

5-1-2017

## Distinguished Scholar in Residence Lecture: A User's Guide to Progressive Federalism

Heather K. Gerken

Follow this and additional works at: <https://scholarlycommons.law.hofstra.edu/hlr>



Part of the [Law Commons](#)

---

### Recommended Citation

Gerken, Heather K. (2017) "Distinguished Scholar in Residence Lecture: A User's Guide to Progressive Federalism," *Hofstra Law Review*. Vol. 45: Iss. 4, Article 7.

Available at: <https://scholarlycommons.law.hofstra.edu/hlr/vol45/iss4/7>

This document is brought to you for free and open access by Scholarship @ Hofstra Law. It has been accepted for inclusion in Hofstra Law Review by an authorized administrator of Scholarship @ Hofstra Law. For more information, please contact [lawscholarlycommons@hofstra.edu](mailto:lawscholarlycommons@hofstra.edu).

## DISTINGUISHED SCHOLAR IN RESIDENCE LECTURE: A USER'S GUIDE TO PROGRESSIVE FEDERALISM

*Heather K. Gerken\**

I want to start by thanking the extraordinary faculty of Hofstra Law School for this honor. It's wonderful to be here, and you have treated me with extraordinary graciousness.

Today I'm going to offer you a "user's guide" to progressive federalism. I should emphasize that while I'll be attaching the word *progressive* to federalism, my main point is that federalism doesn't have a political valence. We often associate federalism with conservatism, but that's pure foolishness on our part. Federalism is a powerful weapon no matter what your political preferences. It can be a source of resistance and, more importantly, it can provide incentives for moderation in the long run. The reason I'll talk to you today about "progressive" federalism is that, at least until the inauguration of President Trump, progressives have been pretty skeptical of federalism. If you are trying to convince people that states and localities play a useful role in our democracy, it's progressives you have to win over.

I must admit I feel a bit uncomfortable attaching a political term to my work. When I speak to an academic audience, I always describe the "nationalist" case for federalism.<sup>1</sup> But when I speak, I find that it's easier to use the more intuitive term. And the nationalist's worries about federalism align pretty closely with the reasons that progressives are skeptical of federalism. Both groups worry about the "isms," fearing that federalism—and its homely cousin, localism—are aligned with racism, parochialism, and cronyism. Much of this skepticism is rooted in the

---

\* Dean, Sol and Lillian Goldman Professor of Law, Yale Law School. This is a lightly edited, lightly footnoted version of the remarks I delivered as the Distinguished Scholar-in-Residence.

1. See, e.g., Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889 (2013) [hereinafter Gerken, *Federalism as the New Nationalism*]; Heather K. Gerken, *The Supreme Court 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4 (2010) [hereinafter Gerken, *Foreword*].

ugly role that states' rights played in the resistance to abolition, *Brown v. Board of Education*,<sup>2</sup> and the Civil Rights Act. Those worries once led the great William Riker to insist that if "one disapproves of racism, one should disapprove of federalism."<sup>3</sup> As I'll explain at the end of this lecture,<sup>4</sup> that argument rests on an outdated factual premise and a deep misunderstanding of how rights work.

For now, though, I thought it would be most useful to talk about the kinds of tools federalism provides progressives (and conservatives) during a period in which they are out of power. Let's face it, that's what people are talking about these days. But then I want to turn your focus to the more general (and more important) claim that has long animated my work—that states and localities play an important role in a well-functioning democracy.<sup>5</sup> As I've noted in describing the "nationalist" school of federalism, of which I'm a founding member, federalism plays a crucial role in "improving national politics, knitting together the national polity, improving national policymaking, and entrenching national power and national policies."<sup>6</sup>

So what can progressives do during a period in which they've lost control of the Presidency and Congress? They can take a chapter from conservatives' playbook and use their control over blue cities and states to shape the national agenda, influence national policy, and encourage political compromise.

