



School of Law

FROM HERE ALL-THE-WAY- DOWN, OR HOW TO WRITE A FESTSCHRIFT PIECE

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Tulsa Law Review, Forthcoming

**George Mason University Law and
Economics Research Paper Series**

12-67

From Here All-the-Way-Down, Or How To Write a Festschrift Piece

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This is the first time I have participated in the great academic exercise that is the festschrift.² I wasn't sure how to approach this specific task. Usually when faced with such a situation, one of my first calls is to a person who has been a mentor and a friend since I became an academic. But because Heather Gerken is the honoree of this little get-together, it seemed a bit weird to ask her for advice on how to proceed. So I did what any good academic would do: research.³ After hours and hours of looking through festschrift articles, I found that the best all took the same three-part form. For those of you who haven't spent as much time studying how to do this, I offer the following guide to writing a successful festschrift piece.⁴

First, dole out as much fawning praise as you can muster for the honoree and her work. Go all out, as mushy as you can make it, with extra points given out for use of the terms "brilliant,"⁵ or "inspiring"⁶ and a triple word score for turning someone's last name into an adjective.⁷ Call this the "Your Work is Perfect, Don't Change a Thing"

¹ Associate Professor, George Mason University School of Law. I would like to thank my research assistants Mark Quist and Mary Watson for their help. I would like to express my profound appreciation for the really excellent people at the University of Tulsa College of Law and the Tulsa Law Review, particularly Rachel Hughes, for putting together this great event. And, of course, this Heather Gerken person deserves some credit for bringing us all together.

² And among such events, this is a particularly odd one, as they are usually associated with an academic approaching the end of his or her career, whereas the subject of this festschrift is just entering the prime of her career. But both as a general and a specific matter, this event makes a lot of sense. Specifically, Heather Gerken has done a career's worth of work in a short amount of time, and there's no reason to wait. And generally the festschrift as mid-career review is probably an improvement on the ordinary set-up, as it might prove useful as well as respectful to the subject. Law review editors of the world ought take heed of the great Kanye West's admonition, "If you admire somebody, go ahead tell 'em/People never get the flowers while they can still smell 'em." KANYE WEST, *BIG BROTHER* (Roc-A-Fella Records 2007).

³ I thought about leaving a blank space after the colon to set up a game of legal academic Mad Libs. Possible answers: "Pawned it off on my research assistants," "Wrote a new introduction for what is really a summary of an old paper," "Missed my deadline," etc.

⁴ Using one's first ever festschrift piece to write a guide on how to write a festschrift piece is a bit presumptuous, I know. However, in the annals of these things, it requires only a tiny bit of writerly chutzpah. For instance, Martin Amis wrote the best and ballsiest first sentence of a book review of all time. "Expect a lot from the next sentence." Martin Amis, *Survivors of the Cold War*, N.Y. TIMES, Oct. 5, 1997 (reviewing DON DELILLO, *UNDERWORLD* (1997)). Expect a lot from the next footnote doesn't have quite the same ring, does it?

⁵ See, e.g., Sanford Levinson, "Perpetual Union," "Free Love" and Secession: On the Limits to the "Consent of the Governed" ,39 TULSA L. REV. 457 (2004).

⁶ See, e.g., Heather Gerken, *Larry and Lawrence*, 42 TULSA L. REV. 843 (2007).

⁷ See, e.g., Adrian Vermeule, *A New Deal For Civil Liberties: An Essay in Honor of Cass Sunstein*, 43 TULSA L. REV. 921 (2008) ("Sunsteinian"); Martha Minow, *Just Education: An Essay For Frank Michelman*, 39 TULSA L. REV. 547 (2004) ("Michelmanian"); Frank I. Michelman, *The Scholarship of Sanford Levinson: Faith and Obligation, Or What Makes Sandy Sweat?*, 38 TULSA L. REV. 651 (2003) ("Levinsonian"). This should not be taken as criticism. For scholars as good as the ones honored by the *Tulsa Law Review*, the only surprise is that the prose isn't *more* purple. Had I been asked to write one of these for, say, Frank Michelman, I would have had to use ink the color of Welch's Grape. Although having reviewed the text below and particularly some of the footnotes, I'm not sure that even Ian Gillan could write

Section. This should be the easiest one, because festschrifts are generally only done for the very best scholars -- this one is definitely no exception -- and because you agreed to do it in the first place.

Second, find a problem or a hole somewhere in the honoree's body of scholarship, preferably a minor one, but one that suggests that her work is unfinished or that there are things that remain difficult for her. This is the "Well, Actually, Come to Think of It, There Is This One Little Thing I Have Questions About" Section. This serves to declare your independence and is necessary because you need to say something interesting and different about work that everyone has read and admires. It also suggests that the next generation of scholars, and you particularly, will be wrestling with the subject's work for years to come.⁸

Third, argue that the problem identified in Section II, and the honoree's work more generally, could be improved by reference and discussion of themes that appear in your own work. However you have to grease the square pegs of your work into this particular round hole, go for it. Call it the "The Only Thing That Could Make The Honoree's Work Any Better Is Discussing My Work Just a Bit More" Section.⁹ Although seemingly presumptuous, this actually makes clear the author's debt to the subject. A conclusion with a bit more praise is the cherry on top of this peculiar and sometimes silly, but often oddly charming, academic Sundae.

Using this guide,¹⁰ hopefully, will make this festschrift article a success.¹¹ So

in a deeper purple than I did in parts of this essay. I am okay with this. Some people -- and Gerken particularly -- are just very good at this thing we do.

⁸ My colleague and friend Adam Mossoff captured the tone of this type of section perfectly when he wrote of his criticisms of Richard Epstein in a Tulsa festschrift: "[S]uch remarks should be understood to be concerns expressed among friends." Adam Mossoff, *A Simple Conveyance for Complex Innovation*, 44 TULSA L. REV. 707, 737 (2009). For what it's worth, and although Epstein is both quite intellectually brave and brilliant, I think Mossoff gilded the lily a bit on the praise front with this: "Aristotle would likely commend Epstein's commitment to truth." *Id.* at 737. I think the odd choice of verb tense is actually what takes it over the top; it makes it seem as if Mossoff thinks that the only reason old Ari hasn't said anything to Epstein yet is some annoying present-day inconvenience, like crosstown traffic or too many student meetings. You gotta feel these things.

⁹ This is a more than a bit (tongue-in) cheeky. Gerken is rightly famous for her generosity with young scholars. She is a prodigious commenter on other people's work and, in her own work, takes the thoughts and work of young scholars as seriously as she does the work of the leading figures in academia. I'm no exception, and it has always been very, very much appreciated.

¹⁰ Although mocking its excesses, this "guide" should be understood as a celebration of the form (and certainly the subject here). I *love* festschrift pieces. Although they are not often the source of truly new ideas themselves, they force us to reflect on where we have been and where we are going as a field more generally. And great work ought to be celebrated and taken seriously.

¹¹ I should note that this is not a description of most festschrift articles so much as it is advice, a normative guide to the festschrift piece. The model accomplishes a few things. If done well, it should produce pieces that are both gracious and respectful, which -- again because you agreed to do it and because these are only done for people who are very, very good -- should be the goal. Second, it is economical with your ideas. People sometimes waste good ideas in these pieces and given other demands, the format of a festschrift piece is not well suited to doing so. Better to focus on what the festschrift is really about, how the subject's work influenced the work of subsequent scholars, namely you, and what you can tell the subject.

here goes.¹² Part I summarizes two lines of Gerken's research. First, it will review her work on "here to there" problems in election law reform. Then it will turn to her work on the benefits for democratic discourse and governance of giving actual power to national minorities and dissenters to make decisions in subnational institutions, or as she put it in her brilliant *Harvard Law Review* Foreword, "Federalism All the Way Down."¹³ The second section in the piece discusses a problem in the "federalism all the way down" research. It argues that, if grants of power to subnational institutions (from states to school boards) are intended to achieve the democratic discourse benefits Gerken lays out, in practice they likely do less of it than our institutional structure suggests. The reason is that non-state mediating institutions -- most notably political parties but also non-governmental organizations and businesses -- that have a national scope can frustrate the ability of dissenters to exercise power at lower levels of government. That is, Gerken's research doesn't show how to get from here to federalism all the way down. Section III argues that my work studying "mismatches" between constitutional or institutional goals and the levels at which law forces/allows mediating institutions to form provides a method for thinking about how to achieve more federalism all the way down. Particularly, the tools of electoral engineering could be used to promote the goals of federalism all the way down.

