second Amendment was an individual right to possess firearms (*Heller*) and the right was incorporated against the states (*McDonald*). Coinciding with the determination by gun rights groups to litigate was a movement in several, mainly western, states to enact Firearms Freedom Acts to protect the *intra*-state regulation of guns. The statutes are part of a larger movement among states to assert their sovereignty and to register their opposition to certain federal policies. (Dinan, 2010)

New federalism arguments were present in the *Heller* and *McDonald* cases. In *Heller* several groups that sought to protect the District of Columbia’s sweeping ban on the possession of handguns argued that the Second Amendment was a federalism provision that limited the power of the national government over the states. The District argued as well that as a federalism provision the amendment “at minimum allows local governments to make different tradeoffs [on gun control] based on local conditions.” (District of Columbia Brief, 2008, 43) A range of federalism stakeholders such as the U.S. Conference of Mayors and several states⁵ pressed the Court to uphold D.C.’s handgun ban and echoed D.C.’s argument that the Second Amendment was not a rights-granting provision but instead was a federalism provision that helped define the federal-state relationship. Further, the briefs used the key new federalism cases involving firearms, *Lopez* and *Printz*, to advocate for the right of states “to perform their role as laboratories for experimentation.” (Brief for the U.S. Conference of Mayors, 2008, 23) Indeed, the City of Chicago’s brief even cited Justice Thomas’s concurring opinion in *Elk Grove* in which he articulated a federalism reading of the Establishment Clause, as support for a federalism reading of the Second Amendment.

The briefs in favor of *Heller*, and against D.C.’s ban on handguns, rarely touched upon federalism issues. This is for the simple reason that the *Heller* litigation was designed primarily to establish the Second Amendment’s right to bear arms as an individual right, and was litigated as an individual rights claim instead of a state power or federalism claim. As Keck has noted, *Heller* (and *McDonald*) are prime examples of conservative advocates using rights-based litigation to challenge an existing policy status quo, in this case long-standing local and state gun control policies. (Keck, 2014, 86-88) Although the brief filed by the State of Texas, and joined by 29 other states, referenced Justice Thomas’s concurring opinion in *Printz* in which he argued for an individual rights interpretation of the Second Amendment, most of the gun rights briefs made arguments for an individual right based on a reading of the common law, British political history, American constitutional history, and detailed readings of the Federalists and

⁵ New York, Hawaii, Maryland, Massachusetts, New Jersey, and Puerto Rico joined in one amicus brief.

Anti-Federalists. In general new federalism arguments were absent from the gun rights side of the litigation.

The follow-up case to *Heller*, *McDonald v Chicago*, tells a similar story. The main question for the Court in *McDonald* was whether the individual right to own guns announced in *Heller* should be incorporated against the states. The briefs arguing for incorporation were usually straightforward arguments that restated the Court's history of incorporating rights under the 14th amendment's due process clause and noted that the Second amendment should not be treated differently than other rights granting amendments. New federalism based arguments were typically absent from pro-incorporation briefs mainly because their overall goal was to convince the Justices to treat the right to own guns on equal terms as other rights. Briefs filed by the conservative Goldwater Institute, 891 state legislators, and the State of Texas (joined this time by 37 other states) all argued that federalism should not be considered a barrier. Using dicta from *Lopez* and *New York v. U.S.* the briefs suggested that federalism has never been considered an end in itself, but instead "secures to citizens the liberties that derive from the diffusion of sovereign power." (Brief of The Goldwater Institute, et. al, 2010, 26) Interestingly, the conservative Eagle Forum argued that incorporating the Second Amendment does not imply that all rights in the Bill of Rights should be incorporated, and referenced further Justice Thomas's concurring opinions in *Elk Grove* and *Zelman* that the Establishment Clause should be considered a federalism provision, and not a rights-granting provision (and hence not incorporated against the states).

The briefs against incorporation of the amendment relied to a large extent on new federalism doctrine. A brief filed by Chicago, and joined by several progressive cities like San Francisco, Seattle, and Portland (OR), relied on *Lopez* and *Printz* to argue that federalism allows states and localities to serve as laboratories and experiment with policies that best reflect their unique needs. A brief filed by the state of Illinois, and joined by Maryland and New Jersey, used Justice Thomas's concurring opinions in *Elk Grove*, *Van Order*, and *Cutter* to argue that the second amendment should be considered a federalism provision that is structural and jurisdiction, and thus resistance to incorporation. Since it defines a

boundary between the federal government and the states it should not be incorporated like other rights in the Bill of Rights.

