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RELATIONAL FEDERALISM: AN ESSAY IN HONOR OF HEATHER GERKEN

David Fontana*

We are here to celebrate the work of Heather Gerken, so allow me first to point out what might be the most unique feature of Gerken's work: she is not easily classified by the subject matter she addresses. Indeed, she might properly be labeled a public law theorist, even though that term is not usually used to describe American law professors. We instead use doctrinal divisions to label ourselves in the United States — we are scholars of constitutional law, or corporate law. The labels at law schools overseas about the “faculty of public law” or the “faculty of private law” are not used as often in the United States.¹

Substantial parts of Gerken's work do have specific doctrinal homes. She might be labeled a constitutional law scholar, or even more precisely an election law scholar.² She works on election law issues in practice.³ Always looking to draw larger connections,

* Associate Professor of Law, George Washington University Law School. My thanks to the editors of the *Tulsa Law Review* and to Heather Gerken for inviting me to participate in this symposium. My essay is on a serious topic, but I want to include in this footnote a brief, personal tribute to Heather similar to the one I offered at Tulsa. It is rare to be both excellent and kind. Heather is both. She has managed to serve as a mentor to so many young students and young scholars, myself included, and to do so in a way that has always emphasized a touch of the personal and professional. Her scholarly voice is unique and important, but her generosity perhaps even more so.

1. As an example, consider the prominent Max Planck Institutes in Germany, divided into public law institutes and private law institutes. See MAX PLANCK INST. FOR COMP. PUB. L. AND INT'L L., <http://www.mpil.de/ww/en/pub/news.cfm> (last visited Apr. 7, 2013); MAX PLANCK INST. FOR COMP. AND INT'L PRIVATE L., <http://www.mpg.de/150209/privatrecht> (last visited Apr. 7, 2013).

2. See Heather K. Gerken, *A Third Way for the Voting Rights Act: Section 5 and the Opt-In Approach*, 106 COLUM. L. REV. 708 (2006); Heather K. Gerken, *Election Law Exceptionalism?: A Bird's Eye View of the Symposium*, 82 B.U. L. REV. 737 (2002); Heather K. Gerken, *Getting From Here to There in Election Reform*, 34 OKLA. CITY U. L. REV. 33 (2009); Heather K. Gerken, *Getting From Here to There in Redistricting Reform*, 5 DUKE J. CONST. L. & PUB. POL'Y 1 (2010); Heather K. Gerken, *In Praise of Rankings*, 19 WIDENER L.J. 1 (2009); Heather Gerken, *Keynote Address: Lobbying as the New Campaign Finance*, 27 GA. ST. U. L. REV. 1155 (2011); Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. PA. L. REV. 503 (2004); Heather K. Gerken, *Morgan Kousser's Noble Dream*, 99 MICH. L. REV. 1298 (2001) (reviewing J. MORGAN KOUSSER, *COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION* (1999)); Heather K. Gerken, *New Wine in Old Bottles: A Comment on Richard Hasen's and Richard Briffault's Essays on Bush v. Gore*, 29 FLA. ST. U. L. REV. 407 (2001); Heather K. Gerken, *Rashomon and the Roberts Court*, 68 OHIO ST. L.J. 1213 (2007); Heather K. Gerken, *Shortcuts to Reform*, 93 MINN. L. REV. 1582 (2009); Heather K. Gerken, *The Costs and Causes of Minimalism in Voting Cases: Baker v. Carr and Its Progeny*, 80 N.C. L. REV. 1411 (2002); Heather K. Gerken, *The Invisible Election: Making Policy in a World Without Data*, 35 OHIO N.U. L. REV. 1013 (2009); Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663 (2001).

3. See *Arena Profile: Heather K. Gerken*, POLITICO, http://www.politico.com/arena/bio/heather_k_gerken.html (last updated 2010) (“In 2008 she served as a senior adviser to the National Election Protection Team for Barack Obama's presidential campaign.”).

Gerken has used her election law scholarship to draw larger constitutional law connections.⁴

The part of her scholarship that has been even more influential — and the part that I will discuss in this Essay — is not just a theory of election law, or even of constitutional law. It is a theory of public law, one that applies just as much to administrative agencies, juries, and legislatures as it does to elections and courts.⁵ Her scholarship about second-order diversity⁶ and how second-order diverse actors can dissent by deciding⁷ is about the relationship between political majorities and political minorities in a range of public law institutions, or what she calls “federalism all the way down.”⁸

In this part of her scholarship, Gerken argues that institutions can be second-order diverse — meaning there is “variation among decisionmaking bodies, not within them”⁹ — and that those institutional actors who are second-order diverse should sometimes use the power of “dissenting by deciding,” meaning that “dissenters could act radically. . . . [by] dissent taking the form of state action.”¹⁰ Dissenters can control other institutions (second-order diversity) and can use this control to dissent by deciding. Second-order diversity is what makes dissenting by deciding possible (without diversity of the second-order, it would involve majorities controlling all institutions).¹¹ Dissenting by deciding is the action that is possible and should be used sometimes as a result of second-order diversity.¹² Gerken argues that dissenting by deciding (what I will call “DBD”) can be used in any institutional context where “disagreement . . . stems from political principle”¹³ and “we can identify winners and losers.”¹⁴

The notion of DBD supplies a “transsubstantive vocabulary”¹⁵ and “institutional fixes across disciplines.”¹⁶ Because of its broad scope, DBD identifies a “set of distinctions that run through large portions of constitutional law (and other areas as well).”¹⁷ Following her most commonly used case study, in this Essay I will discuss DBD in the

4. See Heather K. Gerken, *Keynote Address: What Election Law Has to Say About Constitutional Law*, 44 IND. L. REV. 7 (2010-2011).

5. Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 8 (2010) [hereinafter Gerken, *Foreword*] (“We have thus not imagined the many institutions . . . — juries, zoning commissions, local school boards, locally elected prosecutors’ offices, state administrative agencies, and the like— as being part of ‘Our Federalism,’ let alone developed an affirmative account of the role they might play in a larger democratic system.”).

6. See Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099 (2005) [hereinafter Gerken, *Second-Order Diversity*].

7. See Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745 (2005) [hereinafter Gerken, *Dissenting by Deciding*]; Heather K. Gerken, *Of Sovereigns and Servants*, 115 YALE L.J. 2633 (2006) [hereinafter Gerken, *Of Sovereigns and Servants*].

8. See Gerken, *Foreword*, *supra* note 5.

9. Gerken, *Second-Order Diversity*, *supra* note 6, at 1102. See Gerken, *Dissenting by Deciding*, *supra* note 7, at 1754 (noting how dissenting by deciding has dissent “embodied in a decision” and involves second-order diverse actors using the “authority of the state collectively”).

10. Gerken, *Dissenting by Deciding*, *supra* note 7, at 1747.

11. See Gerken, *Second-Order Diversity*, *supra* note 6, at 1109–10.

12. Gerken, *Dissenting by Deciding*, *supra* note 7, at 1748.

13. *Id.* at 1753.

14. *Id.*

15. Gerken, *Of Sovereigns and Servants*, *supra* note 7, at 2639.

16. *Id.*

17. *Id.* at 2634.

context of federalism.¹⁸ Gerken often refers to the federalism debates as a case study of the larger idea of DBD.¹⁹

Many arguments for federalism rely on the greater *number* of institutions with the power to make policy in a federal as opposed to a unitary system and the greater *diversity* of policy or politics that result from this greater number of institutions. This diversity of policy or politics is something of a “public good” that a greater number of institutions created by federalism is uniquely positioned to provide.²⁰

Gerken relies on these numerical arguments in discussing how DBD adds to discussions of American federalism.²¹ Gerken argues that permitting political minorities to make policy increases the effective number of institutions with power to make policy by diversifying the factions controlling these institutions.²² DBD is “federalism all the way down”²³ because it is federalism in greater numbers.

DBD’s contribution is to argue that not only does the American system feature the federal government in Washington, and the State of California, but it also features a Mayor of San Francisco, Gavin Newsom, who disagrees with Washington and Sacramento some of the time.²⁴ Federalism before Gerken might count this as three separate institutions with power, but Gerken counts it as three plus: three separate institutions but with one of these institutions controlled by someone with a “minority view.”²⁵ We receive many of the benefits of federalism not just by having the United States, California, and San Francisco, but by ensuring that at least some of those institutions are controlled by political minorities because it gives us not just more institutions but more different institutions.

There is an implicit, but central, empirical assumption behind DBD and behind prior federalism scholarship: more institutions produce more diversity of outputs.²⁶ This need not be symmetrical, so that ten states need not produce ten times more different outputs than one state. But scaling is substantial, so that ten states would produce meaningfully more diversity than one state. The fact that there is a sum is what makes the sum different from the parts.

As this Essay will briefly highlight, that assumption is important in evaluating federalism, and important in evaluating DBD. There are many reasons to believe that greater

18. See Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009) [hereinafter Bulman-Pozen & Gerken, *Uncooperative*]; Gerken, *Foreword*, *supra* note 5; Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549 (2012).

19. See Gerken, *Dissenting by Deciding*, *supra* note 7, at 1755 (“[F]ederalism offers a good example of decisional dissent.”); *Id.* at 1782 (“American federalism [is] the dominant example” of the trend.”). See also Gerken, *Of Sovereigns and Servants*, *supra* note 7, at 2639 (listing “local government law, federalism and the separation of powers” as examples of DBD).

20. See Roderick M. Hills, Jr., *The Case for Educational Federalism: Protecting Educational Policy from the National Government’s Diseconomies of Scale*, 87 NOTRE DAME L. REV. 1941, 1966 (2012) (“Conventional federalism theory suggests [that federalism can provide] national public goods.”).

21. See Gerken, *Foreword*, *supra* note 5, at 20.

22. See Gerken, *Dissenting by Deciding*, *supra* note 7, at 1763–65.

23. Gerken, *Foreword*, *supra* note 5.

24. Mayor Newsom’s decision to order the City of San Francisco to issue marriage licenses to same-sex couples is an example of DBD that Gerken often references. See, e.g., Gerken, *Dissenting by Deciding*, *supra* note 7, at 1748; Gerken, *Of Sovereigns and Servants*, *supra* note 7, at 2640–41.

25. See Gerken, *Dissenting by Deciding*, *supra* note 7, at 1746–47.

26. See *id.* at 1759–60.

numbers of institutions produce greater diversity of outputs only some of the time. One genre of reasons to question the assumption that greater numbers beget greater diversity is *atomistic*, based on who might control the greater number of institutions.

Another genre of reasons, more relevant for our purposes, is *relational*. Federalism is just as much about how institutions interact as it is about how many institutions there are — in other words, federalism is relational just as much as it is numerical. If federalism is a “dialogue,” as David Shapiro suggests,²⁷ then we must examine how the dialogue not only engages institutions but also transforms them by engaging them in a dialogue. Federalism is constitutive as much as it is numerical.²⁸ For more numbers to produce more diversity, institutions must interact in a particular way.

Atomistic and relational dimensions of federalism are important, but this Essay will focus on the relational dimension for a simple reason: this is Gerken’s contribution to federalism scholarship, and more generally to public law theory. She might not realize it, but she has theorized a new version of federalism because of how the federal government and state governments interact in DBD. Her theory is original in substantial part because it envisions a new form of *relationships* between institutions.

