

## THE STATES AS NATIONAL AGENTS

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### INTRODUCTION

I am delighted for the chance to engage with Heather Gerken's work. I want to begin by offering tremendous kudos. I think the new nationalist school of federalism is a very exciting intellectual development. Over the years, many federalism scholars have emphasized the importance of state participation in federal programs.<sup>1</sup> But Gerken's recent writings, and those of other contributors—Abbe Gluck, Jessica Bulman-Pozen, and Erin Ryan—have forced this phenomenon onto center stage, highlighting the ways that devolution advances nationalist goals. With her characteristic elegance and provocation, Gerken's Article contends that the centrality of nation-state conjoining requires casting aside some of our inherited but outmoded conceptions of nation and state as distinct entities. She challenges both nationalists and federalists to get with the times. For the nationalists, that means recognizing the value of decentralization and devolution.<sup>2</sup> For the federalists, it means recognizing that states can wield powers even in these heavily nationalist contexts.<sup>3</sup>

I agree with large parts of the nationalist school argument. The modern day reality is one of nation and state acting together, cheek by jowl. This reality deserves the pride of place that the nationalist school insists it receive. That said, I want to push back at Gerken's contentions that the concepts of state autonomy and state sovereignty are now outmoded, as are nationalist concerns about dependence on state governance.<sup>4</sup> The theme of my remarks is agreement but with a plea for a little bit more balance and nuance. We can

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1. The classic exposition is DANIEL J. ELAZAR, *AMERICAN FEDERALISM: A VIEW FROM THE STATES* 2, 51–80 (3d ed. 1984) (describing the scope, financing, and forms of sharing between state and federal actors). See also Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 668–73 (2001) (emphasizing the political reality of cooperative federalism).

2. See Heather K. Gerken, *Federalism and Nationalism: Time for a Détente?*, 59 ST. LOUIS U. L.J. 997, 1000 (2015) (stating decentralization and devolution are merely means toward “a well-functioning democracy”).

3. *Id.* at 1001.

4. *Id.* at 1009–10.

better profit by integrating the concerns of prior decades of federalism scholarship into the insights of the new. I will close with a few comments on the question of what the rules of engagement should be for the world of federal-state bargaining. Gerken urges that this is where federalism scholars should focus their attention, and rightfully so: it is the critical question for federalism going forward.

#### I. THE ONGOING RELEVANCE OF STATE AUTONOMY AND SOVEREIGNTY

Let me begin with the issue of whether or not state autonomy and sovereignty are outmoded. There is a lot of power to the idea that it is time to get past state autonomy and state sovereignty as the sole bases of state power. Insofar as the new nationalist school's point is to simply insist on the importance of the "power of the servant," as Gerken has put it,<sup>5</sup> then I am on board. But throughout her Article, Gerken pushes further and challenges the relevancy or coherency of invocations of state autonomy and state sovereignty.<sup>6</sup> I think that additional move goes too far and risks undermining the very state role in national programs that the nationalist school emphasizes.

To put the point directly: unless the motifs of state autonomy and state sovereignty are in the equation, I have trouble explaining why we should use states as national agents. To its credit, the nationalist school has engaged with the question of "why the states," and has done a tremendous job of showing how the states add value to national programs and national politics. What strikes me, however, is how much of that value comes, at some background level, from the status of states as autonomous and sovereign. For example, one important benefit identified for the states, particularly by Jessica Bulman-Pozen, is that they serve as sites for national political dialogue.<sup>7</sup> But states are able to play this role not just because they have been incorporated into federal programs, but also because, critically, they are formally independent levels of government: they have distinct electoral bases and a claim to representative legitimacy. Their status as governments with aspects of sovereignty is central to their ability to help the nation work through contested issues. The fact that states set marriage laws is what has helped the same-sex marriage debate move forward; it is the fact that states play a big role in criminal law that has allowed them to push on the marijuana decriminalization front as well. States are able to experiment and help develop new ways of approaching federal programs precisely because they run programs. They are governments, and that relates closely to the idea of states as sovereign.

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5. *Id.* at 1010.

6. *Id.* at 1022–24.

7. Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1079 (2014).