Coinciding with the *McDonald* litigation was a state-level movement that sought to test the legitimacy and reach of federal gun control laws. The movement, part of a larger and more nebulous state sovereignty movement, focused on getting states to adopt a Firearms Freedom Act (FFA) that would declare state regulatory power over all firearms, ammunition, and gun accessories manufactured and retained within that states. FFA statutes would rely on intrastate commerce justifications to limit federal gun laws to cover only firearms that had been involved in interstate commerce. The FFA movement built upon the Court's decisions in *Lopez* and *Morrison*, both of which limited Congress's ability to use the interstate commerce clause to regulate certain types of gun possession. By 2010 eight states had passed FFA laws, and a test case was generated in Montana to get the U.S. Supreme Court to again focus on gun rights, and extend its *Lopez* and *Morrison* decisions to protect from federal regulation the *intrastate* production and sale of firearms. (Dinan, 2010, 1664-65)

Montana was the first state to pass a Firearms Freedom Act, which declared in part that “a personal firearm, firearm accessory, or ammunition that is manufactured commercially or privately in Montana and that remains within the borders of Montana is not subject to federal law or regulation, including registration...” (Dinan, 2010, 1650) After the law's passage in 2009, the Montana Sports Shooting Association (MSSA) sought guidance from the federal Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) on the extent to which federal law governed the intrastate manufacture and sale of firearms. The ATF responded that a federal license is required to manufacture guns for sale to others, and in reaction to that directive MSSA and its leader Gary Marbut sued the federal government to enjoin enforcement of federal law over the solely intrastate conduct described above. A federal district court dismissed the suit due to standing concerns, and on appeal to the 9th Circuit several groups and states participated as amicus in favor of the law. As CATO Attorney Ilya Shapiro argued, the goal of the litigation was “to reinforce state regulatory authority over commerce that is by definition intrastate, [and] to take back some of the ground occupied by modern Commerce Clause jurisprudence.” (Shapiro, 2013)

At first glance the FFA movement reflected the growing partisanship over gun rights and the attempts by red states to frustrate implementation of federal gun control policy. Most states have introduced FFA bills into their legislatures, but only 9 states have passed the bills into law as of 2015. As Austin Raynor has noted too, such laws “are a much broader trend,” and show how “federal policy subject to regional unpopularity has increasingly been met with affirmative [state] legislative resistance.” (Raynor, 2015, 614-15)

The Ninth Circuit ruled in 2013 that the MSSA and Marbut had a standing to sue the federal government, but dismissed the lawsuit for failure to state an appropriate claim. The court determined that the federal firearms law was well settled and reached intrastate production of guns for sale and distribution within a state only. (*MSSA v. Holder*, 9th Circuit, 2013) A subsequent petition for writ of certiorari to the U.S. Supreme Court was denied by the high court in January 2014. In the circuit court litigation, the state of Montana intervened and with other amicus groups raised several new federalism issues. In the cert petition to the Supreme Court new federalism was raised as well.

The conservative groups Center for Constitutional Jurisprudence and the Goldwater Institute, along with the more libertarian CATO Institution, argued that the key new federalism precedents *Lopez* and *Morrison* established that states retain significant police powers to regulate conduct within their states, from suppressing violent crime to regulating firearms that only remain within a state and do not enter interstate commerce or traffic. The Montana FFA had no impact on interstate commerce, therefore the federal government had no authority to preempt it. The State of Montana, as intervenor, argued that *Lopez* also cautions against allowing the federal government to “pile inference upon inference” to expand its interstate commerce power over solely intrastate conduct. A brief filed by the State of Utah, and joined by 8 others⁶ argued that *Lopez*, *Morrison*, and *New York* reflect the Supreme Court’s narrow construction of federal power, embodied textually in the 10th amendment, and under those cases Montana’s intrastate

⁶ Alaska, Idaho, Michigan, Nebraska South Carolina, South Dakota, West Virginia, and Wyoming.