I. **Your Work is Perfect, Don't Change A Thing: Selections from Gerken's Greatest Hits, including *From Here to There*, and *Federalism All the Way Down***¹⁴

For a scholar of her age, Gerken's work has been remarkably varied and wide-

¹² This footnote will discuss admonitions from people like Mark Tushnet, Paul Horowitz and Marc DiGirolami on the perfidy of the roadmap paragraph. See Mark Tushnet, *Reflections on "Art and the First Amendment,"* BALKINIZATION (Apr. 12, 2012), <http://balkin.blogspot.com/2012/04/reflections-on-art-and-first-amendment.html>; Paul Horowitz, *The Road Map*, PRAWFSBLAWG (Apr. 12, 2012), <http://prawfsblawg.blogs.com/prawfsblawg/2012/04/the-roadmap.html#comments>; Mark DiGirolami, *Roadmap to the Roadmap*, PRAWFSBLAWG (Apr. 13, 2012), <http://prawfsblawg.blogs.com/prawfsblawg/2012/04/roadmap-to-the-roadmap.html#comments>. Tushnet notes that he hates these paragraphs, a point that Horowitz expands upon, noting that the paragraphs are an example of the most "risible" aspects of legal scholarship. He even rejects their use in complex articles, as the use of such a paragraph in aiding an unclear article is "like a surgeon trying to fix massive spinal injuries by inserting a safety pin and a wad of chewing gum into the patient." He notes that most scholars include them because they think law review editors want to see them. DiGirolami jokes that articles should include road maps to road maps ("In this section of the Introduction, I aim to explain the paper's meta-structure....."). I am less opposed than these critics to roadmaps as a tool to allow readers to keep track of substantial arguments, particularly if they are integrated into the introduction (as Bruce Boyden suggests in the comments to Horowitz's post). But as this article is not particularly complex, already has a paragraph summarizing its meta-structure, and does not need to attract law review editors, including one is pretty silly. Which is of course why I had no choice other than to include it.

¹³ Heather K. Gerken, *2009 Term Foreword: Federalism All The Way Down*, 124 HARV. L. REV. 4 (2010).

¹⁴ Needless to say, this section is more of a Rolling Stone's "Hot Rocks" type greatest hits album -- where each song is a hit and the editors end up leaving classics on the cutting room floor -- than something like, say, Tone Loc's "Wild Thing & Other Hits," which includes, of course, *Wild Thing* and *Funky Cold Medina*, but also contains a lot of tracks that one can't really describe as the greatest anything (although I suppose the least great thing about this is that I know the contents of Tone Loc's *Wild Thing & Other Hits*. Alas.). See The Rolling Stones, *Hot Rocks 1964-71* (ABKCO Records 1971); Tone Loc, *Wild Thing & Other Hits* (Rhino Flashback 2001).

ranging, not to mention brilliant and inspiring.¹⁵ I'm sure other participants will focus on her important contributions to Voting Rights Act scholarship and election law, and to constitutional law more broadly. I will focus on her two most recent series of papers, one on how election reform might actually be achieved, and the other on the benefits diffusing power across institutions provides to democratic discourse by allowing national minorities to actually exercise power at lower levels of government.

From "Here to There": From relatively early in her career, Gerken's work veered from the ordinary interests and obsessions of election law scholarship to focus on a different type of question: how might election law reform be achieved and implemented? An early article on partisan gerrymandering, for instance, did not focus on why or whether courts should protect competition from self-interested entrenchment, but rather looked at how the Supreme Court might develop a *method* for relying on local judgments about the fairness of districting.¹⁶

More recently, Gerken developed this into a multi-pronged argument that election law suffers from what she calls a "Here to There" problem.¹⁷ Election law reform efforts and scholarship focus on questions of whether and how to reform things like gerrymandering, election administration and campaign finance. But entrenched policies in these areas have withstood even the fiercest attacks of the most brilliant and acerbic critics. Blame for the failure of election reform to take hold is generally laid at the feet of the fact that election law policy is made by incumbent legislators who have incentives to manipulate the law to help themselves and/or their party. Because incumbents are the "foxes guarding the henhouse" of election law policy-making, scholars tended to seek *deus ex machina* solutions to produce reforms, like Supreme Court decisions or referenda requiring nonpartisan election law policy making or neutral rules.

While traditional goals like entrusting districting to neutral redistricting bodies are admirable, Gerken argues this "instinct for non-partisanship" has distracted reformers from focusing on short and medium term reforms that could be achieved through the ordinary political process.¹⁸ However, election law reform will not be achieved merely by asking foxes to stop eating hens; lobbying for specific changes under current conditions is simply spitting into the wind.¹⁹

¹⁵ It really has been an inspiration! I first encountered her work as a classic law school gunner reading up on my Civil Procedure professor and have been trying to keep up ever since. Although my work approaches similar problems using a very different set of methodological tools, I have always tried to match one quality in particular in her work: her vision. Gerken's work is most notable to me for its ability to look at familiar problems in different and revealing ways. John Updike once wrote: "I want to write books that unlock the traffic jam in everybody's head." JOHN UPDIKE, *HUGGING THE SHORE: ESSAYS AND OTHER CRITICISM* (1992). Gerken is responsible for unlocking as many traffic jams as any scholar around. An inspiration, indeed.

¹⁶ Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law and the Doctrinal Interregnum*, 153 U. PA. L. REV. 503, 531-36 (2004).

¹⁷ Heather K. Gerken, *Getting From Here to There in Redistricting Reform*, 5 DUKE J. CONST. LAW & PUB. POL'Y 1 (2010).

¹⁸ *Id.* at 2.

¹⁹ Sorry for the mixed metaphor. Perhaps Benjamin Franklin's comment would serve me better: "Many foxes grow grey, but few grow good." BENJAMIN FRANKLIN, *WIT AND WISDOM* (1998).

Instead, Gerken argues that scholars and reformers need to think about how to create the conditions that would make reform possible. To do this, they need to change the political incentives of the key actors in the system. Election law reformers should seek to develop tools that "realign the incentives of the foxes with those of the hens, to redirect competitive political energies into healthier channels."²⁰

This is the "here to there" problem. Even if we agree that an election law system should be more neutral, more competent and more competitive than our current system, we need a method for convincing current holders of power to adopt reform. The key, Gerken argued, was "harness[ing] politics to fix politics." The mechanisms for doing so are the subject of Gerken's work in the area.

For instance, take gerrymandering.²¹ In the short term, rather than inveighing against the evils of partisan or bipartisan gerrymandering, Gerken argues reformers should develop new tools to create pressure on legislators engaged in districting to behave in a fairer, more open manner. Open-source software that allows anyone to make redistricting maps forces politicians to own up to the choices they make in districting, rather than hiding behind claims to expertise. Private contests held among citizens to design the best district maps might shame politicians into following the models set by private citizens. Reform groups might model how non-partisan gerrymandering would work by creating "shadow" non-partisan panels themselves that designed maps, putting public pressure on legislators to create such panels for real. Further, the outputs of shadow commissions could be used to judge the outputs of actual legislators. The goal of each of these proposals is to create incentives and social pressure for those in power to enact reform or at least to be a little less biased in their districting choices. That is, they are tools to help us get from here to the "there" of better, more neutral districting.

In the longer term, even the "theres" should embrace politics in order to make reform something that sticks. Gerken endorses ideas like Sam Hirsch's proposed baseball-style arbitration process for redistricting, which calls for both parties (and private citizens) to introduce maps in a competition to produce the "winning" map, judged according to neutral principles, and Michael Kang's idea to have the parties propose maps to the electorate as a whole, which would choose among them in a referendum.²² The attraction of these policies is that they do not displace politicians -- who after all don't like being displaced and would work to undermine even enacted

²⁰ Gerken, *Getting From Here to There*, *supra* note 17, at 1.

²¹ Pretty please. Cf. David Schleicher, *Mapping Election Law's Interior* in RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS: RECURRING PUZZLES IN AMERICAN DEMOCRACY 75, 77 (Charles, Gerken and Kang eds., 2011) (explaining why I thought that the gerrymandering literature was all written out in 2011); Christopher S. Elmendorf and David Schleicher, *Districting for a Low-Information Electorate*, 121 YALE L.J. 1846 (2012) (an article co-written by me about gerrymandering in 2012).

²² Sam Hirsch, *A Proposal for Redistricting Reform: A Model State Constitutional Amendment*, Lecture at the American Mathematical Society's Special Session on the Redistricting Problem (Jan. 8, 2009), available at

http://img.slate.com/media/1/123125/123054/2207789/2208001/2208423/Hirsch_Redistricting.pdf Hirsch (the coolest-ever redistricting proposal, made cooler still by its unfinished status, like Gaudi's La Sagrada Familia or Volume III of Robert Musil's *The Man Without Qualities*, or, more accurately, like dozens of other unfinished-but-very-clever wonky proposals); Michael S. Kang, *De-Rigging Elections: Direct Democracy and the Future of Redistricting Reform*, 84 WASH U. L. REV. 667 (2006).

reforms that excluded them -- but rather change the ways politicians can benefit from redistricting.