## I. UNCOOPERATIVE FEDERALISM

One of the features in federalism that is most understudied—at least by constitutional theorists—is how much the federal government depends on states and localities to carry out its policies. The federal government doesn't have enough resources to enforce its own drug laws, carry out its immigration policies, administer its own health care laws, or implement its own environmental policies. Indeed, as the federal government has moved into one traditional state domain after another, it hasn't displaced state government. Instead, the federal government has consistently found it easier to enlist the states' existing administrative apparatuses in the federal project rather than build its own from scratch.

2. 347 U.S. 483 (1954).

3. WILLIAM H. RIKER, *FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE* 155 (1964).

4. See *infra* text accompanying notes 34-39.

5. See, e.g., Heather K. Gerken, *Windsor's Mad Genius: The Interlocking Gears of Rights and Structure*, 95 B.U. L. REV. 587, 596-600 (2014) [hereinafter Gerken, *Windsor's Mad Genius*]; Heather K. Gerken, *The Loyal Opposition*, 123 YALE L.J. 1958, 1963-64, 1968 (2014) [hereinafter Gerken, *Loyal Opposition*]; Gerken, *Foreword*, *supra* note 1, at 21-33.

6. Gerken, *Federalism as the New Nationalism*, *supra* note 1, at 1894.

We call these arrangements “cooperative federalism,” but we often overlook how many opportunities they create for what Jessica Bulman-Pozen and I term “uncooperative federalism.”<sup>7</sup> States serve as the agents of the federal government, and you only have to spend a few days studying administrative law or corporate law to realize just how powerful an agent can be.

One of the tools of “uncooperative federalism” is simply refusing to partner with the federal government. The GOP-controlled federal government can’t put cops on every beat or a bureaucrat at every desk. Examples abound. Sometimes states just refuse to participate in federal programs. For instances, states simply refused to carry out parts of the PATRIOT Act.<sup>8</sup> The same is true of immigration policy and environmental regulations.<sup>9</sup>

Perhaps the most spectacular example of uncooperative federalism we’ve seen in recent years has been marijuana enforcement. Federal dependence on states is so pronounced in criminal law that Professor Robert Mikos insists that states can “nullify” federal marijuana law simply by withdrawing enforcement resources, as did Colorado and Washington.<sup>10</sup>

States don’t just opt out of federal programs. Sometimes they engage in so-called cooperative regimes but do so begrudgingly. Rather than refuse to carry out federal law, they slow walk it or undermine it from within. Think about what happened to the No Child Left Behind Act, which was to be a signature reform of the Bush Administration. The states manipulated testing standards and put up all manner of roadblocks. Eventually the Bush Administration effectively gave up on the whole enterprise, giving the states so many waivers that the program was essentially gutted.<sup>11</sup>

Sometimes state resistance doesn’t involve slow walking a programmatic commitment, but taking it in a new and unexpected

---

7. Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1258 (2009).

8. *Id.* at 1278-80.

9. *Id.* at 1276-78 (discussing environmental regulations). As to immigration policy, one need only read the newspaper to notice the role sanctuary cities and states are playing in resisting federal immigration policies.

10. Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States’ Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1425 (2009); see also Ernest A. Young, *Modern-Day Nullification: Marijuana and the Persistence of Federalism in an Age of Overlapping Regulatory Jurisdiction*, 65 CASE W. RES. L. REV. 769, 779-81 (2015).

11. For a description, see Heather K. Gerken, *Federalism and Nationalism: Time for a Détente?*, 59 ST. LOUIS U. L.J. 997, 1014-16 (2015).

direction. For instance, during the 1990s the Republican Governors of Michigan and Wisconsin created the early models of “Welfare to Work” inside the very welfare scheme they aimed to topple. They thus used federal funds to challenge the program that was funding them. Those models jumpstarted a national debate and eventually pushed Bill Clinton and congressional Democrats to overhaul the existing welfare system.<sup>12</sup> We saw a similar effort when Massachusetts used Medicaid funds to help enact “Romneycare,” which would become the model for Obamacare.