regulation of guns is protected from federal oversight. The states' brief also argues that states cannot assert their own power under federalism "until the courts revisit and alter their expansive reading of the 'commerce' that Congress may properly regulate" under the interstate commerce clause. The brief encourages the court to review the substantial effects test in commerce clause jurisprudence since it has allowed Congress to effectively legislate without limit on intrastate activities, and the test has no textual grounding in the Constitution and is at odds with the high court's current federalism jurisprudence. (Utah Brief, 2013, 9-12)

Similar to Utah's brief, the conservative Pacific Legal Foundation argued for a reassessment of the substantial effects test. According to the PLF lower courts misapplied the test by expanding it to cover noneconomic activities within a state, and in so doing departed from the Supreme Court's use of the test in *Lopez*, *Morrison*, and *Gonzales v. Raich* (2005). In the follow up cert petition to the Supreme Court the state of Montana argued for a re-assessment of the substantial effects test, and the state of Utah's brief in support of certiorari argued the same.

The use of New Federalism doctrine in firearms policy litigation has had mixed results. In the important new federalism precedents of *Lopez* and *Printz* the high court struck down national firearms regulations on federalism grounds. Both cases were catalysts for a broad-based gun rights movement that used litigation to establish that the Second Amendment grants an individual right to own firearms, and that right is incorporated against the states. During that litigation campaign from *Heller* to *McDonald* new federalism arguments and precedents were generally used only by the federalism actors that wanted to preserve the existing policy status quo, in which the Second Amendment was not interpreted as a right-granting amendment and the federal government retained very broad authority to regulate firearms. The rights-based approach was also used by key federalism actors, and shunned new federalism arguments in favor of an individual rights approach to guns—an approach that would be far more encompassing if the Court accepted it, and an approach that would truly upset the policy status quo.

However, once the individual right to possess guns was established in *Heller* and incorporated in *McDonald* debate over firearms policy continued, and new federalism reverted back to a means through

which stakeholders could attack the policy status quo. In the Montana Firearms Freedom Act case federalism stakeholders relied on new federalism claims and cases to insulate intrastate conduct related to guns from federal regulation. That goal of protecting intrastate gun policy became bound up with a broader goal of getting the Supreme Court to reassess its expansive interpretation of the interstate commerce clause powers of Congress. The substantial effects test of the clause, which allows Congress to regulate conduct that substantially affects interstate commerce, is the target of some stakeholders that seek to further protect state policymaking from the federal government.

Case Three: New Federalism and LGBTQ Rights

In an ordinance that was set to become effective on April 1, 2016, the city of Charlotte, North Carolina amended its existing non-discrimination public accommodation law to include marital status, familial status, sexual orientation, gender identity, and gender expression. Previously, the Charlotte ordinance only barred businesses from taking away rights of people using places of public accommodations based on race, color, religion, sex, and national origin. (City of Charlotte 2017). The change to the Charlotte ordinance occurred less than a year after the U.S. Supreme Court, in *Obergefell v. Hodges* (2015), held that same-sex couples had the constitutional right under the Fourteenth Amendment's Due Process and Equal Protection Clauses to wed; and approximately two years after the same court ruled in *United States v. Windsor* (2013) that Congress exceeded its authority in passing the 1996 Defense of Marriage Act, which defined marriage in heterosexual terms, on due process and equal protection grounds because it discriminated against same-sex couples that were legally married in states authorizing those relationships. Still, shortly before the Charlotte ordinance went into effect, the North Carolina Assembly repealed it with House Bill (H.B.) 2 (or, "Public Facilities Privacy and Security Act"), in part because it would have permitted transgendered persons to use public bathroom facilities on the basis of their gender identity instead of the gender declared on their birth certificate. Whereas critics denounced North Carolina's action as discriminatory, supporters claimed the repeal was necessary to protect privacy rights and public order (Berman 2017; Gordon, Price, and Peralta 2017).