This, we will see, is a central theme in Gerken's work. Well-meaning goo-goo reformers, at least since the Founding period and certainly through the Progressive Era and on to today, have tended to take a dim view of the messy parts of politics. For them, the constant fighting, the self-interestedness, the narrow focus of individuals and groups, was the target of institutional reform. Gerken views the unseemly fracas of politics differently, as a necessary and potentially transforming part of life in a democracy. The goal of institutional reform, whether of election law or as we will discuss below the decentralization of power, should not be to displace or bypass politics. Instead, institutional design should attempt to focus the conflict and selfishness inherent in politics in ways that produce more meaningful and useful discourse and inclusion rather than exclusion.

The central focus of Gerken's "here to there" work has been the red-headed stepchild of election law: election administration. The plumbing of the electoral system -- vote counting, manning the polls, locating polling places, etc. -- was always seen as a less sexy topic than things like campaign finance, voting rights and the regulation of the parties and got less attention from scholars and reformers.²³ At least it was a less sexy topic until *Bush v. Gore* and the Florida vote dispute in 2000 more generally, bringing national attention to the inadequacies of election administration in this country. After that landmark, there were all sorts of efforts to make reforms -- a blue ribbon commission, several Congressional acts and intense popular attention (including more than a few claims of stolen elections).²⁴ Despite this, very little was actually accomplished and virtually no one thinks that our election administration system works particularly well. This is not because people don't have ideas about how it should work, but rather, as Gerken argues, because there is a "here to there" problem.

Implementing high-quality election administration, in Gerken's recounting, faces a slew of problems. First, partisanship. State and local elected officials control election administration and are loath to implement reforms that may harm them or their co-partisans. After all, when one thinks of the American vote counting system, the image that immediately springs to mind is Katherine Harris's caked-on makeup.²⁵ Second, localism. Much of the work of election administration is done at the local level, by underfunded county and city officials that get few rewards for running an election system well and are able to export the cost of doing badly. After all, the problems with a poorly conducted Presidential election will be felt in places beyond the county that does a bad job counting votes. Further, the decentralization of the system hides information from voters and officials. Even figuring out how many people voted in any given election is

²³ Two leading figures in the field made this clear. "Ultimately our concern is with the structural aspects of constitutional law, not the regulatory arcana of elections. Approaching the law of democracy from this vantage point makes the field not a derivative and limited domain but a body of ideas that reflect the meaning and assumptions of constitutional law itself." Samuel Issacharoff & Richard H. Pildes, *Election Law as Its Own Field of Study: Not by 'Election' Alone*, 32 LOYOLA L.A. L. REV. 1183, 1184 (1999).

²⁴ See generally Richard A. Hasen, *The Untimely Death of Bush v. Gore*, 60 STAN. L. REV. 1 (2007).

²⁵ I will leave it to you, dear reader, to determine whether this means that election administration is still a less-than-sexy topic.

an extremely difficult task, as it requires getting information from huge numbers of differently run systems.²⁶

While many have called for the creation of a non-partisan, national (or at least state-wide) election administration system, these calls have largely gone unheeded. Gerken argues that election administration is the perfect area for institutional tools that can harness politics to fix politics. Her answer is "The Democracy Index."²⁷ The Index would rank states (or counties) in terms of the quality of their nuts-and-bolts election administration. This numerical ranking would provide a clear heuristic guide for voters in elections for Secretary of State or county clerk about how well their officials are doing in achieving well-run elections along indisputably important dimensions, like the length of lines at voting locations, the functioning of voting machines, and the like. It would create competition among jurisdictions to rise up the Index's ladder, engendering a race to the top rather than to the bottom. Further, it would provide information to election administrators, who would be able to see who was doing well and what they could copy from the policies of high performers. If the Democracy Index is a success, politicians would still be in charge, but instead of politics providing incentives to scrimp on election administration (or worse), it would provide incentives to improve election administration.

The Democracy Index's story is still playing itself out -- a huge number of cities, states and even countries have committed to creating Indexes, and the Pew Center on the States is putting together a national Index. But the core of the idea is the same as the core of Gerken's redistricting ideas: it is designed to be a tool to provide incentives to incumbent officials and information to voters in order to create the conditions for election reform. This move is one of the most important in modern election law -- a move that brings the theoretical complexity and cleverness of the scholarship into the world of practical politics.²⁸

Federalism-All-The-Way-Down:

Also early in her career, Gerken began working on a project about the ways American governance uses and benefits from having *unrepresentative* subnational decision-making bodies, either by opinion or by demography. In *Second-Order Diversity* and *Dissenting By Deciding*, Gerken addressed at a theoretical level how to think about institutional design decisions to accommodate and to address difference in the population.²⁹ (These papers, and those that follow, are almost impossibly rich and my efforts to summarize them will inevitably leave a great deal out -- one of the great things

²⁶ Stephen Ansolabehere & Nathaniel Persily, *Measuring Election System Performance*, 13 N.Y.U. J. LEGIS. & PUB. POL'Y 445, 455 (2010).

²⁷ HEATHER K. GERKEN, *THE DEMOCRACY INDEX: WHY OUR ELECTION SYSTEM IS FAILING AND HOW TO FIX IT* (2009).

²⁸ This is *extremely* characteristic of Gerken's work. She has a rare comfort bringing the messiness and complexity of real world disputes into the scholar's ivory tower, and rare skill in bringing the scholar's logic and wisdom into the politics of the real world. She not only embraces democratic mess of real politics as a scholarly matter; her scholarship takes on the difficulties and messy contradictions necessary to contribute to real politics.

²⁹ Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099 (2005); Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745 (2005).

about Gerken's work is that page 33 of an article is inevitably as interesting as page 3.)

In the first article, Gerken contrasted "first-order" diversity -- the degree to which the population constituting a subnational decision-making body is representative of the national population -- with "second-order diversity" or the extent to which subnational decision-making bodies drawn from the same population are different from one another.³⁰ Gerken argued that second-order diversity, which allows some subnational entities to be minority-majority while others are heavily-majority dominated, provides substantial benefits. It gives a range of national minorities the ability to make decisions that matter, turns the tables on national majorities thereby influencing their beliefs, creates diverse outcomes, and allows for cycling between a variety of results. Rather than repeating our national debates in subnational institutions, as first-order diversity ensures, second-order diversity creates a richer, more varied set of democratic results.

In *Dissenting by Deciding*, Gerken argued that second-order diversity provided a particular type of benefit to national minorities, the ability not only to state their differences in losing efforts, but to actually enact them in some places.³¹ These serve as examples that make their dissenting ideas more powerful in national debates. Further, it puts the onus on dissenters to make their ideas real rather than merely theoretical, which may change their (or others') views.³²

While there had been some discussion of things like second-order diversity and dissenting by deciding in different areas of the law, these pieces made several truly important intellectual moves. First, they discussed the benefits of second-order diversity and dissenting-by-deciding in a trans-substantive way, across institutions of all sorts from juries to school boards. Rather than analyzing the effects of particular institutions on particular policy areas, Gerken forced us to look on a theoretical level at how hierarchical institutional design affects politics broadly defined.

Second, the benefits Gerken highlights are different in kind from the ways these issues are generally discussed in the academic literature. The benefits of diffusing power in Gerken's work are not primarily about how diffusing power improves the fit between locals and local policy, as in scholarship following the work of Charles Tiebout, nor are they the benefits of putting decision makers closer to the electorate.³³ Rather, Gerken's focus is on how diffusing power affects discourse at both the national and local levels, and on how diffusing power affects the opinions and beliefs of both majorities and minorities. That is, hers is a theory of how diffusing power improves democracy at all levels of government.

Gerken then moved on to discussing how subnational institutions might express

³⁰ Gerken, *Second-Order Diversity*, supra note 9, at 1102-05.

³¹ Gerken, *Dissenting By Deciding*, supra note 29, at 1746-53.

³² That dissenting without deciding is unsubstantial and cheap is a point well-made by Arcade Fire: "When you're hiding underground/The rain can't get you wet/ But do you think your righteousness/ Could pay the interest on your debt?/I have my doubts about it." ARCADE FIRE, CITY WITH NO CHILDREN (Merge 2010).