She might also not realize that the new relationships between these institutions in DBD is not just what makes her federalism and public law theory new, but what makes it compelling. There is pervasive social science evidence to suggest that the relationships envisioned by DBD are not just “interesting,”²⁹ but also uniquely ensure that the numerical dimension of federalism produces a diversity of outputs.

THE NUMERICAL ARGUMENTS FOR FEDERALISM AND DISSENTING BY DECIDING

A. *The Standard Numerical Arguments for Federalism*

Let’s contrast federalism with its natural design opponent — unitary government. A unitary government is a centralized government, meaning all ultimate power to govern rests in the central government. The central government can be separated into constituent parts, each with some separate policy powers, but separate policy powers dependent on cooperation of the other parts of the central government. For instance, consider the example of France, often cited as the paradigmatic example of a unitary system.³⁰ The French Constitution of 1958 creates “two Houses.”³¹ The French Constitution also features a President with his own series of overlapping but separate powers,³² a Prime Minister with his own powers,³³ a court system with its own powers,³⁴ and a “Government”

27. See DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* (1995).

28. Robert Schapiro also implies that the “interactive” dimensions of federalism might be consequential. But that is because there is interaction, not because the interaction transforms institutions. See, e.g., Robert A. Schapiro, *Justice Stevens’s Theory of Interactive Federalism*, 74 *FORD. L. REV.* 2133, 2168 (2006) (arguing that interaction between states “promote[s] the values of choice, self-governance, and restraining tyranny”).

29. Bulman-Pozen & Gerken, *Uncooperative*, *supra* note 18, at 1308.

30. See GEORGES R. DELAUME, *BILATERAL STUDIES IN PRIVATE INTERNATIONAL LAW: AMERICAN-FRENCH PRIVATE INTERNATIONAL LAW* 20 (Arthur Nussbaum ed., 2d ed. 1961) (“As a unitary government, no constitutional issue of a federal nature could . . . be presented [in France].”).

31. 1958 CONST. art. 11 (Fr.).

32. See *id.* at arts. 5–19.

33. See *id.* at art. 21.

34. See *id.* at arts. 56–68.

(meaning essentially the Cabinet) composed of “public legal entities”³⁵ with its own powers. Even with the major institutions of government all included as part of the central government in Paris, there are still multiple, separate institutions.

This could exaggerate the number of separate institutions that exist in a unitary system. It is difficult for these separate institutions to make any meaningful policy without the cooperation of the other “separate” institutions. These separate institutions are all ultimately part of the same “indivisible” government of the Republic of France.³⁶

Moreover, many of these separate institutions in the central government are only separate in the sense that they are agents to another principal, and therefore they exercise what we might call delegated powers. The Prime Minister of France, for instance, can “delegate certain of his powers to Ministers.”³⁷ The civil service can “determine[] and conduct[] the policy” of France but is ultimately “[accountable] to Parliament.”³⁸ But delegable power can ultimately be un-delegated, so the separateness of the Ministers or the civil service is only the default.

Federalism differs from unitary government because it creates an even larger number of distinct institutions with the power to make binding policy than institutions created in a unitary system. Consider the American system as compared to the French system. There are separate institutions at the central level in the United States, as in the French system. But the federal government can only enact laws if it can identify some part of the Constitution that authorizes it to act.³⁹ Otherwise, the power to act rests either with “the people” or “the States.”⁴⁰ With fifty state governments, and with the potential for those state governments to further sub-divide, this increases the number of separate institutions substantially.

The amount of power that these central and non-central governments are granted varies from federal system to federal system. In the United States, the modern Commerce and Spending Clauses have been interpreted to grant the federal government substantial powers, and the Supremacy Clause permits the federal government to preempt state governments without having to articulate any reason why it would be better for the federal government to regulate.⁴¹ In Canada, the provinces have limited powers and the central government has residual powers.⁴² In the European Union, the principle of subsidiarity

35. *Id.* at art. 34.

36. *See id.* at art. 1.

37. *Id.* at art. 21.

38. *Id.* at art. 20.

39. *See, e.g.,* Oona A. Hathaway et al., *The Treaty Power: Its History, Scope, and Limits*, 98 CORNELL L. REV. 239, 324 (2013) (“The federal government is a government of limited powers.”).

40. U.S. CONST. amend. X.

41. The Supremacy Clause provides that “the [l]aws of the United States which shall be made in [p]ursuance” of the Constitution are “the supreme [l]aw of the [l]and.” U.S. CONST. art. VI, cl. 2. So long as a law is “made in pursuance” of the Constitution — meaning it can be grouped into one of the powers of the federal government — there is no separate requirement that it be important for the federal government to enact the law. *See id.* The closest limitations to this have come from the Supreme Court’s cases indicating that it is more difficult for the federal government to argue that it is acting within one of its powers if it is regulating a topic traditionally left for the states. *See, e.g.,* *United States v. Morrison*, 529 U.S. 598, 615–16 (2000) (arguing that it was “undoubtedly significant” that the federal law was touching on “family law and other areas of traditional state regulation”).

42. *See* 1 PETER W. HOGG, *CONSTITUTIONAL LAW OF CANADA* 504 (5th ed. 2007) (“The residuary nature of the federal power in Canada is in contrast to the distribution of legislative powers in the earlier Constitution of the United States. . . . There are reasons for supposing this difference . . . was part of a design to create a

essentially creates a “for cause” requirement before the member-states can be preempted.⁴³

These differences matter in classifying how much power these separate institutions possess. State governments with more limited powers (like in Canada) might be able to make fewer policies than state governments with more powers (like in the United States). These are all differences of degree, not type, though, and the most important detail is that federal systems have many more institutions that can make their own separate policies. In all federal systems the number of meaningful separate institutions that can make laws is far greater than one.