Amidst a fury of controversy, boycotts, and backlash, and in light of news studies showing that the state stood to lose nearly 4.7 billion dollars by 2028 in jobs, businesses, and sports revenue (Associated Press 2017), the North Carolina legislature reversed course and revised H.B. 2, a measure that repealed the law but still contained provisions that restricted cities and counties from passing anti-discrimination ordinances (Bauerlein and Kamp 2017). While the reaction to North Carolina's legislative action is still unfolding and likely to satisfy only a few on each side of the issue, there is little doubt that the episode represents "a strange and profoundly American collision of polarized politics, big-time sports, commerce and the culture wars." (Faussett 2017). While the constitutional issue of same-sex marriage was settled in *Obergefell*, its implications on a legal and cultural scale, and the issue of shaping transgender rights as a matter of constitutional law, remains in flux on the national and state level, especially in terms of new federalism judicial politics. To illustrate, before President Trump's election, the Obama administration was supportive of transgender rights, a fact helped a transgender teen who wanted to use a public restroom at a Virginia high school in *Gloucester County School Board v. G.G.*, a case that the Supreme Court had scheduled for review in its current Term. But, after the Trump administration rescinded the guidance letter issued from the U.S. Department of Education that supported the transgendered teen's claims, the Supreme Court vacated the case in an effort to allow the U.S. Court of Appeals for the Fourth Circuit reconsider the issue (Howe 2017).

The episode is also a manifestation of the political and legal dynamics underlying new federalism politics and constitutional rights, making it an ideal case study for analysis. Using the American Bar Association's Preview of United States Supreme Court Cases and SCOTUSblog as sources for identifying relevant state stakeholders and their constitutional arguments in federal litigation testing the limits of federal and state action on the issue of LGBTQ rights, this paper's section will focus on three cases: the first two leading up to and then establishing same-sex marriage (*Windsor* and *Obergefell*) and the third relating to *Obergefell's* implications for transgender rights (*Gloucester County*). Of particular interest is investigating how the constitutional arguments from opposing sides of the same-sex and transgender

rights' issues implicate the basic new federalism and culture war tension of advancing or protecting state rights and sovereignty against federal overreach.

Windsor, Obergefell and New Federalism

In deciding whether a New York survivor of a same-sex marriage (sanctioned in Canada) is entitled to an estate tax exemption that was barred by Section 3 of the federal Defense Against Marriage Act, the Supreme Court in *United States v. Windsor* (2013) avoided determining if there is a constitutional right to same-sex marriage; and, in striking down Section 3, it did not do so because Congress overstepped its authority in “disrupt[ing] the federal balance,” but rather because the law violated Fifth Amendment equality principles in treating same-sex couples differently than heterosexual couples in terms of the federal benefits they receive in a marriage union. For the Court’s plurality, Justice Anthony Kennedy reasoned that Congress did overreach by enacting DOMA in one respect, however: disparate treatment “interfer[ed] with the equal dignity conferred by the States in the exercise of its sovereign power.” In doing so, Kennedy used the Fifth Amendment’s heightened level of scrutiny to limit Congress’s powers which, for some scholars, is unusual since “a state’s exercise of its police powers to identify a right that has not previously been used to justify heightened Due Process or Equal Protection clause scrutiny.” (Barnett 2013).⁷ Put differently, more rigorous review is needed since Congress was regulating marriage, a traditional area reserved for state police powers. Moreover, Kennedy’s opinion gave more weight to a sovereign state’s (New York) decision to grant same-sex marriage but disregarded, for some court observers, the possibility that states defining marriage in traditional terms ought to be given the same dignity and sovereign respect (Restuccia and Lindstrom 2013).

Notably, law professor Randy Barnett and other “federalism scholars” took to SCOTUSblog to point out that the arguments they made as amicus curiae brief writers in support of respondent Windsor

⁷ As Barnett explains, “state law is being used to identify a protected liberty or right within its borders against a federal statute.” Still, whether *Windsor* and Kennedy used intermediate scrutiny might be open to debate, however, as the language cited by Barnett for that proposition is not stated in words that are ordinarily linked to that level of review (i.e. “in determining whether a law is motivated by an improper animus or purpose, ‘[d]iscriminations of an unusual character’ especially require careful consideration.”) (Barnett 2013) (emphasis added).