³³ See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956) (arguing that diffusing power to many local governments will produce an optimal provision of local public services under some conditions).

their power. In *Sovereigns and Servants*, Gerken claimed that the traditional focus in both federalism and local government law on determining what decisions smaller governments can make without interference from larger governments -- state sovereignty, *imperio in imperium* local governmental power -- ignores the power locals have even when they have no protection against higher levels of governments or when they are implementing policies devised by higher levels of government.³⁴ The key point Gerken makes is that when locals can propose policies or implement policies in ways of their choosing, even if they can be overruled, they have the power to force the larger government to overrule them, giving them control over the larger government's policy agenda.

Forcing the larger government to decide to overrule them gives the local dissenters the power to influence policy not only in their jurisdiction, but also beyond their borders, because the way issues are posed at the national level can affect outcomes.³⁵ The fact of a local or state government's subordination to a higher power in a policy area gives the smaller government the ability to dissent as a member of a community, as opposed to merely doing its own thing entirely separately from the rest. Put in the language of the previous pieces, dissenting by deciding may be more powerful (or at least differently powerful) when made by dependant and subordinated subnational or substate institutions. Further, national groups may be more willing to delegate power to institutions they can overrule.

In *Uncooperative Federalism*, Gerken, along with Jessica Bulman-Pozen, took the insights of *Sovereigns and Servants* and applied them to debates about federalism.³⁶ They argued that federalism scholars focused on three potential types of relationships between the national government and the states. When states challenge federal authority, we think of them as either autonomous sovereigns or as powerless. And when they work with the federal government, we use the language of "cooperative federalism," and talk about states as dependent allies of the federal government in implementing national goals. What is left out of this is a fourth possibility, "uncooperative federalism," or the ways in which states can exercise power as a "dissenter, rival or challenger" in areas where they are implementing federal policies.

When the federal government calls on states to implement federal policy (as it increasingly does), states can implement them according to their own wishes, either to fit their own needs or to directly challenge federal policy. States gain control over the national agenda by forcing the federal government's hand. Further, uncooperative States can speak to national decision-makers from inside the federal policy-making universe and gain the benefit in national debates of dissenting by deciding and providing real world examples of how dissent would work. The federal government may be more willing to

³⁴ Heather K. Gerken, *Of Sovereigns and Servants*, 115 YALE L.J. 2633 (2006).

³⁵ Although she does not put it this way, Gerken's point here is well-grounded in social choice theory, as agenda-control can change outcomes in the presence of cycling preferences. See KENNETH ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 22-23 (2d ed. 1963) (establishing that a no voting rule consistent with basic democratic values can produce unique outcomes, meaning that voting order and agenda control matter to determining results.).

³⁶ Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009).

grant power to servant States because it knows it can overrule extreme local variations. Various doctrines, particularly the anti-commandeering principle expressed in *New York v. United States* and *Printz v. United States* ignore this point, focusing exclusively on the degree to which states are sovereigns and missing entirely their power as servants.³⁷

The final piece (so far) in the series, one that brought together the insights of her previous work in the area, is Gerken's 2009 Term Harvard Law Review Supreme Court Foreword, *Federalism All the Way Down*.³⁸ Gerken argued that the rhetoric of federalism is rooted in a conception of states-as-sovereigns, even in areas where scholars understand that states are not sovereign or independent in any meaningful sense. We tend to think of states as most important when they are providing functional alternatives to the federal government, or where they can define policies all on their own. Scholars and judges focus on federalism as a tool for providing individuals with exit rights, ways for minorities to avoid national decisions in protected separate spheres or to choose policies as consumers voting with their feet.

While these are valid ways of thinking about the benefits of federalism, Gerken argues that federalism also empowers national minorities even when they are not sovereign and even when their powers are "contingent, limited and subject to reversal by the national majority."³⁹ Rather than providing power through exit and differentiation, non-sovereign federalism gives national minorities voice in national decisions by allowing them to use their local experience as a tool in national debates and as a method of forcing the hand of national power. That is, we should think about federalism not only as a method for providing governance goods at the subnational level, but as a method for improving democratic debate and representation at all levels of government.

Looking at how federalism works in areas without sovereignty suggests that many of federalism's benefits—the benefits of second-order diversity, dissenting by deciding, and uncooperative policy making—are provided not only by states but also by all sorts of multi-purpose and single-purpose institutions, from cities to juries to zoning commissions. Further, the harms we associate with federalism, particularly the difficulties created by rogue states and their refusal to implement national-level decisions, are not so bad in areas without sovereignty. "Freed from the heavy costs associated with sovereignty, we might imagine that the principal-agent problem isn't always a problem. While resistance surely has its costs, minority rule at the local level generates a dynamic form of contestation, the democratic churn necessary for an ossified national system to move forward."⁴⁰

In Gerken's hands, "federalism all the way down" promotes democracy in a big, messy, disputatious country. It allows power to shift constantly among different groups and different ideas, provides minorities of all stripes with tools to make their claims in the public sphere, and is designed not to promote administrative efficiency but rather

³⁷ *Id.* at 1295-98; *Printz v. United States*, 521 U.S. 898, 933 (1997); *New York v. United States*, 505 U.S. 144, 188 (1992).

³⁸ Gerken, *Federalism All the Way Down*, *supra* note 13, at 4.

³⁹ *Id.* at 8.

⁴⁰ *Id.* at 9-10.

provides an arena for political debate.⁴¹ Gerkenian⁴² federalism all the way down is a tool for promoting a rich, varied democracy, not merely for providing a variety of exit options for consumer-voters.

I. Well, Actually, Come to Think of It, There Is this One Little Thing I Have Questions About: Reasons to Doubt We See as Much *Dissenting by Deciding* or *Uncooperative Federalism* as Our Institutional Structure Suggests We Might

Looking at these two lines of scholarship together leads us to a question rather than an answer. If dissenting-by-deciding, uncooperative federalism and second-order diversity are good things, are we sure that our current allocation of power provides them in optimal ways, balancing other needs? If we, following Gerken, believe that part of the reason we devolve power to state, local and other institutions is to produce the benefits of dissenting by deciding and uncooperative federalism, then we might ask whether our current devolutions of power actually accomplish this goal.⁴³ And if we actually see less than we might like, how do we get from here to there?

This section will show that there are strong reasons to believe we end up with less dissenting-by-deciding and uncooperative policy-making than our institutional structures might suggest. That is, it is pretty likely that American federalism in practice does not reliably produce the theoretical benefits touted by promoters of "our federalism," at least in the quantities suggested by our decisions to devolve power.⁴⁴ The reasons are strategic and, more importantly for our purposes here, are due to the development of non-state national entities from political parties to think tanks that diminish difference and responsiveness to local needs and beliefs in decentralized political units.

⁴¹ *Id.* at 20 ("I thus limn the theories that make up the other half of constitutional federalism -- those that emphasize the role that minority rule plays in shaping identity, promoting democracy and diffusing power.").

⁴² Triple word score! 45 points!

⁴³ This, of course, assumes that our constitutional structure is good. To the extent we think that we want *less* dissenting by deciding and uncooperative federalism than our constitutional structure seems to call for, then this isn't a problem but rather something to celebrate. I'm going to assume that the Constitution here provides its own normative *desiderata*. But particularly with the Constitution's leading modern scourge (the great Sandy Levinson) in attendance, we should be careful before we assume that we, you know, *dēsīderāmus* the Constitution's *desiderata*. (I hope my middle school Latin worked out there. One can't be sure about these things.) Another way of putting this point is with a speech from Whit Stillman's brilliant film *The Last Days of Disco* (1995): "You know that Shakespearean admonition, 'To thine own self be true'? It's premised on the idea that 'thine own self' is something pretty good, being true to which is commendable. But what if 'thine own self' is not so good? What if it's pretty bad? Would it be better, in that case, *not* to be true to thine own self?... See, that's my situation." Although I am engaging in this assumption here, it is certainly a bad, if common, practice to assume that our political order is necessarily pretty good and that we should strive to be true to it. Even if I wasn't, though, the point holds. For any polity attempting to achieve some quantum of federalism-based goods through institutional design, we need to ask whether the existence (or likely development) of non-formal institutions will result in achieving the ends of that institutional design.

⁴⁴ See Gerken, *Federalism All the Way Down*, *supra* note **Error! Bookmark not defined.**, at 8-10, 19-20 (describing traditional benefits associated with federalism.)

a. Strategic Reasons for a Lack of Subnational Difference: Susan Rose-Ackerman's Theories About Democratic Laboratories Applied to Dissenting by Deciding and Uncooperative Federalism

The idea of states as "laboratories" of democracy is one of the most frequently discussed benefits of federalism.⁴⁵ But the extent to which state governments or other loci of decentralized power actually experiment is not really known (nor is it clear what benchmark we should judge it against.) Further, states have good reasons not to experiment. Some of these reasons apply equally to dissenting-by-deciding and uncooperative policy-making.