What results follow from this greater number of institutions empowered to make policies? Federalism theory usually argues that a diversity of policies and politics is a public good. And federalism theory usually argues that the greater number of institutions in a federal system is uniquely positioned to provide this diversity of output. Policy comes from Washington, but also from Albany, Oklahoma City and Sacramento, and this generates a greater number of differential outputs than if all policy came from Washington.

Some of the arguments for federalism that see numbers begetting diversity see numbers begetting *policy* diversity. The most noted defense of federalism is the innovation defense, associated with Justice Louis Brandeis’s laboratories argument: “[O]ne of the happy incidents of the federal system is 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.”⁴⁴

In the 1990s, the state governments of Florida, Iowa, Vermont, and Wisconsin all experimented with “time limits on the receipt of welfare.”⁴⁵ Several states denied welfare benefits to those who had additional children.⁴⁶ If welfare policy had been made only in Washington, this would not have been possible.

This state policy diversity occurred at the same time that the federal government itself was contemplating, and eventually enacting, experiments with welfare reform via the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 that supplemented these state reforms.⁴⁷ This all transpired because “multiple lawmakers enable laboratories of experimentation.”⁴⁸ This cross-institutional policy heterogeneity is facili-

stronger central government in Canada than in the United States.”)

43. See George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 338 (1994) (describing subsidiarity as reflecting “[t]he notion that action should be taken at the lowest level of government at which particular objectives can adequately be achieved”).

44. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

45. Nancy A. Wright, *Welfare Reform Under the Personal Responsibility Act: Ending Welfare as We Know It or Governmental Child Abuse?*, 25 HASTINGS CONST. L.Q. 357, 362 (1998) (citing Mark Greenberg, *Ending Welfare Law As We Know It: The New World Of Welfare Waivers*, 4 CONSORTING 1, No. 1 (Nov. 1993); Jason DeParle, *In Welfare Debate, It's Not 'How?' But 'Why?'*, N.Y. TIMES, May 8, 1994, at E1).

46. *Id.* at 362–63 (citing DeParle, *supra* note 45, at D1).

47. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, 42 U.S.C. § 1305 (codified as amended in scattered sections of 42 U.S.C., 7 U.S.C., & 8 U.S.C.); see also Wright, *supra* note 45, at 358–62.

48. Erin O’Hara O’Connor & Larry E. Ribstein, *Preemption and Choice-of-Law Coordination*, 111 MICH. L. REV. 647, 659 (2013) (citing *New State Ice Co.*, 285 U.S. at 311 (Brandeis, J., dissenting)).

tated by jurisdictional competition for citizens and businesses.⁴⁹

The opportunity for policy innovation is made possible because multiple lawmakers means more minds thinking about policy issues, but also because multiple lawmakers are more difficult to monitor. The federal government has a more difficult time monitoring multiple institutions as part of its decision whether to preempt state action. There is so much more state and local law for the federal government to monitor.⁵⁰ Interest groups have a more difficult time monitoring multiple institutions as part of their efforts to persuade governments to take or refrain from certain actions.⁵¹ A powerful interest group might be able to persuade one legislature to support their cause, but it will be difficult to persuade fifty other state legislatures to do precisely the same thing. In other words, more institutions mean more agents to monitor, thereby increasing agency costs substantially.⁵²

The flip side of the same policy innovation coin argument is that it causes *representational* diversity. Citizens in different states want different policies, so permitting there to be different states allows these states to accommodate preference heterogeneity.⁵³ More different types of policies are important because it “allows for laws to be tailored to different tastes, conditions, and preferences.”⁵⁴

Another reason for federalism that implicates numerical federalism arguments is that more institutions create more diversity of *politics*.⁵⁵ Federalism “increases opportunity for citizen involvement in democratic processes”⁵⁶ by increasing the number of institutions where democratic processes transpire. Because there are fewer citizens subject to each government, “the creation of sub-governments reduces the monitoring problem” for citizens because there are not as “many citizens subject to [each] government.”⁵⁷ Each discrete group of citizens can more easily monitor their government and ensure that their government represents their discrete preferences.⁵⁸

Again, though, the argument is that numbers beget diversity. If access to each government were identical, there would not be cheaper citizen monitoring even with more government. For instance, even with criminal law set mostly by states and localities,⁵⁹ more states with power over criminal justice might not produce different criminal justice politics if there is a “systematic bias in the interest group environment across levels of government”⁶⁰ in favor of the political efforts of victims, or of prosecutors, and so on. It

49. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 422 (1956).

50. Henry N. Butler & Jonathan R. Macey, *The Myth of Competition in the Dual Banking System*, 73 CORNELL L. REV. 677, 709 (1988).

51. See O'Connor & Ribstein, *supra* note 48, at 660.

52. See *id.* at 661.

53. Steven G. Calabresi & Nicholas Terrell, *The Number of States and the Economics of American Federalism*, 63 FLA. L. REV. 1, 34 (2011).

54. *Id.*

55. *Id.* at 34–35.

56. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

57. Tom Ginsburg & Eric A. Posner, *Subconstitutionalism*, 62 STAN. L. REV. 1583, 1591 (2010).

58. *Id.*

59. See Markus Dirk Dubber, *Toward A Constitutional Law of Crime and Punishment*, 55 HASTINGS L.J. 509, 529 (2004) (“American criminal law remains, by and large, state criminal law.”).

60. LISA L. MILLER, *THE PERILS OF FEDERALISM: RACE, POVERTY, AND THE POLITICS OF CRIME CONTROL* 7 (2008).

has to be different in what it takes to influence the South Carolina legislature than it is to influence the Oklahoma legislature.