In short, state autonomy and state sovereignty are an important part of why running national programs through the states adds value. As a result, going beyond the descriptive task of demonstrating how states are advancing national interests to query the ongoing coherency and relevancy of state autonomy, state sovereignty, or state interests risks significantly undercutting the federalism side of the nationalist school. To be sure, another central reason why this nation delegates so many responsibilities to the states is that states have tremendous historical, political, and cultural resonance. But incorporating the states into national programs also guarantees that they will continue to have that resonance. Before we reinforce the states in this fashion, I think that as a nation we need a clearer sense of why we might want to do so. To my mind, the reason to reinforce the relevance of the states is not simply the benefits for national programs or the kind of democracy that may therefore develop. It is also because of the constitutional weight assigned to the states and the respect due to states as part of our governmental structure. But emphasizing the constitutional stature of states and their governmental role quickly leads back to a discussion about state autonomy and state sovereignty.

Hence, I don't think we can really get rid of the concepts of state autonomy and state sovereignty quite as much as Gerken wishes. The real challenge posed by the new nationalist school is not for us to cast these concepts aside as outmoded, but instead for us to rethink what state autonomy and state sovereignty should and do mean today. What do state autonomy and state sovereignty mean in a world in which states are functioning and wielding their biggest powers as national agents? Understanding that these concepts have changed meaning but maintain their relevance hews closer to actual practice. In the healthcare context, for example, the Supreme Court's constitutional federalism decision in *NFIB v. Sebelius* laid out the background constitutional ground rules that then shaped negotiations about how states would implement their responsibilities under the Affordable Care Act.<sup>8</sup> Those negotiations have a different form after the Supreme Court's decision, which relied on ideas of state sovereignty and autonomy.<sup>9</sup> States now have different kinds of levers of power and influence. Even if you find the Supreme Court's more state-protective baseline constitutionally mistaken, that baseline is what may lead to many of the benefits that the new nationalists are identifying in state implementation of national programs. Figuring out how state autonomy and state sovereignty should and do come into the context of joint nation-state undertakings is thus a key element of the nationalist school's descriptive and normative vision.

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8. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2608 (2012).

9. *Id.* at 2578.

## II. THE HIDDEN COSTS OF NATIONAL DEPENDENCE ON THE STATES

I also want to take up Gerken's challenge to the nationalists to recognize the value of devolution and decentralization.<sup>10</sup> Again, the new nationalist school of federalism has done a great job at showing a lot of the underappreciated benefits of having states as national agents for national programs—not just for states, but also for the nation. But I also think it is fair to say that as part of seeing their task to highlight those benefits, the new nationalist school has focused more on articulating the positive case for states as national agents and given less attention to what some of the downsides might be. Here, I just want to raise a cautionary flag and suggest that it is a little bit more empirically open whether or not using the states as national agents necessarily improves the structure of the national program or our national democracy.

So what might be some of the downsides of states as national agents, and is nationalist caution on this front as outmoded as Gerken suggests? On the programmatic side, my expectation is that including states as national agents will slant national programs in particular directions. I think it leads to pressure to set programmatic requirements and demands at a sort of lowest common denominator level, so as to include as many states as possible. I also think it is likely that you will see certain kinds of politically unpopular groups and interests losing out. There is nothing unique about that; these groups and interests often lose out at the national level as well. But having the states serve as key program implementers opens up new political battlefields. Groups must battle on a state-by-state basis, rather than consolidate their political pressure and leverage at the national level.

Again to its credit, the new nationalist school has addressed both the danger that state implementation will result in limited federal requirements and undermine the political power of unpopular groups and highlighted potentially countervailing benefits. Thus, Gluck has emphasized that relying on the states also plays an important role in getting federal programs off the ground to begin with; it lets the proverbial camel's nose under the tent.<sup>11</sup> Put differently, before we worry too much about lowest common denominator, we should realize that it may be the lowest common denominator or nothing. Similarly, Gerken has done a great job about talking about how pushing decisions down to the state

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10. Gerken, *supra* note 2, at 1001–07.

11. See Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534 (2011) (discussing congressional reliance on state experimentation for implementation of federal statutes).

level actually may enhance the voice of minority groups.<sup>12</sup> Even if these groups are disenfranchised or disengaged at the national level, at the state and local level these groups can be the deciders and exercise real power.

These are important points, but it remains an open empirical question whether certain programmatic goals or the interests of minorities and unpopular groups are enhanced more by national or state implementation. In addition, I think that to really assess empirically whether state implementation benefits certain groups requires comparing apples to apples. This means not comparing states to Congress, where unpopular groups may not win out either, but rather comparing states to national administrators. I am not convinced that the calculus will be as favorable as the nationalist school suggests.