Uncooperative federalism is often paired with uncooperative localism.<sup>13</sup> We’re witnessing a clear example of uncooperative localism right now with the sanctuary city movement. Cities have simply refused to assist with certain homeland security and deportation efforts, and the federal government lacks the staff and resources to carry out those policies itself. Little wonder that the Trump Administration is so panicked about sanctuary cities that it’s threatened to cut off all federal funding to sanctuary cities.<sup>14</sup>

None of this is to say that states and localities can’t be brought to heel. Attorney General Jeff Sessions could change the marijuana equation by bringing a few prosecutions in Colorado. President Trump can’t cut off all federal funding to sanctuary cities under existing law,<sup>15</sup> but there are constitutional ways for him to use federal spending power to pressure cities to comply. Still, even if President Trump can win one battle or another against blue states, he cannot win the war. If he spends political capital and legal resources on marijuana, it’ll be harder for him to battle in the immigration or environmental arena. Social scientists have long talked about the power of the “street-level bureaucrat” to shape the law.<sup>16</sup> If you look carefully, though, you’ll realize that this sort of resistance is rarely confined to the street.

---

12. Bulman-Pozen & Gerken, *supra* note 7, at 1274-76.

13. See *id.* at 1310 n.188; Kathleen S. Morris, *Uncooperative Localism* (forthcoming) (manuscript at 21) (on file with the author).

14. See Enhancing Public Safety in the Interior of the United States, Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017). In the interest of full disclosure, I should note that my clinic helped file the first-in-the-nation challenge to that executive order. See Complaint for Declaratory and Injunctive Relief, City & Cty. of S.F. v. Trump, No. 4:17-cv-00485-DMR (N.D. Cal. Jan. 31, 2017).

15. See Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 575-85 (2012) (spending clause ruling).

16. See generally MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES (1980).

## II. SPILLOVERS

States and localities possess another, important power in “our federalism”: spillovers.<sup>17</sup> When one state regulates, it often affects its neighbors. We see spillovers all the time in our highly interconnected regime. Think, for instance, about who really sets emissions standards in the United States. You’d guess it was the federal EPA. It’s not. It’s California. California sets higher standards for itself than the federal government has set for the nation. And no car company can afford to ignore those standards because no company can give up on the California market.<sup>18</sup> After all, California has the sixth largest economy in the world, beating out France.<sup>19</sup> Some of my colleagues have written about “superstatutes”<sup>20</sup> and “superprecedent.”<sup>21</sup> In my view, California is a “superstate.”<sup>22</sup> It can enact national regulations even when it’s nominally regulating for itself.

## III. ENFORCING FEDERAL LAW

California has created another tool of progressive federalism, one readily available to other states. It prohibits businesses from engaging in unlawful activities, a definition that includes violations of federal law. That innovative provision licenses not only the state attorney general, but also counties and large cities to enforce it.<sup>23</sup> In effect, it turns state attorneys general and city attorneys into a standing army for enforcing federal law. This tool is likely to be particularly important in challenging President Trump’s deregulatory agenda. The Trump Administration

---

17. For an overview, see Heather K. Gerken & James T. Dawson, *Living Under Someone Else’s Law*, DEMOCRACY J., Spring 2015, at 42; Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 MICH. L. REV. 57 (2014).

18. See Gerken & Dawson, *supra* note 17, at 43; Gerken & Holtzblatt, *supra* note 17, at 63.

19. Alison Vekshin, *California Overtakes France to Become Sixth-Largest Economy*, BLOOMBERG (June 14, 2016, 6:43 PM), <https://www.bloomberg.com/politics/articles/2016-06-14/california-overtakes-france-to-become-sixth-largest-economy>.