Another argument for federalism is that it can serve as “a check on abuses of government power.”⁶¹ This implicates numerical arguments because the multiple institutions empowered to act are not colluding but rather competing. Whether it is politics, policy, or both, numbers make competition possible because numbers create different institutions with different interests rather than the same institutions with the same interests. Numbers facilitate diversity, and that diversity is what creates competition rather than collusion. As Alexander Hamilton explained in *The Federalist Papers*, “[p]ower [is] almost always the rival of power” and if the “rights” of the people are invaded by one part of the government then the people can make use of an “other” government “as the instrument of redress.”⁶² As James Madison put it, it is because federalism does not involve a “single republic” or a “single government” and rather is a “compound republic” that yields “distinct governments” or “different governments” that provides a protection against usurpation of liberty.⁶³

These are the commonly offered reasons for federalism, and there are also competing visions of how best to maximize these reasons for our goals of federalism. Gerken highlights the “sovereignty” account of federalism, which imagines the federal government and states “swim[ming] in their own lanes, carrying out their own programs within their own independent spheres.”⁶⁴ Sovereignty is the legal means that makes having a greater number of institutions with power possible.⁶⁵ It provides space for “policies separate and apart from the center.”⁶⁶ Because state sovereignty creates a protected space for state governments, state governments can enact a diversity of policies.⁶⁷

Gerken highlights the “servant” account that other scholars have argued produces the public goods that are the reasons for federalism.⁶⁸ This account focuses on “integration and interdependence.”⁶⁹ Known sometimes as “cooperative federalism”⁷⁰ this account of federalism argues that the federal government and state governments are separate, but separate and overlapping. Because state governments are the agents implementing the wishes of the federal government principal, it is their status as a separate agent that produces diversity of outcomes.⁷¹

The result is more diversity than if everything was only controlled by Washington because of agency slack. The agency slack makes it possible to have the diversity that results from adaptation of policies “to local conditions,”⁷² greater “competition”⁷³ be-

61. *Gregory*, 501 U.S. at 458.

62. THE FEDERALIST NO. 28, at 151 (A.B.A. ed. 2001) (Alexander Hamilton).

63. THE FEDERALIST NO. 51, at 295 (A.B.A. ed. 2001) (James Madison) (emphasis added).

64. Gerken, *Foreword*, *supra* note 5, at 34.

65. *Id.*

66. *Id.* at 13.

67. *See id.* at 14.

68. *Id.* at 33.

69. *Id.* at 34.

70. For examples of this genre of scholarship, see, for example, Susan Rose-Ackerman, *Cooperative Federalism and Co-Optation*, 92 YALE L.J. 1344 (1983); Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692 (2001).

71. *See Gerken, Foreword, supra* note 5, at 20–21.

72. *See Weiser, supra* note 70, at 1696.

tween different policies, and more “experimentation with different approaches.”⁷⁴ This is numerical federalism: separateness multiplies the number of institutions and when added to interaction that produces diversity of outcomes.

B. The Numerical Arguments for Dissenting by Deciding

Gerken’s arguments for DBD also use this argumentative structure: more institutions yield more different policies and politics.⁷⁵ Gerken’s contribution, as she frames it, is based on the notion that DBD is increasing the number of institutions with power by varying the *types* of institutions that exercise power.⁷⁶ She varies the types of institutions with controlling power by varying who controls these institutions.⁷⁷ This, in turn, creates different types of institutions.⁷⁸

For example, at least as pertains to gay marriage, former San Francisco Mayor Gavin Newsom had the “minority view”⁷⁹ in California and the United States when he ordered marriage licenses to be issued. It was the fact that the leader of San Francisco had a “minority view” and had policy-making control in San Francisco that increased the number of institutions with policy-making power.⁸⁰ If it were only up to the State of California or the United States to issue marriage licenses there would be fewer institutions with policy-making power.

But why do we care that minority views control institutions as well as majority views? Because these institutions controlled by minority views produce a greater diversity of outputs than if the “majority view” controlled all institutions.⁸¹ For instance, Gerken justifies DBD because it produces a diversity of policy outputs.⁸² Newsom has a different position on gay marriage than does the State of California or the United States, and putting him in charge of San Francisco means that San Francisco produces a different policy output — legalizing gay marriage — than if someone else controlled San Francisco.⁸³ DBD would not produce a diversity of policy outputs if, even when controlled by a minority view, the City of San Francisco for whatever reason had the same policy on gay marriage as did California or the United States.

This diversity of policy outputs has downstream diversity consequences for Gerken as well. Once other institutions see the policy enacted by the institution controlled by the “minority view,” these different policies provide “real-world example[s] of what their principles would look like in practice,”⁸⁴ and this gives society a better chance “to test its

73. *Id.*

74. *Id.*

75. See Gerken, *Second-Order Diversity*, *supra* note 6, at 1107–08.

76. See Gerken, *Dissenting by Deciding*, *supra* note 7, at 1759–60.

77. See *id.* at 1763–64.

78. See *id.*

79. *Id.* at 1748.

80. *Id.*

81. See *id.* at 1747 (“The assumption underlying this conventional view of dissent is that dissent means speaking truth to power, not with it. That is, we assume that dissenters will be in the minority on any decisionmaking body.”).

82. *Id.* at 1759–60.

83. See *id.* at 1747–48.

84. *Id.* at 1754.

views and positions.”⁸⁵ It is not just that Newsom creating gay marriage in San Francisco changes what happens in San Francisco, but it might be that New York enacted a gay marriage law in 2011⁸⁶ because it observed the experience in San Francisco.

Again, this is because of the relationship between the number of institutions and diversity of outputs. Newsom did something different than California did because there is a separate policy-making institution he controls; New York did something different because it is separate from California, from San Francisco, and from the United States, and it was perhaps persuaded by what San Francisco did.