In a classic 1980 article, Susan Rose-Ackerman explored two types of reasons states might not experiment to the socially-optimal level.⁴⁶ The first is that experimentation is costly, but does not give rise to property rights in the policy. States may decide to free ride on the policy experiments of others, or refuse to experiment to the socially-optimal level because they do not care about benefits to other states. As Brian Galle and Joseph Leahy note, this depends on ideas being easily copy-able by other states, which may not be true, and on the same ideas being good across different states.⁴⁷ But it seems pretty likely that ideas do spread, and that the lack of property rights in them reduces the incentive to innovate in many policy areas. Second, Rose-Ackerman argued that, even where innovation is optimal for the population, it may be bad for incumbent officials. Innovation is risky and most incumbents win reelection. Someone sure to win reelection is unlikely to take a lot of chances.

Both of these arguments apply to the types of behavior prized in Gerken's account. One of Gerken's key points is that benefits of dissenting by deciding run not only to the dissenters, but to the rest of society—we all can see how different policy choices play out in the real world when power is decentralized. But the cost of developing dissenting policies, however, is borne entirely by the state or other decentralized entity. This is the opposite of Gerken's point about cheap talk. Dissenting without deciding is cheap, in the sense that one does not have to actually live with the results of one's dissenting opinion nor does one have to figure out how one's dissent would actually work. However, dissenting-by-deciding is costly, and differentially so—the dissenters have to bear the risk of trying something new and have to invest in figuring out how it would work. Dissenting jurisdictions have to come up with alternatives and methods for implementing their dissent without being able to draw on the resources of the whole, while part of the benefit flows to others. The benefits of coming up with something new may be less than the costs of merely acquiescing to some disagreeable federal policy. We may see less dissenting-by-deciding than we'd expect given differences in the population and diffusion of power because the cost of developing good dissents is borne entirely by the dissenters.

⁴⁵ See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.")

⁴⁶ Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593, 594 (1980).

⁴⁷ Brian Galle & Joseph Leahy, *Laboratories of Democracy? Policy Innovation in Decentralized Governments*, 58 EMORY L.J. 1333, 1347-60 (2009)

Rose-Ackerman's point about the incentives of elected officials being more risk averse than voters also applies to dissenting-by-deciding and uncooperative policy-making. The cost to elected officials in subnational jurisdictions—in lost opportunities for advancement, in sheer personal pressure—of dissenting from national orthodoxy can be quite high. For instance, a mayor who defies state policy in the name of local representation may be risking a chance at winning a statewide election.⁴⁸ This pressure can be social as well as political. A local education official who promotes a locally popular but nationally disliked idea—e.g., creationism, Ebonics—may become a national joke.

None of this is to say that we don't see dissenting-by-deciding or uncooperative policy-making, but rather that merely diffusing power may not create as much as Gerken might hope.

b. Private Institutional Reasons for a Lack of Dissenting By Deciding: The Problem of Mismatch

Gerken's work, like many of ours, can generally be described as existing in the world of institutional or constitutional design: she is making arguments about the benefits and costs of dividing power among various governmental bodies. Theories of institutional design work from a basic assumption that the institutional set-up produces real world effects, that if you design the institutions in a certain way, there will be predictable consequences at the level of policy making and benefits and costs for individuals. What work on institutional design frequently leaves out is the (possible) existence of non-state entities gumming up the operation of institutional designs.

When institutional designers advocate diffusing power to lower levels of *democratic* government because it will achieve certain policy ends, they have to make some assumptions about how voters at the lower level of government will behave.⁴⁹ Usually, they assume that voters at the lower level of government will use elections to express preferences about policies that can be enacted by the lower level of government and demand accountability from officials at the lower level of government. That is to say, they expect local democracy to work.

But decades of research on voters shows that they have trouble making democracy work without help.⁵⁰ As Joseph Schumpeter and Anthony Downs famously

⁴⁸ The same can be said of cooperative federalism. This point was made well in the brilliant HBO show, *The Wire*. In episode 12 of season 4, Mayor Carcetti of Baltimore is faced with a dilemma -- the city is running out of money and could benefit greatly from getting an influx of state money, but accepting this type of bailout would harm his reputation in richer parts of the state and damage his chances for winning a future gubernatorial race.

⁴⁹ Gerken makes this point clearly: "Most theories of federalism explicitly or implicitly depend on minority rule. For instance, states are unlikely to constitute laboratories of democracy or facilitate Tieboutian sorting if the same types of people are making decisions at the state and national levels. Similarly, ambition is unlikely to counter ambition if state and national actors are united in their ambitions." Gerken, *Federalism All The Way Down*, *supra* note __, at 12 n. 10.

⁵⁰ See Christopher S. Elmendorf & David Schleicher, *Informing Consent: Voter Ignorance, Political Parties and Election Law*, 2012 U. ILL. L. REV. __ (forthcoming 2012). We might exempt very small local governments from this analysis because of the high incentives of homeowners to avoid risk to their largest

showed, becoming knowledgeable about politics isn't instrumentally useful for most people.⁵¹ No one vote is likely to affect an election and learning about politics is costly—only a rare citizen (and likely a monomaniac)⁵² will take the time to learn the policy positions of each person who appears on the ballot, from state senator to sheriff, never mind developing the analytical tools for determining which policies are better at a particular level of government.⁵³ And in fact, many voters know shockingly few of the facts one might need to make informed voting decisions.⁵⁴

This is not specific to subnational elections, although voters do know less about state policies than national ones. But national elections give voters a key bit of help—useful political party labels. In our modern, polarized Congress, knowing a candidate is a Democrat or a Republican will tell you almost all the useful information you need about their issue stances.⁵⁵ Further, it will permit voters, as Morris Fiorina argued, to develop "running tallies" about the performance of political parties over time, attaching to parties in power whatever good or bad they notice about the world when one party or another is in power.⁵⁶ As long as the parties are roughly consistent over time, divide the electorate roughly equally, and are internally coherent, these running tallies will be pretty good guides for voters.⁵⁷ When aggregated across the electorate, even if most voters are inert "Michigan voters," with preferences determined as a result of social forces rather than assessments of performance, the fact that some voters are engaged in running-tally decision-making at least some of the time can lead to "macro-partisan" efficiency, allowing the electorate to behave as if it were far more informed than it actually is.⁵⁸ The inert types balance each other out across a national electorate (at least partially); some percentage of voters changing their minds in response to performance can produce an overall responsive electorate. While political scientists have debate endlessly exactly how competent political party heuristics and "the miracle of aggregation" allow voters to be,

asset and the influence voters and participants can have due to small numbers. See WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* (2001).

⁵¹ JOSEPH SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 251-68 (1943). ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 238-60 (1957).

⁵² Or even more likely a lobbyist.

⁵³ Voter ignorance is not a problem of a benighted *they*, but rather is a problem for all of us who live in the real world with its competing demands, requirements that we feed ourselves, and the like. If you show me someone who has deeply and truly studied each choice they have to make when voting, I'll show you someone who isn't all that busy. Or is, as I suggested earlier, a lobbyist.

⁵⁴ See Elmendorf and Schleicher, *supra* note __, at 8-11.

⁵⁵ *Id.* at 14-20.

⁵⁶ MORRIS P. FIORINA, *RETROSPECTIVE VOTING IN AMERICAN NATIONAL ELECTIONS* 89-106 (1981); Elmendorf & Schleicher, *supra* note __, at 14-18.

⁵⁷ Chris Elmendorf and I summarize these requirements: "By this we mean: (1) that learning a candidate's party affiliation enables voters to infer the candidate's position on most significant issues of national policy; (2) that the packaging of policy positions into party labels tracks latent preference correlations within the electorate (so that voters who favor the Democratic position on issue x are also likely to favor the Democratic stance on issue y); and (3) that the major party brands divide the electorate fairly evenly, such that roughly half of the electorate prefers the Democratic brand to the Republican brand and vice versa." Elmendorf & Schleicher, *supra* note __, at 5.