were also ignored; that is, due to the Constitution’s structure, Congress could not foist its definition of heterosexual marriage on the states because it lacked the enumerated powers to upset the traditional authority of states to define and regulate marriage relationships through their police powers (Barnett 2013). How Justice Kennedy’s *Windsor* opinion implicated federalism logic, but “converted it from an enumerated powers into a ‘liberty’ argument” (Barnett 2013), is significant because some state *amici curie* (representing Indiana and 12 other states) used structural arguments of federalism to reach an opposite conclusion. In defending Congress’s power to enact DOMA, the Indiana (et al.) *amici* argued that conflating structural protections (which limit national government powers) with individual rights claims enables courts to use heightened scrutiny (instead of rational basis) to determine if Congress exceeded its powers in regulating federal marriage benefits. Using a higher standard of judicial review, then, is improper because it would make it easier to find that DOMA discriminates against same-sex couples by defining marriage in heterosexual terms, thus undermining the sovereign authority of states to define marriage in traditional terms (Zoeller 2013, 12). Notably, the Indiana (et al.) *amici* had good reasons to be concerned, as what the *Windsor* Court did is precisely what they feared, which also was in line with the *amici* States (New York, plus 14 other states, plus the District of Columbia) views supporting respondent *Windsor* (Schneiderman 2013)⁸ as well as Barnett’s (2013) interpretation of the case.

For some court watchers who ironically note, *Windsor*’s reaffirmation of New York’s sovereign decision to grant marriage rights to same-sex couples was contradicted by the Court’s ruling in *Obergefell v. Hodges* (2015), an outcome that “swept away” the democratic and sovereignty rights of several states to keep opposite-sex and traditional notions of marriage as their preferred policy (Duncan 2015). In their merit briefs, the four states at issue (Kentucky, Ohio, Michigan, and Tennessee) adopted the same federalism themes to assert that they had the sovereign right to create a ban on same-sex marriages or to keep a separate prohibition on recognizing them for same-sex marriages that were legally sanctioned

⁸ Notably, the New York *amici* also argued that Section 3 of DOMA would fail any level of constitutional review, intermediate, rational basis, or otherwise. (Schneiderman 2013)

elsewhere (Denniston 2015a). Notably, unlike *Windsor*, the states defending the bans arguably had the disadvantage of not having the support of the federal government, as the Obama administration and its Department of Justice sought to have them struck down (Denniston 2015b).

Citing the principle that the exercise of state police powers is subject to overriding constitutional limitations (such as due process and equal protection guarantees), the attorney generals of Massachusetts and 16 other states and territories (Table 1) argued as *amici* that “federalism considerations” do not endorse the discriminatory effect of same-sex marriage bans, especially when they target specific or unpopular groups. The Massachusetts (et al.) *amici* brief also maintained that legally recognizing same-sex marriage will not disrupt their sovereign capacity to regulate and license marriage to those or opposite sex couples; and, that same-sex marriage advances a multitude of legitimate governmental interests, such as the strengthening the institution of marriage and promoting the health and well-being of children and communities at large (Healey 2015).

Table 1. State Actors and Stakeholders in LGBTQ Culture Wars (Amicus Briefs in *Windsor* and *Obergefell*)

<i>U.S. v. Windsor</i>	<i>For Petitioner U.S. and Respondent Windsor (Pro-Same-Sex)</i>	<i>For Intervening Respondent (BLAG)+ (Pro-Heterosexual)</i>
	Brief on the Merits for the States of New York, Massachusetts, California, Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, New Hampshire, New Mexico, Oregon, Rhode Island, Vermont, and Washington, and the District of Columbia,	Brief for Indiana and 16 Other States (Alabama, Alaska, Arizona, Georgia, Idaho, Kansas, Michigan, Montana, North Dakota, Oklahoma, South Carolina, Texas, Utah, Virginia, West Virginia, and Wisconsin)
<i>Obergefell v. Hodges</i>	<i>For Petitioners (Pro-Same Sex)</i>	<i>For Respondents (Pro-Heterosexual)</i>
	Brief for Massachusetts, California, Connecticut, Delaware, the District of Columbia, Illinois, Iowa, Maine, Maryland, New Hampshire, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington	Brief for Louisiana, Utah, Texas, Alaska, Arizona, Arkansas, Georgia, Idaho, Kansas, Montana, Nebraska, North Dakota, Oklahoma, South Dakota, and West Virginia
	Brief for Hawaii	Brief for Alabama
	Brief for Minnesota	Brief for South Carolina
	Brief for Virginia	Brief for Robert J. Bentley, Governor of Alabama
	Brief for Lisa Brown, Clerk/Registrar of Deeds for Oakland County, Michigan*	Brief for Idaho Governor C.L. “Butch” Otter
	Brief for County of Cuyahoga, Ohio	
	Brief for 226 Mayors; Mayors for the Freedom to Marry; U.S. Conference of Mayors; International Municipal Lawyers Association; National League of Cities; Cities of Los Angeles, San Francisco, Chicago, New York and 36 Other Cities	