To be clear, Gerken need not believe that federalism creates “experimentation” in the way that Justice Brandeis imagined. There might be two traditional, obvious, and well-tested ways of resolving a policy issue. DBD could produce a diversity of outputs even when these outputs are familiar. Perhaps Newsom faced a familiar set of policy choices, and he just picked one of them.

The diversity of outputs is also observable in terms of the diversity of *political* outputs.⁸⁷ DBD “has a direct political consequence” of making the minority view “visible”⁸⁸ by giving it “binding legal effect”⁸⁹ and thereby permitting political minorities to engage “in the type of agenda setting that is otherwise difficult for those outside the political mainstream.”⁹⁰ Because Newsom controls San Francisco and enacts different policies, it might be that Mississippi starts talking more about gay marriage.

DBD changes politics by changing the topic of conversations. And DBD changes the topic of conversation because with more institutions there will be more of a variety of conversations. Gerken highlights state laws that expressed displeasure with the federal Patriot Act and how this changed the state and national conversation about national security law.⁹¹ Because some states were enacting laws repudiating the Patriot Act, it created a conversation in those states and then in other states about how to protect national security without a Patriot Act. If all fifty states said the same thing about the Patriot Act, then the conversation about the Patriot Act would not have been diversified either. DBD relies on the notion that Newsom’s decision to issue gay marriage licenses will change the political conversation in many of the institutions of government in the American federal system.

THE RELATIONAL DIMENSIONS OF FEDERALISM AND DISSENTING BY DECIDING

A greater number of institutions begetting a greater diversity of outputs — either policy or political outputs — is a contingent empirical phenomenon. It could be that cre-

85. *Id.* at 1759. *See id.* at 1766 (“Dissenting by deciding offers a real-life instantiation of an idea. It thus allows electoral minorities to remap the politics of the possible. When dissent takes the form of decision, electoral minorities have a chance to put their ideas into practice, to move from abstract principles to actual policy.”).

86. *See* Thomas Kaplan, *After Long Wait, Gay Couples Marry in New York*, N.Y. TIMES, July 24, 2011, at A4.

87. *See* Gerken, *Dissenting by Deciding*, *supra* note 7, at 1762.

88. *Id.* at 1762, 1760.

89. *Id.* at 1762.

90. *Id.* (citation omitted).

91. *See* Bulman-Pozen & Gerken, *Uncooperative*, *supra* note 18, at 1278–81.

ating more institutions *never* matters, as William Riker famously wrote.⁹²

A more plausible and empirically supported hypothesis is that whether and when the number of institutions produces more diversity of outputs depends on a number of variables. One reason for lesser or no diversity given greater numbers of institutions might be *who* exactly controls these different institutions of policy-making power in a federal system. These are *atomized* reasons to doubt the empirical hypothesis, which I mentioned earlier — reasons having to do with the particular people or forces controlling power at the state level.

For instance, as David Schleicher points out in his contribution to this symposium, voters tend to view all politics through a national lens.⁹³ Therefore, increasing the number of institutions might not increase the diversity of outputs because it does not increase the diversity of inputs.⁹⁴ If the Democratic Party of New York features the same types of figures supported by the same types of coalitions as the Democratic Party of Mississippi, then Democratic governors of New York and Democratic governors of Mississippi might produce the same outputs.

It could be that not only are all politics the same, but actually sub-national politics are inferior to the point of not producing anything different in terms of politics or policy. As Ernest Young has written, state governors in the United States often become President.⁹⁵ In other federal systems, particularly where there is an opposition party empowered at the national level, presidents and prime ministers tend to make their name as federal ministers rather than state governors.⁹⁶ Angela Merkel, the Chancellor of Germany, spent almost her entire career before becoming Chancellor as an elected member, minister, and then opposition leader in the national German Bundestag.⁹⁷ If the political tradition of a state, or of all states, were like the German version, then inferior political figures would be in control at the state level. Inferior political figures might be more inclined to copy and repeat rather than diversify and innovate.

This is related to the point that the diversity of outputs depends on the pre-existing capacities of particular state governments. The sociologist Michael Mann calls this “infrastructural capacity,”⁹⁸ meaning that some sub-national institutions have sticky traditions of leaders who are more “deeply embedded in their societies.”⁹⁹ In the United States, more numbers of institutions might produce more diversity depending on how many states have rules encouraging and traditions recognizing strong state governors and

92. See William H. Riker, *Six Books in Search of a Subject or Does Federalism Exist and Does It Matter?*, 2 COMP. POL. 135, 145 (1969) (“Do[more institutions] make any difference in the way people are governed? [T]he answer appears to be . . . [h]ardly at all.”).

93. David Schleicher, *From Here All-The-Way-Down, or How to Write a Festschrift Piece*, 48 TULSA L. REV. 401, 416–17 (2013).

94. See *id.*

95. Ernest A. Young, *Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror*, 69 BROOK. L. REV. 1277, 1286 (2004).

96. See David Fontana, *Government in Opposition*, 119 YALE L.J. 548, 553 (2009).

97. See *Angela Merkel*, WALL ST. J., <http://topics.wsj.com/person/M/angela-merkel/5351> (last visited Apr. 24, 2013).

98. See I MICHAEL MANN, *THE SOURCES OF SOCIAL POWER: A HISTORY OF POWER FROM THE BEGINNING TO A.D. 1760*, at 59–61, 170 (1986).

99. Daniel Ziblatt, *Rethinking the Origins of Federalism: Puzzle, Theory, and Evidence from Nineteenth-Century Europe*, 57 WORLD POL. 70, 71 (2004).

governments. If there were more powerful executives like the Governor of New York, that would be different than if there were more weak executives like the Governor of Texas.¹⁰⁰

These are reasons for questioning numerical accounts for federalism based on who is likely to hold power, and they cast doubt on the empirical hypothesis that I argued is at the core of standard DBD accounts for federalism. But there are other reasons to doubt numerical accounts for federalism based not on who is in power in the federal system, but on how those in a federal system interact with one another. These interactions and how they affect what federalism produces are called *relational* accounts of federalism. Federalism is about interactions between institutions, or *relationships*, as much as it is about the number of institutions.