⁵⁸ *Id.* at 17; ROBERT S. ERIKSON, MICHAEL B. MACKUEN & JAMES STIMSON, *THE MACRO POLITY* (2002).

virtually everyone agrees they improve voter competence substantially.⁵⁹

But voters in sub-national elections don't have the same help. Voters in these elections suffer from what I have called elsewhere the problem of "mismatch."⁶⁰ Our political parties are national coalitions that do not compete for the local median voter on the basis of issues specific to the corresponding level of government. That is, they are "mismatched" to local and state elections—they do not provide voters with much information about how candidates running on their platform will govern at the local level, nor do they much to compete for the allegiance of the median voter at the local level. But they are on the ballot nonetheless. And voters, because they do not know much about individual legislative candidates, end up using their national level preferences in local elections because it likely tells them at least something about the candidates. One result of this is that jurisdictions that are uncompetitive at the national level—say Idaho or New York City—have no partisan competition at the city council or state legislative level.⁶¹ Another result is that we see less and different dissenting by deciding and uncooperative policy making than Gerken suggests.

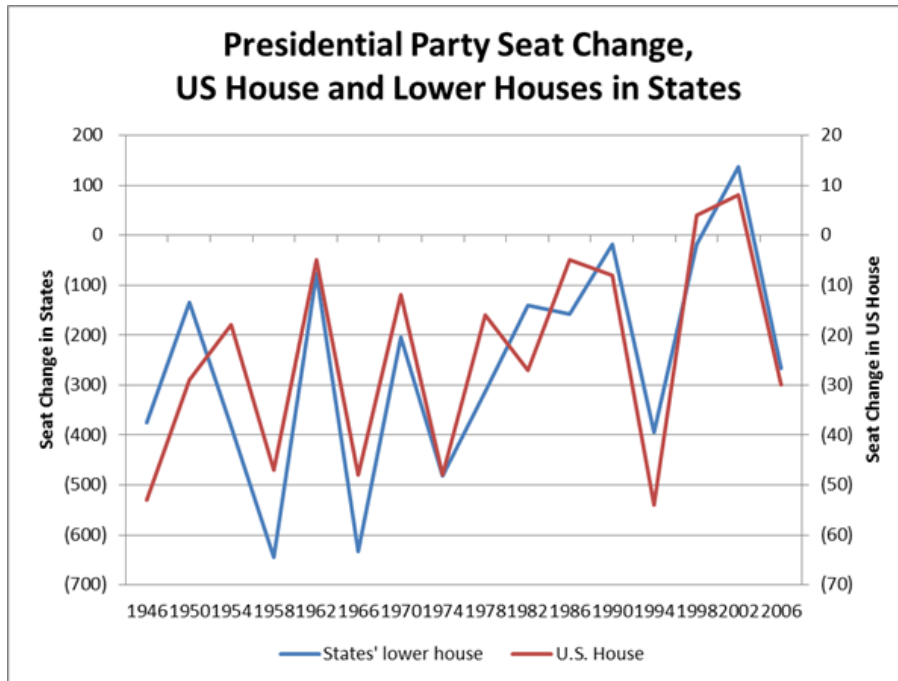
Here is a graph prepared by political scientist John Coleman⁶²:

⁵⁹ See Elmendorf & Schleicher, *supra* note __, at 18.

⁶⁰ See *id.* at 32-43; David Schleicher, *What if Europe Held an Election and No One Cared?*, 52 HARV. INT'L L. J. 109 (2011) [hereinafter known as *What if Europe*]; David Schleicher, *I Would But I Need the Eggs: Why Political Corruption Does Not Cause Exit From Big American Cities and Why Political Competition Fails to Check Local Corruption*, 42 LOY. U. CHI. L.J. 277, 279-84 (2010). David Schleicher, *Why Is There No Partisan Competition in City Council Elections? The Role of Election Law*, 23 J. L. & POL'Y 419 (2007) [hereinafter known as *City Council Elections*].

⁶¹ Primaries don't help either, as voters in primaries are without any heuristic guides at all. As a result, they behave largely like they are uninformed of the ideological stances of candidates, particularly in down-ballot elections. See Elmendorf & Schleicher, *supra* note __, at 27-29.

⁶² John Sides, *Seat Losses Everywhere*, THE MONKEY CAGE (Nov. 1, 2010), http://www.themonkeycage.org/2010/11/seat_losses_everywhere.html (graph produced by John Coleman).



As you can see, voting in state legislative elections directly tracks voting in national elections, even though many inputs to national politics (e.g. foreign policy) are not a part of state politics, and the performance of officials obviously can differ. Local legislative elections are even more dramatic, with national level preferences determining almost all voting local legislative elections.⁶³ Executives—governors and mayors—can become well-known enough to break out of this dynamic. But voting in state and local legislative elections is frequently what European political scientists call "second-order." Local and state legislative elections are mostly referenda on the President and Congress.

In the next section, I'll present some of the theories I have developed for why mismatch occurs, first in my own work and then in work with Chris Elmendorf, and some potential ways to mitigate or fix it. But here I want to discuss what the implications of those theories are for dissenting-by-deciding, uncooperative federalism, and localism. Clearly, when local and state elections are second-order, the degree to which local governments represent local preferences diminishes. Local politicians face few repercussions from passing policies not favored by the local median voter. After all, what they do just doesn't matter very much to their election chances. However, they will likely be responsive to *national* level partisanship and ideology. Local officials win elections on the basis of their national partisan affiliation, can be challenged in primaries for failure to be responsive to national level issue stances, and if they want to advance in politics, need to do so through national level party organizations.⁶⁴ This changes how

⁶³ See Schleicher, *City Council Elections*, *supra* note __, at 430.

⁶⁴ A quick note on primaries. Primaries almost certainly do not do much to encourage state and local politicians to curry favor with the local median voter on local issues, even when one party is effectively 100% of the electorate. The reason is that there are no ballot labels inside primaries, making them, in effect, like non-partisan elections with a limited electorate. Voters do not have the tools to track the performance of officials or heuristics for their ideological stances. See Schleicher, *City Council Elections*, *supra* note __, at 440; Elmendorf & Schleicher, *supra* note __, at 18-20.

state and local politics relates to national politics. When you see big swings in presidential election years—like 1964 or 2008—local politics will largely resemble national politics, with little dissenting by deciding based on local realities or uncooperative policy-making. When you see large counter-swings, like 2006 or 2010, with the out-of-power party at the national level dominating at the state level, you will see *more* dissenting-by-deciding and uncooperative policy-making, with national parties using state and local governments to make national-level points.

As a result, ideological minorities other than national political parties will be less influential than their local or state numbers suggest because they do not have the tools—effective party labels—to use elections to give voice to their dissent. Many of the benefits Gerken identified that flow from second-order diversity will not emerge if there is mismatch, from the introduction of new ideas that challenge the national ideological status quo to the ability to see in practice ideas that we don't see emerging in the handoffs of power between national Democrats and Republicans.

And because it causes local elections to behave something like polls on national party preference, mismatch can deform the dissenting-by-deciding and uncooperative policy-making we do see. Allowing local and state governments to check national policy by not implementing it is a check on government power, a form of uncooperative federalism. However, this can be employed as a method of achieving the goals of co-partisans at the national level (for instance, Governors refusing to cooperate with policies coming from an opposite party President in order to frustrate his agenda or affect his popularity.) While uncooperative federalism, in this context, provides another check in our system of checks and balances, it is largely one that replicates the checks provided by having a separate legislature and executive. It gives the party that does not hold the presidency another tool for frustrating his agenda. This may have its benefits, but they are not the same as the benefits Gerken suggests "our federalism" provides—a rich, multi-directional give-and-take between multiple types of majorities. If political parties take a different scope (i.e. national and not local) than governmental units, they can change the likely effects of decentralizing power.

Political parties are not the only national non-governmental institutions that suppress local dissent and change the form local dissent and uncooperative policy making take. A problem Rose-Ackerman discusses—the lack of investment due to easy copying of state laws—is enhanced by institutions that push nationwide uniformity like the American Law Institute or National Conference of Commissioners on Uniform State Laws.⁶⁵ By reducing the cost of copying, they make dissenting-by-deciding comparatively more expensive.

The extent of copying by governments can be surprisingly large, even on the international level. A group of sociologists and international relations scholars known as the World Society School has shown that nation-states copy one another to an enormous

⁶⁵ See Bruce H. Kobayashi & Larry E. Ribstein, Private Lawdrafting, Intellectual Property, and Public Laws (January 16, 2012) (unpublished manuscript). available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1986455

degree, even when it makes little sense.⁶⁶ For instance, all countries divide their military up into army, air force, and navy, even landlocked countries; countries without scientific establishments create science policy-review boards just like developed countries; and school curriculums are almost identical across industrialized and non-industrialized states.⁶⁷ When a new idea gets hot, like including "rights of the child" in constitutions, it suddenly appears in new constitutions no matter their origin.⁶⁸ Notably, ideas travel from poor to rich countries as well as from rich to poor; all countries are copiers.⁶⁹

World Society school scholars explain this "isomorphism" as the effect of a form of international peer pressure, both formal and informal, on state organization. Organizations like the United Nations, the International Monetary Fund and the World Bank and other states grant recognition and dole out aid based on the acceptance of the basic form of the modern state.⁷⁰ Other countries provide examples that resource-constrained and risk-averse leaders can turn to when decisions need to be made. And substate entities can legitimate subnational actors that push conforming. If all potential finance ministers go to the Kennedy School and study the same examples, it is no surprise that many nations end up following similar policies.