Moreover, state involvement does not only mean including the state legislature, where a variety of groups and interests may have a voice, but also means giving a central programmatic role to state governors and other statewide elected officials who control state administration. A key question then is whether certain voices will be excluded or will wield less influence at the gubernatorial and other statewide levels. In the Affordable Care Act rollout, I think we have seen that certain interest groups have had limited influence. Governors have taken positions at odds with the interests of some groups within their states, such as those who would benefit from expansion of their states' Medicaid program, often for political or ideological reasons.<sup>13</sup>

A third reason to question whether including the states always enhances national programs and national democracy is that structuring programs in this fashion may serve to give certain views an outsized voice on the national political stage—outsized relative to their actual public support. A similar concern is sometimes raised with respect to equal state representation in the Senate, which is said to provide small states disproportionate influence.<sup>14</sup>

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12. See Gerken, *supra* note 2, at 1006 (noting federalism's benefits for minorities and further scholarship which explores the topic). See also Heather K. Gerken, *The Loyal Opposition*, 123 YALE L.J. 1958 (examining the effects of federalism on dissenters and minorities); Heather K. Gerken, *The Supreme Court 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 44–73 (2010) (discussing the democratic nature of “federalism-all-the-way-down” as it pertains to minorities).

13. See Frank J. Thompson & Michael K. Gusmano, *The Administrative Presidency and Fractious Federalism: The Case of Obamacare*, 44 PUBLIUS 426, 430–36 (2014) (describing Republican ideological opposition to expanding Medicaid under the Affordable Care Act); see also Timothy J. Conlan & Paul L. Posner, *Inflection Point? Federalism and the Obama Administration*, 41 PUBLIUS 421, 423–24 (2011) (discussing the difficulty of the National Governor's Association to deliver a clear message given the increasing polarization amongst state actors).

14. See Lynn A. Baker & Samuel H. Dinkin, *The Senate: An Institution Whose Time Has Gone?*, 13 J.L. & POL'Y 21, 24–47 (1997) (discussing the disproportionate power smaller states wield within the Senate); see also SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION:

Whether or not this outsized voice for those states that are resisting national policy leans conservative or progressive depends a great deal on the politics that dominates at the national level. Moreover, Jessica Bulman-Pozen has underscored how, at times, involving the states has served to check inaction and failure to regulate at the national level.<sup>15</sup> Still, my guess is that the most prominent voices at the state level will often tend towards resisting national policy. Resistance generates more attention as a voice within a national program than an insistence on really implementing federal policy strongly. Indeed, instances in which the states are prodding the national government to go further often involve the states wielding their independent powers. An example is New York's recent efforts to get the national government to regulate and enforce more on the securities front. New York's Attorney General not only pushed the Securities and Exchange Commission to be more aggressive in enforcing national securities laws, but he also wielded his independent state powers under New York's Martin Act.<sup>16</sup>

Again, my point is not to deny the benefits of state implementation, but rather to underscore the need for more comprehensive assessment of the empirical effects of state participation in national programs. The nationalist school has offered an incredibly rich, but nonetheless somewhat anecdotal account of these effects. A fuller account would allow greater nuance on how national programs are hurt as well as helped, and democracy is hurt as well as helped, by implementing national initiatives through the states.

### III. THE RULES OF ENGAGEMENT FOR STATES AS NATIONAL AGENTS

Lastly, I want to respond to Gerken's identification of the need to develop "rules of engagement," a point that Gluck has also emphasized.<sup>17</sup> Some potential suggestions on this front can be drawn from my earlier comments.<sup>18</sup>

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WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 49–62 (2006) (arguing states are overrepresented because each gets two Senate votes regardless of total population). For a skeptical view of claims for excessive small state influence, see John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 746–48 (2002) (noting that supermajority rules can be viewed as properly reflecting the equality of states).

15. Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459, 486–98 (2012).

16. See Jonathan R. Macey, *Wall Street in Turmoil: State-Federal Relations Post-Eliot Spitzer*, 70 BROOK. L. REV. 117, 126–33 (2004) (describing then New York State Attorney General Eliot Spitzer's push to actively engage the SEC in enforcing securities regulations); see also Mike McIntire, *Two Views of a Rising Star: Populist Warrior or Reckless Foe of Big Business*, N.Y. TIMES, Oct. 15, 2006, at 35 (describing Attorney General Spitzer's powers under the New York's Martin Act).