Notes: + BLAG=Bipartisan Legal Advisory Group of the U.S. House of Representative, which intervened because Department of Justice and Attorney General refused to defend federal Defense Against Marriage Act provision in question. *Brown, as an elected clerk, issued same-sex marriage licenses and was prosecuted by Michigan after a judge ruled that Michigan’s same-sex marriage ban was unconstitutional.

Source: American Bar Association. 2017. “Preview Briefs.” Accessed April 1, 2017.

http://www.americanbar.org/publications/preview_home.html.

Whereas Hawaii’s *amici* brief similarly argued that “history and tradition” and general deference to state laws cannot support exclusionary bans, and that same-sex marriage rights are essential to the institution of marriage and mankind’s “existence and survival” (Suzuki 2015), Virginia (which was on a different side of the issue in *Windsor*) agreed with the Massachusetts (et al.) *amici* to argue that “the

Fourteenth Amendment trumps federalism” because state laws cannot “enshrine unequal treatment of gay people.” (Herring 2015). For its part, in its *amici* filing Minnesota’s attorney general referred to evolving statutory law and judicial decisions, along with notions of fairness, to declare their support for same-sex marriage; while other state-related but indirect stakeholders in the litigation, as listed in Table 1, similarly did not address federalism principles *per se* in making their interested third-party arguments. Instead, they described the adverse real-life impact that the exclusionary bans had on their local governments and residents.

In defending the bans, a group of 15 States, led by Louisiana, resorted to new federalism language and precedents (such as *Bond v. U.S.* [2011]; *New State Ice Co. v. Liebman* [1932]; and *Gregory v. Ashcroft* [1991]) to argue that the Constitution’s structural limitations allocates diffuse power and citizen rights into multiple sovereigns; but that it is essential to safeguard state prerogatives by allowing states the freedom to enact policies that are in accord with local preferences and social or economic experiments that are filtered through (and debated in) the democratic process, especially in traditional areas falling within the state’s police powers, such as domestic relations. As such, while states must adhere to constitutional limitations, they still have the liberty to define and regulate marriage relationships that advance procreative and other interests without federal (or judicial) interference (Caldwell 2015). The separate *amici* briefs from Alabama and South Carolina voiced similar new federalism structural chords; though the latter state (also joined by the Alliance Defending Freedom) added that violating “foundational” Tenth Amendment and federalism principles would mean that “dual sovereignty is dead.” (Wilson 2015; Cortman 2015). Whereas the brief of Alabama’s governor also cited the Tenth Amendment as well in claiming that defining the fundamental right to (heterosexual) marriage, which is lodged in the Ninth Amendment, is a reserved state power (Bryne 2015), Idaho’s governor argued in another separate brief that principles of federalism and deference to the states dictate that “States and their people should be allowed to make important decisions of contested policy free from federal interference or Monday-morning judicial quarterbacking.” (Perry 2015).

Gloucester County School Board and New Federalism

Under the Obama administration, the Department of Education issued an unpublished 2015 opinion (guidance) letter that suggested that the receipt of federal education monies under Title IX was to be conditioned upon whether local school boards allowed transgendered persons that do not identify themselves on the basis of their biological identity to use non-separate restroom facilities in public schools. West Virginia and 20 other states filed an *amici curiae* brief that objected to that new requirement, arguing that the federal government exceeded its authority because Article I's Spending Clause imposed a structural limit that afforded the states, as sovereign entities, the discretion to tailor its bathroom policies based on biological or physiological characteristics determined at birth. Unless the new condition was removed, the brief argued, the States would be forced to adhere to it or lose billions of dollars that they relied upon to provide education to students and their residents.⁹ Notably, in asserting its argument West Virginia and the other states relied upon related structural new federalism and "clear statement" precedents (such as *Pennhurst State School and Hospital v. Halderman* [1981]; *Gregory v. Ashcroft* [1991]; *Bond v. U.S.* [2011]; *National Federation of Independent Business v. Sebelius* [2012]) that showed that Congress and federal agencies overstepped their boundaries by not clearly stipulating in law that the states were bound by the new condition (and forcing them to accept it). (Morrissey, Patrick. 2017).