Similar things likely happen at the state and local level inside the United States. State and local policy makers attend national universities and law schools; are lobbied by national-level interest groups; receive policy advice from national level think tanks and political organizations, both left and right. The socialization of states and cities pushes them away from the de-centered, dissent-and-difference-focused model of federalism

⁶⁶ The most notable of these scholars are John W. Meyer and John Boli. See John W. Meyer et al., *World Society and the Nation-State*, 103 *Am. J. Soc.* 144 (1997); John Boli, *World Polity Sources of Expanding State Authority and Organizations*, in *INSTITUTIONAL STRUCTURE: CONSTITUTING STATE, SOCIETY AND THE INDIVIDUAL 1870-1970* (George Thomas et al. eds., 1987); JOHN W. MEYER, *THE WRITING OF JOHN W. MEYER* (Georg Krücken and Gili S. Drori eds., 2009). In the legal academy, Ryan Goodman and Derek Jinks are the leading expositors and contributors to this literature. See Ryan Goodman & Derek Jinks, *Towards an Institutional Theory of Sovereignty*, 55 *STAN. L. REV.* 1749 (2003); Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 *DUKE L.J.* 621 (2004). For a review of the literature, see David Schleicher, *Liberal International Law Theory and United Nations Mission in Kosovo: Ideas and Practice*, 14 *TULANE J. INT'L & COMP. L.* 179, 228-33 (2007) [hereinafter *Liberal International Law Theory*].

⁶⁷ See Schleicher, *Liberal International Law Theory*, *supra* note __, at 228-33.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Gerken responded to this literature in an essay in 2006. Heather K. Gerken, *Legislatures in Dialogue with One Another: Dissent, Decisions and the Global Polity*, in *THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE* 547, 558-563 (Richard W. Bauman & Tsvi Kahana eds., 2006). She argued that isomorphism created substantial costs and that international organizations should try to engage in "norm management" to encourage dissenting-by-deciding or simply difference between legislatures by not providing social pressure to conform to best practices too quickly or some case not even collecting best practice information. Although international organizations are important transmission mechanisms and perhaps could take steps to reduce internationally copying to some degree, I am skeptical that such norm management would be particularly effective. International organizations aggregate opinion from leading countries and are as much a product of this socializing process as they are the creators of it. Further, these pressures are as much informal as they are formal, as much conducted through social interactions between Kennedy School graduates in different countries as they are through formal policies by international organizations. I suspect an international organization could no more intentionally retard international isomorphism than a grade school could put an end to peer pressure affecting its students.

Gerken suggests is a central goal of "our federalism."

Even in areas where the federal government allows states to make policy *and* where states or localities want to dissent, the scope of institutions frequently limits their power. Because businesses frequently take national form, a few big states are able to decide policies for all others in a number of areas. When California sets auto emissions policies, automakers must follow California's policies if economies of scale mean they can only produce one type of each car for the domestic market (and Rhode Island or Wyoming's preferences for dissent be damned). The content of high school and grade school textbooks were for a number of years determined almost entirely by the odd politics of Texas's State Board of Education for similar reasons.⁷¹ Textbooks require a lot of upfront investment, but publishers can print as many as they want, creating enormous economies of scale. Ignoring the Texas market would be extremely costly, and publishers therefore cater to the State Board's whims.⁷²

Put together, I hope these sections show that, if dissenting-by-deciding and uncooperative policy making are goals of our institutional structure, we likely get less of them (and get them in a different form) than our extant institutional structure seems to ask for. Things that are not part of the institutional design of "our federalism" gum up its operation. This leaves two types of questions for Gerkenian federalism: (a) how much dissenting-by-decision and uncooperative policy-making does our system of federalism, localism, and decentralization actually produce given the existence of national non-formal bodies like political parties and private groups that serve to reduce difference across the country, and (b) how might law respond to, and attempt to shape, the scope of these non-formal institutions in service of goals like dissenting-by-deciding, uncooperative federalism at the like? The next section will take a stab at these questions.

II. "The Only Thing that Could Make Gerken's Work Any Better Is Discussing Mine Just a Bit More": Solving Mismatch as a Method of Getting From to Here All the Way Down

I jumped the gun on this section, as I used my work to define the "problem" in Section II. Mismatch—a misalignment between the demands of the constitutional system (federalism, localism etc.) and the scope of political parties and other institutions—creates problems for dissenting-by-deciding and uncooperative federalism. These are not problems for Gerken's scholarship. After all, states and localities do engage in dissenting by deciding and uncooperative federalism even the amount and form are affected by mismatch and her work identifies, explains and analyzes their properties. Rather, it suggests a future path for research. Mismatch creates problems if we think that dissenting-by-deciding and uncooperative federalism are good things that our institutional structures were designed to provide. This creates a question: If all-the-way down is where we want to be, how do we get from here to there?

⁷¹ Gail Collins, *How Texas Inflicts Bad Textbooks on Us*, N.Y. REV. BOOKS, June 21, 2012, at 21.

⁷² California does not exert similar influence in the textbook market because it requires textbooks to be California-centric, meaning that it is basically its own market for books, whereas the Texas-approved books are generalist. *Id.*

As the outline suggests, this is no section for modesty: I think my work provides an answer, or at least can help point to one. But in order to get there, we need to discuss why we see mismatch.

Mismatch can occur for a few reasons. Parties either do not *take* consistent stances on local issues that divide the electorate for legal or strategic reasons, are not *perceived* to have taken such stances on local issues due to voter limitations, or a sufficient number of voters *do not care* whether they take stances on local issues that it removes incentives for local parties to care about local issues.

The classic Downsian assumptions about parties would have them say whatever it took to get elected, constantly proposing policies to get the attention of the median voter.⁷³ At the local and, to a lesser degree, the state level, we don't see this. Parties seem to do nothing to try to attract the median voter on issues specific to their level of government. In fact, they are frequently not even coherent on local issues. Trying to figure out, say, the position of the Washington D.C. or New York City Democratic Party on zoning, schools, or policing is impossible. Instead, there are as many positions as there are Democratic Party officials, as membership in the party is defined by allegiance to national party policies from abortion to redistributive taxation.⁷⁴ The question is why, or more specifically, why doesn't the local minority party—usually the Republicans—create a coherent set of policies on local or state issues to attract voters away from the dominant major party?

One explanation I have offered is that election laws limit their ability to create differentiated local platforms. Ballot access laws ensure that the same parties that appear in state-wide elections also appear in local ones. Laws governing party switching make it impossible for voters to be members of one party for the purpose of national elections and another for the purpose of state or local elections. Laws requiring primaries ensure that voters who have selected their party membership based on national allegiance choose candidates (and frequently result in local or state primary electorates) without coherent beliefs on local or state issues.⁷⁵ The result of these laws and their interaction with simple facts about voter behavior—that voters generally don't know much about individual legislative candidates and care more about national politics than local or state politics when making party identification decisions—are uncompetitive local and state elections. Voters use national party membership as a heuristic when voting because they don't have any other information about candidates (and this makes sense as long as there is *any* correlation between national and local policy preferences). The local minority party can't develop a coherent policy message on issues specific to that level of government because it can't attract a membership to choose a coherent set of candidates. And the ordinary Duvergerian limitations on third-party entry ensure that we don't see

⁷³ See DOWNS, *supra* note 51, at 23-31, 115-120.

⁷⁴ See David Schleicher, *Ain't No Party Like a Bloomberg Party Because a Bloomberg Party Don't Stop (Or, You Know, Have to Deal With Term Limits)*, PRAWFSBLAWG, (May 7, 2012), <http://prawfsblawg.blogs.com/prawfsblawg/2012/05/aint-no-party-like-a-bloomberg-party-because-a-bloomberg-party-dont-stop-or-you-know-have-to-deal-wi.html>.

⁷⁵ See Schleicher, *City Council Elections*, *supra* note __, at 430-40; Elmendorf & Schleicher, *supra* note __, at 46-48.

new local-only third parties.⁷⁶ The result is that national votes are translated almost perfectly into state and local votes with almost no attention paid to the promises or actual performance of state or local officials.