20. WILLIAM N. ESKRIDGE JR. & JOHN FEREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 8 (2010).

21. Jeffrey Rosen, *So, Do You Believe in ‘Superprecedent’?*, N.Y. TIMES (Oct. 30, 2005), <http://www.nytimes.com/2005/10/30/weekinreview/so-do-you-believe-in-superprecedent.html>.

22. Gerken & Holtzblatt, *supra* note 17, at 103.

23. See generally THE FAMILY AND MEDICAL LEAVE ACT, ABA SECTION OF LABOR & EMPLOYMENT LAW 2006 (giving an overview of California Business and Professions Code section 17200); Kathleen S. Morris, *San Francisco and the Rising Culture of Engagement in Local Public Law Offices*, in WHY THE LOCAL MATTERS: FEDERALISM, LOCALISM, AND PUBLIC INTEREST ADVOCACY 51, 54-56, 58-59 (Kathleen Claussen et al. eds., 2009). For an excellent example of how this power might be deployed, see Eliza Lehrner, *Dissenting by Enforcing: Overcooperative Federalism and State and Local Enforcement of Federal Law*, YALE L. & POL’Y REV. INTER ALIA (forthcoming) (on file with the author).

may—as have prior administrations—refuse to enforce or under-enforce certain federal regulations. But it takes a lot more work to *erase* federal law no matter how fast Congress works. That means that federal regulations that might have lain dormant during the Trump Administration can be kept alive in California and any other state that follows its lead.

#### IV. CREATING THE CONDITIONS FOR DEMOCRATIC CHANGE

There is one, final way in which states can be a tool for progressive values. It creates the necessary conditions for change. When we think about democratic change, we usually look to the First Amendment, not federalism. We forget, however, that federalism and localism play an important role in effecting change. Indeed, social movements have long used state and local policymaking as an organizing tool, a rallying cry, a testing ground for their ideas.<sup>24</sup>

The same-sex marriage movement is one of the most recent examples. Proponents of marriage equality used states and localities as staging grounds for organizing and debate. In doing so, they didn't just change policy; they changed how we, as a nation, think about this issue. It was precisely that pairing of politicking and policymaking that explains why equality norms run so deep that the Supreme Court's ruling in *Obergefell v. Hodges*<sup>25</sup>—a decision that would surely have been quite controversial not so long ago—was widely celebrated and generated little opposition.

As I've argued elsewhere,<sup>26</sup> we see lots of examples of where core parts of the equality project are pushed through state and local sites. Just think about the work being done on immigration, policing, sentencing, and the living wage movement. National policy, after all, is a *giant* gear to move. As with a clock, you need movement from lots of small, interlocking gears to move a bigger one. Federalism and the First Amendment *are* those interlocking gears.<sup>27</sup> Debate leads to policy, which in turn provides a rallying point for still more debate. Social movements include pragmatic insiders, forging bargains from within, and principled outsiders, demanding more and better from without.

---

24. For an overview, see Gerken, *Foreword*, *supra* note 1, at 62-63; Gerken, *Loyal Opposition*, *supra* note 5, at 1978-81.

25. 135 S.Ct. 2584 (2015).

26. See, e.g., Heather K. Gerken, *Second-Order Diversity: An Exploration of Decentralization's Egalitarian Possibilities* (Yale Law Sch., Pub. Law Research Paper No. 591, 2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2868032](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2868032).