While accounts of federalism that focus on the discrete and atomized actors of federalism matter, I will focus more on the relationships between the actors of federalism. These relationships matter because in a federal system “the choices of constitutional actors are strategically interdependent.”¹⁰¹ Gerken’s account of federalism innovates when it comes to identifying possible changes to the relationships of federalism.¹⁰² I will focus on how federalism is relational in general, how Gerken’s theory is relational, and how her relational theory of federalism could produce the kind of diversity of outputs that numerical accounts of federalism require.

A. How Federalism is Relational and the Diversity of Relational Federalism

Federalism is relational along many dimensions, and how it is relational varies along the dimensions of both *how often* and *how close or collegial* relationships in a federal system are. At the vertical level, in the United States, the federal government will often bargain with state governments to enforce federal laws and is therefore “prepared to make concessions to [its] state counterparts.”¹⁰³ Anti-commandeering rules require that the federal government must negotiate this compliance by state governments rather than assume it or coerce it.¹⁰⁴ States agreeing to work with the federal government have “discretion in choosing how to accomplish . . . tasks and which tasks to prioritize.”¹⁰⁵ The close relationship between local and national political parties creates networks of federal and state officials that might increase cooperation and closeness — what Larry Kramer called the “political safeguards of federalism.”¹⁰⁶ On the other hand, the federal government can always preempt state governments, largely without cause, without warning, and without negotiation,¹⁰⁷ and that minimizes the amount of interaction and the

100. See Patrick Wohlfarth, *Gubernatorial Power: The Institutional Power Ratings for the 50 Governors of the United States*, available at <http://www.unc.edu/~beyle/gubnewpwr.html> (last updated July 2008).

101. Adrian Verneule, *Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 4, 7 (2009).

102. See, e.g., Bulman-Pozen & Gerken, *Uncooperative*, *supra* note 18.

103. DANIEL J. ELAZAR, *AMERICAN FEDERALISM: A VIEW FROM THE STATES* 182 (3d ed. 1984).

104. See Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629, 1634–35 (2006).

105. Bulman-Pozen & Gerken, *Uncooperative*, *supra* note 18, at 1266.

106. See Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000).

107. See U.S. CONST. art. VI, cl. 2 (“[T]he [l]aws of the United States which shall be made in [p]ursuance” of the Constitution are “the supreme [l]aw of the [l]and . . .”).

collegial nature of those interactions.

The relationships at the vertical level differ in other systems, in particular by featuring more frequent and more collegial relationships. In the German system, the *Land*, or states, “send[] members of [their] cabinet to represent . . . interests in” one house of the federal legislature.¹⁰⁸ This means that representatives of sub-national actors interact more frequently with national actors because the votes of sub-national actors sitting in the federal legislature are necessary to enact many pieces of legislation.¹⁰⁹ Interaction is more frequent as well because the German Basic Law requires sharing of certain revenues between the central and the state governments.¹¹⁰

Not just is interaction more frequent, but also in many federal systems interaction is more intimate than in the American system. In the German system, there is a constitutional obligation that federal actors consult sub-national actors and play nice with them.¹¹¹ In the German system, there is a duty of comity requiring federal and state governments to negotiate in good faith before acting to ensure that the interests of all institutions are considered.¹¹² In other systems there are also concurrent federal and state powers, essentially requiring that federal and state governments work together to agree on how to regulate and how to distribute regulatory authority.¹¹³

Federalism also features horizontal relationships. American states interact differently depending on whether they agree to a formal arrangement under the Compact Clause of the Constitution.¹¹⁴ States interact differently if they are geographically closer or politically closer.¹¹⁵ Just as relationships between federal and state are not fixed, so too the relationships between state and state are not fixed. The relational dimensions of federalism can vary substantially in both a vertical and horizontal way.

B. How Relational Federalism Might Matter

The heterogeneity of these relationships is centrally relevant in assessing whether more institutions produce more diversity of outputs. Relational versions of federalism have only been discussed in the context of causing some scholars to doubt whether these relationships create *incentives* for diversification.¹¹⁶ Scholars have argued that the particular nature of relationships in federalism can create federalism free riding.

108. See Daniel Halberstam & Roderick M. Hills, Jr., *State Autonomy in Germany and the United States*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 173, 175 (2001).

109. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [Basic Law], May 23, 1949, BGBl. I at art. 50 (Ger.) (“The Länder shall participate through the Bundesrat in the legislation and administration of the Federation and in matters concerning the European Union.”).

110. See *id.* at art. 106(3) (Ger.).

111. DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 69 (2d ed. 1997).

112. See *id.* (identifying a constitutional “principle of federal comity . . . which obligates federal and state governments to consider each other’s interests in exercising their authority”). See also DAVID P. CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 77–80 (1994) (noting a “constitutional analog of the general civil-law duty . . . to act in good faith”).

113. See, e.g., INDIA CONST. art. 246 (listing “concurrent” powers).

114. See U.S. CONST. art. 1, § 10, cl. 3.

115. See Brian Galle & Joseph Leahy, *Laboratories of Democracy?: Policy Innovation in Decentralized Governments*, 58 EMORY L.J. 1333, 1351–52 (2009).