Another explanation is that, even where local branches of parties do attempt to differentiate themselves, voters are unable to differentiate these locally-specific messages from the national party's brand.⁷⁷ There is substantial evidence that some state parties, for instance, have adopted messages that are in-keeping with the local median voter. Based on surveys of voters and officials, political scientists estimate, for instance, that the Massachusetts Republican Party in the state legislature take issue stances very close to those of the median voter in the state. Voters in the Bay State don't seem to care very much, however, with Democrats dominating both houses of the legislature for more than 100 years. This may be because voters can't keep the differences between state and national party straight in their heads. It may be because voters develop opinions retrospectively and therefore have no experience with actual minority party governance in many states. And it may be because voters care more about using state or local elections as a way to comment on national elections than they do about state or local governance.

A final story has to do with differences among voters.⁷⁸ Since the 1950s, we have known that some percentage of voters relate to political parties in a way very different than Downs would suggest. Downs and the literature that followed assumed voters made an assessment of the performance or promises of parties and then deciding which fits their pre-existing preferences better. Many voters—Elmendorf and I call them "Michigan voters" after the political scientists that discovered this—identify with parties, and their assessments and ideologies are defined by this identification, rather than the other way around.⁷⁹ In this model, party identification is more like a membership in a religion than an assessment of politicians; it gets passed down from parent to child and defines one's involvement in politics. While Michigan voters will every now and again step out and vote cross-party, only "realignments" can change this fundamental identification decision for these voters.

If the electorate is entirely made up of Michigan voters, party democracy would not be a very productive method of getting popular views on public policy. However, even if large parts of the population are Michigan voters, the existence of some running tally policy-and-performance voters can turn the electorate into a pretty responsive one, if the Michigan vote balances out between Democrats and Republicans. But at the local or state level, there is no reason to believe the Michigan vote balances out because the partisan vote is unbalanced. If a jurisdiction is 60/40 Republican in Presidential races

⁷⁶ See MAURICE DUVERGER, POLITICAL PARTIES: THEIR ORGANIZATION AND ACTIVITY IN THE MODERN STATE (Barbara North and Robert North, trans 1959) (laying out theory why electoral systems with first past the post vote counting and single member districting systems tend to have only two parties); David Schleicher, *'Politics as Markets' Reconsidered: Natural Monopolies, Competitive Democratic Philosophy and Primary Ballot Access in American Elections*, 14 SUP. CT. ECON. REV. 163, 190-92 (2006) (discussing Duverger's Law.)

⁷⁷ See Elmendorf & Schleicher, *supra* note __, at 44-46.

⁷⁸ *Id.* at 43.

⁷⁹ *Id.* at 1.

and half of all partisans are Michigan voters, then in order to win, a Democratic candidate would have to get 60% of the people who even consider policy or performance when they vote. The existence of a large, unbalanced number of Michigan voters can make competition basically impossible.

Depending on which of these stories is right in any given situation, you can imagine different policies designed to alleviate mismatch. Each of them would have interesting effects on the benefits of federalism Gerken identifies.

If the problem is a failure of local or state parties to modify their platforms due to legal constraints, one can imagine changing election laws, repealing or modifying some of the rules discussed above. A strong form of this would be barring parties that appear on the ballot in national elections from contesting local elections.⁸⁰ Some of these changes would face constitutional challenges, but absent restrictions and with party switching made easier, we might imagine a greater responsiveness of elections to local considerations, and with it a more varied form of dissenting by deciding and uncooperative federalism. We also could imagine all sorts of legal changes that encourage voters to consider local issues.⁸¹ We could, for instance, change how candidates are labeled on the ballot, making for instance Massachusetts state legislative candidates run as “Massachusetts Democrats” and “Massachusetts Republicans” to disassociate them from their national parents. We could also put on the ballot the party that controls the legislature, something voters are often confused about. And many other things as well.

If those changes didn't or weren't allowed to work, one might imagine developing what Elmendorf and I have called party substitutes.⁸² We've come up with a few ideas like this. The simplest would (in the context of the formally non-partisan elections used in most American cities) allow the mayor or governor to make on-ballot endorsements. The intuition is pretty simple. Mayors and governors have high enough profiles to avoid being trapped by their party, as out-party governors from Republican Mitt Romney in Massachusetts to Democrat Dave Freudenthal in Wyoming and mayors like Michael Bloomberg and Richard Riordan have shown. Mayoral endorsement on the ballot would take these high-profile elected officials' personal brands and turn them into down-ballot quasi-party brands. Again, this would give voters access to information about candidates on state or local issues and would allow politics in a jurisdiction to turn on a different axis than national Democrats versus national Republicans.

⁸⁰ I proposed this in Schleicher, *City Council Elections*, *supra* note __, at 450, although it would surely face serious constitutional challenges. I also proposed a strong form of electoral engineering to fix mismatch problems in European Union's European Parliament elections, which are almost entirely determined by the results of national party preference. I proposed a rule that would require a party to receive votes in a number of different countries in order to win any seats, thus creating pressure to run as European-wide parties rather than national ones. See Schleicher, *What If Europe*, *supra* note __.

⁸¹ Elmendorf & Schleicher, *supra* note __, at 53-58.

⁸² Elmendorf & Schleicher, *supra* note __, at 59-65; David Schleicher, *All Politics Is National: How State and Local Elections Fail Us and What We Can Do About It*, THE ATLANTIC, (July 13, 2012), <http://www.theatlantic.com/politics/archive/2012/07/all-politics-is-national/259789/>; Chris Elmendorf & David Schleicher, *Making Democracy Work in San Francisco*, S.F. CHRONICLE, Feb. 28, 2010, at E4.

One might imagine trying some version of this outside of the ballot process. In fact, Gerken has.⁸³ The Democracy Index is, in its way, an attempt to solve the problem of mismatch. State voters know very little about the performance of Secretaries of State, for instance, and hence use national party as the sole criterion for voting. The Democracy Index would give voters information specific to the jurisdiction, allowing them to engage in retrospective evaluation of official performance. This would give officials reasons to try to produce locally effective policies, even if they face pressure from the national government. To the extent dissenting-by-deciding produces good results, it needs measurement for voters to reward it. The Democracy Index would help in this regard.

If election law changes were not enough—say the problem was an excess of Michigan voters who could not be swayed by new information—one might think that we need institutional design changes. We might think that mayors and governors are more likely to exercise the powers of "servants," that is, of uncooperative federalism, than legislatures and allocate more power to them. We might delegate more power to institutions that don't seem likely to be affected by mismatch problems, like juries.⁸⁴ Or we might think about changing allocations of power to separate state and local democracy from federal elections. For instance, there is substantial evidence that the 17th Amendment, which provided for direct election of senators instead of having them appointed by state legislatures, was aimed in part at making voter choice in state legislative elections turn on state issues rather than national ones.⁸⁵ We might imagine, for instance, that removing from state legislatures the power to gerrymander congressional districts would give at least some voters a willingness to vote based on state issues rather than national issues (because the state elections would have fewer federal ramifications).⁸⁶

This is obviously just the beginning. Gerken's brilliant, inspiring work points us towards benefits of federalism, localism, and decentralization beyond those that are

⁸³ For a more extensive discussion of the Democracy Index as a tool of solving mismatch problems, see Schleicher, *What If Europe*, *supra* note __, at 59-63.

⁸⁴ Gerken has endorsed moving election reform to citizen's assemblies, a version of a move like this. Heather Gerken, *Citizens Must Drive Electoral Reform*, ROLL CALL (Nov. 15, 2005), http://www.rollcall.com/issues/51_52/-11239-1.html. For what it's worth, I'm quite skeptical of moves in this direction, as assemblies have their own problems and do not deliver the type of finality and legitimacy that elections do. But they do not suffer from mismatch problems in the same way as local elections.

⁸⁵ This is the subject of a forthcoming paper of mine. On newsstands soon. If by soon, one means about ten months or so.

⁸⁶ Interestingly, Franita Tolson argues that giving state legislatures the power to gerrymander districts is a "safeguard of federalism." Franita Tolson, *Partisan Gerrymandering as a Safeguard of Federalism*, 2010 Utah L. Rev. 859 (2010). By these lights, the exact opposite is more likely true, at least if by "federalism" we mean something functional about the benefits of diffusing power rather than the formal powers of states. To the extent voters are partisan and care more about national elections than state ones, they might vote in state elections in order to influence national elections if state legislatures have the power to influence national politics. As most theories of the benefits of federalism turn on states making policy decisions that are responsive to the preferences of their citizens about state issues, the power to gerrymander means that state officials face less pressure to be responsive to state voter preferences on state issues. This almost certainly harms the operation of American federalism.

usually discussed in debates about "our federalism." We need to think about how we might achieve those Gerkenian benefits in practice.