27. For an overview, see Gerken, Windsor's *Mad Genius*, *supra* note 5, at 592-600.

## V. WIDENING THE LENS

Now that I've given you a "progressive user's guide," let me widen the lens, return to the more comfortable mode of speaking as an academic, and talk about why federalism should matter to progressives and conservatives alike. As I noted when I began, federalism is for everyone. There's nothing inherently progressive or conservative about federalism. Just as we witness uncooperative federalism with regard to sanctuary cities and states, we also saw it with states' resistance to Obamacare. We see progressive spillovers when California regulates emissions or Minnesota prohibits the purchase of electricity generated at new coal-fired plants.<sup>28</sup> But we also see conservative spillovers when, say, Texas insists on a more conservative curriculum and blue states were forced to buy textbooks written for the Texas market, or when Virginia's lax firearms rules resulted in New York City being flooded with guns through the Iron Pipeline.<sup>29</sup> As I noted earlier, federalism and the First Amendment served as interlocking gears, moving debates forward. But it moves *all* kinds of debates forward, from gun rights to gay rights. Red states have used their power to shape the abortion debate just as effectively as blue states have used theirs to shape the policing debate. Progressives may hope that federalism will turn out to be a one-way ratchet on their issues, but it won't. Nothing excuses either side from suiting up and getting into the game of politics.

We should value the role that cities and states play in our democracy no matter what our politics. Uncooperative federalism may sound antithetical to certain legal values, but it's not antithetical to democratic ones. It is good to have a source of friction, dissent, and debate inside the behemoth we call the "Fourth Branch."<sup>30</sup> Moreover, federal dependence on states and localities creates incentives for moderation and compromise. Just ask President Obama, who had to compromise a great deal to bring Obamacare to the red states.<sup>31</sup> President Trump may not have to cooperate with Democrats on the Hill, but he's going to need the support of blue states and cities if he wants to get things done.

We should also value spillovers. To be sure, it is uncomfortable to recognize that we are all sometimes forced to live under someone else's

---

28. For an overview, see Gerken & Dawson, *supra* note 17, at 42-43.

29. For an overview, see *id.* at 43-44.

30. Bulman-Pozen & Gerken, *supra* note 7, at 1285-87; Gerken, *Foreword*, *supra* note 1, at 40-41.

31. Heather Gerken & Ted Ruger, *Real State Power Means Getting into the Obamacare Game*, HARV. BUS. REV. (Apr. 2, 2013), <https://hbr.org/2013/04/real-state-power-means-getting>.



law.<sup>32</sup> But there are many democratic virtues associated with spillovers.<sup>33</sup> For example, in today's heated political environment, state officials lack incentives to compromise with those from the other side. But when a blue policy spills over into a red state (or vice versa), legislators can't ignore the opposition. They must reach across state (and party) lines to fix the problem. Spillovers thus force state and local officials to do what they are supposed to do: politic, find common ground, and negotiate a compromise that no one likes but everyone can live with.<sup>34</sup>

The most important role that federalism plays is in furthering change. Free speech is a precondition for democracy to function. These days, however, dissenters have little problem getting their message *out*; they have trouble getting it *across*.<sup>35</sup> Federalism and localism matter to anyone trying to get a message across. Federalism and localism supply different platforms and different forms of advocacy for would-be dissenters. By giving social movements a chance to "dissent by deciding"—converting abstract appeals into concrete policies—decentralization confers a variety of benefits on democracy's outliers that the First Amendment, standing alone, cannot supply.<sup>36</sup>

Decentralization also facilitates agenda setting.<sup>37</sup> When those seeking change put in place a real-life instantiation of their ideas, the majority can't ignore them, as majorities are wont to do. Decentralization thus helps social movements shift the burden of inertia and force the majority to engage. Federalism and localism also give those who seek change a chance to move from the abstract to the concrete. They don't have to talk about how a policy would work in theory. They can show that it does work in practice. Better yet, it allows advocates of change to build their movement one step a time. It is hard to jumpstart a national movement. That's why virtually every national movement began as a local one.

I recognize that my claim that federalism facilitates change will seem like an odd claim to those who associate federalism with efforts to hold back the tide of civil rights. But that was your father's federalism.

---

32. For an in-depth exploration, see Gerken & Dawson, *supra* note 17, at 42-44; Gerken & Holtzblatt, *supra* note 17, at 69-78.

33. For a survey of those benefits, see Gerken & Dawson, *supra* note 17, at 44-50; Gerken & Holtzblatt, *supra* note 17, at 89-97.