In contrast, none of the interested third party briefs written by States or their attorney generals supporting the transgendered teen sought refuge in new federalism structural arguments. Instead, the New York (and et al.) *amicus* brief countered the violation of Spending Clause claims by asserting that the statutory text, as confirmed by judicial precedents, do not create new mandates on the recipients of federal educational funds. In fact, it asserted, there is no legal requirement that Congress specifically identify every single condition in its underlying statutes. Moreover, it maintained that States had legitimate

⁹ A separate argument, concerning whether courts must adhere to administrative decisions that are reasonable under the *Chevron* doctrine was also made; but it will not be addressed in this paper. Likewise, West Virginia and 18 other States in an earlier *amici* brief urged the Court to grant cert., based on structural federalism rationales; but as those claims mirror the rationale stated in its subsequent *amici* brief addressing the case's merits, it will not be discussed either.

interests in advancing laws that do not discriminate against transgendered persons, largely on the grounds that they allow for a safe and inclusive communities, public places, and workspaces. (Schneiderman 2017). The remaining *amici* briefs that were filed, as well, that represented the indirect stakeholders of the state-related entities supporting the transgendered teen did not utilize new federalism structural rhetoric to advance their causes; instead they concentrated on illustrating how inclusive and non-discriminatory laws and policies have a salutary impact on local communities and school districts (see Table 2).

Table 2. State Actors and Stakeholders in LGBTQ Culture Wars (Amicus Briefs in *Gloucester County School Board v. G.G.*)

<i>Gloucester County School Board v. G.G.</i>	<i>For Petitioner School Board (Pro-Gender Identification by Biology)</i>	<i>For Respondent G.G. (Transgendered Teen) (Pro-Gender Identification by Non-Biology)</i>
	Brief for States of West Virginia, and 20 Other States (Alabama, Arizona, Arkansas, Georgia, Idaho, Kansas, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, and Wisconsin; plus Maine (Governor, as pro se) and Kentucky (Governor)	Brief for States of New York, Washington, California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New Mexico, Oregon, Pennsylvania, Rhode Island, Vermont, and Virginia, plus the District of Columbia
		Brief for the City and County of San Francisco, The City of New York, and 29 Other Jurisdictions and Mayors
		Brief for School Administrators from 31 States and the District of Columbia
		Brief for Montgomery County Public Schools as Amicus Curiae Supporting Respondent

Source: SCOTUSblog. 2017. “Gloucester County School Board v. G.G.” Accessed April 1, 2017. <http://www.scotusblog.com/case-files/cases/gloucester-county-school-board-v-g-g/>.

Conclusions

Our three case studies suggest the following conclusions about new federalism and the culture wars.

First, the use of new federalism is opportunistic and tends to fit with an understanding that how policymakers perceive federalism is prompted more by substantive policy concerns, and less by a commitment to an understanding of the structure of federalism itself. (Raynor, 2015; Sullivan, 2006;

Shapiro, 2009) Thus, federalism arguments reflect a commitment to a policy outcome first instead of a commitment to states' rights or national power. In this sense, federalism stakeholders will use new federalism strategically in culture wars disputes in order to argue for a specific policy outcome. In church-state relations, for example, new federalism was used to argue for a federalism reading of the Establishment clause that would lower the "wall" between church and state and allow for fewer constitutional restrictions on state and local religious policymaking. It would also effectively (if not outright) overturn the key Establishment clause precedent *Lemon v. Kurtzman* (1971) which many conservative religious groups and policymakers perceive as wrongly decided.

With gun rights, new federalism was used by stakeholders who sought to uphold the existing interpretation of the Second Amendment as not granting an individual right, which allowed states and localities to maintain gun control measures as part of their traditional police powers. In opposition, litigants seeking to establish an individual right to own guns essentially ignore new federalism claims and focused instead on rights-based argument. Yet, after the Court ruled in *Heller* and *McDonald* for a constitutional, incorporated right to own guns, the debate over gun rights shifted to how states can effectively protect that right. Relying on intrastate commerce and police powers, states used new federalism to argue that states can broaden the right to own, manufacture, and even distribute guns within a state only. Some stakeholders used that shift to use new federalism to argue for a wholesale overturning of the Court's New Deal commerce clause jurisprudence, based on the ideological committee to more libertarian or original intent reading of the Constitution.