17. Gerken, *supra* note 2, at 1029; Gluck, *supra* note 11, at 549–50.

18. See *supra* note 9 and accompanying text.

For instance, perhaps there should be a presumption of local as well as state involvement in national programs. Such a presumption might help ensure that running national programs through the states gives minorities more of a decision-making role, but it might make administering programs more difficult. Such a presumption might also work to the detriment of the states by making it more likely that national programs will serve to break open the states and perhaps undermine the states' ability to control what are otherwise seen as parts of the state government. Hence, it may not be an appropriate presumption to adopt, but it represents one potential approach to designing state and national engagement.

My focus here, however, is on the question of what rules might follow from the idea of states as national agents. Perhaps revealing that I am, in Gerken's evocative phrase, an "aging boxing club member[]"<sup>19</sup> in the nationalist camp, I want to suggest that if the states are going to serve as national agents, national supervision of state implementation becomes critical. Setting the terms of that supervision is a key part of working out what the new nationalism will mean in practice.

Why do I think supervision matters so much? In part, it stems from the idea of what it means to be an agent. In *Hollingsworth v. Perry*,<sup>20</sup> albeit in the different context of justiciability, the Supreme Court emphasized a principal's rights to control as central to what it means to be an agent and the relationship of agency.<sup>21</sup> The discussion in *Hollingsworth* itself is a bit contrived, and I do not believe the Court successfully justifies its ultimate result. Nonetheless, the principal's ability to control an agent is an important feature of agency. This emphasis on control also arises in the other body of law that addresses agents of the national government: administrative law. A recurrent theme in administrative law is identifying the proper agency relationships for national agencies.<sup>22</sup> Are they agents of Congress? The President? The courts? The people? All of the above? A second theme is determining how best to reinforce and preserve these relationships, and, here, the idea of supervision and oversight is particularly central.<sup>23</sup>

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19. Gerken, *supra* note 2, at 997.

20. 133 S. Ct. 2562 (2013) (holding that proponents of California's same-sex marriage bill (Proposition 8) did not have standing to appeal district court's order declaring the Proposition unconstitutional).

21. *Id.* at 2666–68.

22. See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 579–80 (1984) (noting the confusion about the role agencies play in our government).

23. See Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 Yale L. J. (forthcoming 2015) (“[D]emonstrat[ing] the constitutional significance of systemic administration and justify[ing] recognition of a constitutional duty to supervise.”).

Here, too, we need to focus on supervision of the states insofar as they are serving as national agents implementing national programs. More than this, we need to focus on a particular form of supervision, namely supervision by national agencies. The reason for emphasizing supervision by national agencies is separation of powers. Bulman-Pozen has argued that involving states as national agents serves separation of powers goals by offering a means by which Congress can check the executive branch.<sup>24</sup> This checking function is an important feature to consider in devising the rules of engagement for states as national agents. But there are also separation of powers considerations that limit the extent to which we should see Congress as free to use the states as national agents against the executive branch. In particular, such a model is in tension with our separation of powers system's vesting responsibility for taking care the federal law be faithfully executed in the President. One way to try to accommodate this countervailing separation of powers concern is to ensure that the states are subject to supervision and oversight by national administrative agencies, so that even if the states operate to check the executive branch, they are also subject to the executive branch's control.

Yet the rules of engagement for the states as national agents cannot be approached solely through a separation of powers lens, whether focused on checking executive branch overreach or preserving adequate executive branch control. It is also necessary to consider whether the rules of engagement for the states as national agents should differ from those applicable to other national agents precisely because they are states. Moreover, if the fact that the states are involved leads to different rules for them as national agents, it is not just because we want states to have the freedom to experiment and to force issues onto the national agenda in ways that the new nationalists have charted for us. It is also because our system has two constitutional structural principles, federalism as well as separation of powers, and the rules we come up with to figure out what that relationship should be must take account of both. Hence, we are back to the need to understand what state autonomy and state sovereignty mean in a world of national federalism in order to develop rules of engagement for the states as national agents.

#### CONCLUSION

Heather Gerken challenges both federalists and nationalists to recognize that their long-held analytic frameworks are out-of-date and dispense with their now-antiquated commitments to state autonomy and state sovereignty on the one hand and resistance to decentralization and devolution on the other. My comments here query whether, in fact, these analytic concerns are as outdated

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24. Bulman-Pozen, *supra* note 15, at 486–98.



as Gerken contends. But they should not obscure Gerken's key insight, an insight shared by her fellow collaborators in the new nationalist school of federalism: that our contemporary reality is one in which nation and state are deeply intermingled and the central task going forward, for federalists and nationalists alike, is to determine the best rules of engagement for this intermingled world.