34. For an in-depth exploration, see Gerken & Dawson, *supra* note 17, at 47-49; Gerken & Holtzblatt, *supra* note 17, at 93-95.

35. For further analysis, see Gerken, *Loyal Opposition*, *supra* note 5, at 1970-72.

36. *Id.* at 1979.

37. *Id.* at 1979-80.

Today, federalism is sheared of sovereignty.<sup>38</sup> States cannot shield their discrimination from national norms, as they did during the days of Jim Crow. If a national norm exists, the federal government can enforce it, provided it's willing to spend the political capital to do so.

The problem these days isn't that federalism is an obstacle to enforcing national equality norms. The problem is that we lack robust national equality norms to enforce. Academics often unthinkingly blame decentralization for shortfalls in equality. This idea ignores the fact that we adopt a decentralized solution only when our national norm *is* to tolerate shortfalls. Rather than condemning federalism for weak national norms, we should focus on whether federalism makes it easier or harder to change those norms going forward. In my view, decentralization plays a central role in the process by which equality norms are constructed.<sup>39</sup> It is precisely because local and national politics constitute one another, decentralization can be as much a tool for change as it is a tool for preservation.

## VI. WILL POLITICS OVERRUN FEDERALISM IN THE FUTURE?

The arguments I've offered in this talk have been the focus of my work over the last decade or so. But I should note one lingering doubt about the future. It's a worry that has less to do with federalism and more to do with my other field, election law. It's a worry that has crystallized in recent days as we've watched our politics unfold since President Trump's inauguration. The worry, put succinctly, is that our politics are quickly overtaking the institutions that were designed to channel them.

I've always understood federalism to be one of many institutional and legal strategies we use to instantiate pluralist politics. I also accept what I take to be the fundamental premise of both my fields: Institutions and legal rules shape politics. The rules of the game shape how the game is played.

My worry—certainly not a new one—is that the gale forces of polarization are putting more pressure on our governing institutions than they can bear. And by “polarization,” I am referring to the tribal dimensions of polarization—the fact that both sides view the other's positions with deep skepticism, even hostility. I worry about this shift for a simple reason. The institutions that help politics work also *depend* on politics to work. At some point, politics may become too powerful a force for institutions like federalism to play this beneficial role.

---

38. See Gerken, *Foreword*, *supra* note 1, at 13-14.

39. For development of this argument, see Gerken, *supra* note 26, at 3-4, 11-25.

Federalism facilitates pluralist politics, but it also requires some pluralism to get up and running. If the two parties view one another as monsters, I'm not sure federalism can fix that problem.

I should emphasize that I mean only to raise questions, not offer definitive answers. None of us know whether polarization is so powerful that it will prevent democratic institutions from playing their usual, salutary rolls. But one fact gives me pause. As my colleague, David Schleicher, has pointed out, the forces of polarization seem to be spreading across the globe despite substantial differences in institutional structure and legal rules.<sup>40</sup> No one, in short, has found a wind break. Schleicher's point, combined with the marked departures from our institutional norms we've seen just during the last year, makes me wonder about the relationship between politics and institutions. If polarization is a gale-force wind, then institutions that have served as wind breaks in the past may not work in the same way going forward. Legal scholars have always focused on the rules of the political game. If we are now playing in a hurricane, the question is how much those rules will matter going forward. No one knows the answer to this question, but it's important we consider it going forward.

## VII. CONCLUSION

Let me just close by returning to the themes with which I began. While I've given you a progressive "user's guide," my overarching point is that federalism isn't associated with any political position. It's for everyone. In this respect, federalism is like the First Amendment. It isn't a given that it will be used for good or for ill, to promote your preferred politics or your opponents'. Instead, it is an essential part of a well-functioning democracy. What we make of our democracy—well, that's up to us.

---

40. David Schleicher, *Things Aren't Going That Well Over There Either: Party Polarization and Election Law in Comparative Perspective*, 2015 U. CHI. LEGAL F. 433, 458-62 (2015).