Regarding LGBTQ rights, the malleability of new federalism is illustrated by the different ways states and state-related stakeholders tailored their arguments to fit their advocacy needs on the issue of same-sex marriage and transgender rights. Whereas, in *Windsor*, structural federalism arguments and precedents were adopted or referenced to claim that Congress either lacked enumerated authority to define marriages or, conversely, that it had full powers to do so at least as a heterosexual union. While Congress's powers were limited and *some* state sovereignty was protected (in states supporting same-sex marriages), the Supreme Court did not decide the case by ruling that Congress was disrupting the

structural balance between the national government and states. Instead, the Court safeguarded the states' rights to be free from a heterosexual definition of marriage that impinged upon their state dignity on equality grounds. In contrast, with *Obergefell* the Court diminished state sovereignty in those states supporting same-sex marriage bans even though state stakeholders tried to defend them through the basic structural argument that states ought to have the democratic prerogative to define marriage in traditional terms. Although that argument was unsuccessfully used in *Obergefell*, it was also co-opted by states opposing federal power on the grounds that they must not be subjected to a new condition of Title IX funding that would adversely affect them if transgendered persons are allowed to use public restrooms based on their gender identity.

A second conclusion focuses on the role of certain actors in federalism disputes. In the debate over establishment clause federalism the George W. Bush administration strongly argued against a federalism reading of establishment in *Cutter v. Wilkinson*. While the impact on the Justices cannot be clearly discerned, it is significant that the executive branch directly confronted and refuted a specific reading of the first amendment when defending a federal policy. Conservative religious groups similarly did not commit themselves to an interpretation of the clause that would remove constitutional restrictions on state religious policymaking, even though many of them perceived the Court's interpretation of the clause over the past 70 years as too restrictive of religion.

With gun rights the Department of Justice under the Bush administration in 2004 articulated an individual rights interpretation of the Second Amendment and shifted the federal government's approach to gun rights. (Keck, 2014, 75-77; DoJ Letter, 2004) The Department of Justice's rights-based interpretation of the amendment perhaps dampened more federalism-based arguments in the ongoing debate over gun rights and gun control. By the time of the *Heller* litigation, though, it became clear that many federalism stakeholders were committed to an individual rights approach to firearms, an approach that dramatically limited federal and state power to regulate firearms.

Regarding LGBTQ rights, the most critical actor in the same-sex marriage context was the Supreme Court itself, as the justices divided along ideological lines to reason that Congress lacked the

authority to define marriage in heterosexual terms; and then establish a fundamental right to same-sex marriage. In both *Windsor* and *Obergefell*, state sovereignty was protected or diminished through a judicial analysis that put rights-based claims over structural federalism arguments and precedents. While the Trump administration's rescission letter took the issue of transgender rights off of the Supreme Court's agenda for the foreseeable future (and reversing the Obama administration's position), the same sort of structural new federalism arguments that were used in *Gloucester County* will surely return in the states attorneys' advocacy should the issue reappear—especially if and when Judge Neil Gorsuch is successfully confirmed as the next Supreme Court justice that will become a part of the conservative bloc.

A third conclusion suggests that when new federalism conflicts with rights-based arguments in culture wars issues, new federalism loses. The advocates for a federalism reading of the Establishment Clause portrayed it as a structural and jurisdictional provision that regulated federal power over the states. The clause was not meant to be a rights-granting provision. The same dynamic is observed in the debate over gun rights—the supporters of an individual rights interpretation of the Second Amendment essentially ignored federalism concerns, yet those stakeholders who sought to maintain the policy status quo of state and federal gun control heavily relied on new federalism arguments in an attempt to protect the regulatory powers of the states. With respect to LGBTQ rights, protecting state sovereignty was not accomplished through structural federalism arguments and rights' based claims trumped state policymaking in the same-sex marriage cases. Still, if the same issue of transgender rights (and Title IX) reappears on the Court's docket, the type of structural arguments used by the states opposing federal power might get new traction, especially if President Trump gets the chance to fill a second (or more) vacancy.

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