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

Most notably, Susan Rose-Ackerman has argued that relational federalism is important because it can undermine the output diversity that federalism aspires to achieve.¹¹⁷ She argued that no government receives the full benefit of diversifying because there are no property rights in governmental diversity, and therefore there is no institution that has a strong incentive to innovate.¹¹⁸ Moreover, an incumbent political figure with a strong chance of reelection faces little incentive to innovate.¹¹⁹

Subsequent research has demonstrated that more numbers can still incentivize more diversity, but this depends on the relationships between these numbers.¹²⁰ If states are located more closely to one another, they tend to interact more often, which tends to produce more similar outputs.¹²¹ In that situation, it would not matter if there were ten different states right next to each other — greater numbers would still not produce more diversity of outputs.¹²² Similarly, states that tend to view one another as ideologically similar produce similar outputs.¹²³ If New York were bordered by Mississippi it would produce more diversity of outputs when they interact than the diversity of outputs created by Connecticut bordering New York.

This is an important insight about how the relational dimensions of federalism can problematize the numbers begetting diversity assumption. It is also true that relationships between institutions create not just incentives to produce output diversity, but *capacities* to produce output diversity. In other words, even with greater numbers, greater diversity is likely to result only depending on whether the *nature* of the relationships creates the capacity to produce a diversity of outputs.

We have substantial empirical support for the proposition that relationships produce a diversity of output when these relationships are close enough to be relevant and conducted with more social distance between the parties to the relationship.¹²⁴ This means that there is interaction, but that the interaction transpires in a way that creates and potentially even reinforces the distance between the interacting parties.¹²⁵ In the psychological literature, the research suggesting that diversity of outputs results from interaction with social distance is known as “construal-level theory” (“CLT”).¹²⁶ CLT has demonstrated that “people construct different mental representations of the same information depending on whether that information” is socially distant or socially close.¹²⁷ The CLT literature tends to “operationalize[] [social distance] as interpersonal similarity.”¹²⁸ If

117. See generally *id.*

118. See generally *id.*

119. *Id.* at 594.

120. See Frances Stokes Berry & William D. Berry, *State Lottery Adoptions as Policy Innovations: An Event History Analysis*, 84 AM. POL. SCI. REV. 395 (1990).

121. See *id.* at 399–400; Frederick J. Boehmke & Richard Witmer, *Disentangling Diffusion: The Effects of Social Learning and Economic Competition on State Policy Innovation and Expansion*, 57 POL. RES. Q. 39, 40 (2004).

122. See Boehmke & Witmer, *supra* note 121, at 40.

123. See Ken Kollman et al., *Decentralization and the Search for Policy Solutions*, 16 J.L. ECON. & ORG. 102, 109, 122 (2000).

124. See, e.g., Xiaoli Nan, *Social Distance, Framing, and Judgment: A Construal Level Perspective*, 33 HUM. COMM. RES. 489 (2007).

125. *Id.* at 490.

126. See *id.*

127. *Id.* at 489.

128. Yaacov Trope & Nira Liberman, *Construal-Level Theory of Psychological Distance*, 117 PSYCHOL.

information is received from someone with “greater [levels of] similarity”¹²⁹ then that leads that information to be construed at a lower-level, and thus to be construed more in terms of its “superordinate [and primary] features.”¹³⁰ If the information is received from someone with lower levels of similarity, then that leads the information to be construed more according to its secondary features.¹³¹

People do not know how they “will spend the day [ten] years from now”¹³² but they can describe that tomorrow (a psychologically closer item) they will have “a breakfast of oatmeal [and] a 10 a.m. meeting with a research collaborator.”¹³³ This makes intuitive sense: when things are closer, we know them better, and can fill in the many details to make these things closer. When they are farther away, we know less about them, and must construct more abstract pictures of them.

Socially distant interactions are more likely to produce innovative results because “creativity [is] related to high-level construal.”¹³⁴ This is because “proximity reduces consideration of alternatives.”¹³⁵ Considering alternatives then disrupts the normal cognitive inertia that leads one to focus on familiar options.¹³⁶ This is also because gains increase in salience relative to losses when the person seems farther away.¹³⁷ Social distance makes it easier to innovate because the benefits become more significant relative to the costs. If you seem very different than I do, and I interact with you, our interactions are more likely to generate diversity of outputs. If you seem very similar to me, and I interact with you, our interactions are more likely to generate identical outputs. Talking to the same person every day is not generative in the same way that talking to a new person is.

A version of CLT has been tested in the policy diffusion literature, which examines when one jurisdiction “introduce[s] a change in their laws that . . . [is] later emulate[d].”¹³⁸ This literature, particularly in the federalism context, supports the CLT finding that less social distance reduces diversity of outputs. Policies are more likely to be copied from one state to another state if those states are more similar to one another.¹³⁹

REV. 440, 451 (2010) (citations omitted).

129. *Id.* at 456.

130. *Id.*

131. *See id.* at 457.

132. Kentaro Fujita & Jessica J. Carnevale, *Transcending Temptation Through Abstraction: The Role of Construal Level in Self Control*, 21 CURRENT DIRECTIONS PSYCHOL. SCI. 248, 249 (2012).

133. *Id.*

134. Trope & Liberman, *supra* note 128, at 458. For studies demonstrating this, see Ronald A. Finke, *Creative Insight and Preinventive Forms*, in THE NATURE OF INSIGHT 255 (Robert J. Sternberg & Janet E. Davidson eds., 1995); THOMAS B. WARD, RONALD A. FINKE & STEVEN M. SMITH, CREATIVITY AND THE MIND: DISCOVERING THE GENIUS WITHIN (1995); Jens Förster, Ronald S. Friedman & Nira Liberman, *Temporal Construal Effects on Abstract and Concrete Thinking: Consequences for Insight and Creative Cognition*, 87 J. PERSONALITY & SOC. PSYCHOL. 177 (2004).

135. Nira Liberman, Yaacov Trope & Cherly Wakslak, *Construal Level Theory and Consumer Behavior*, 17 J. CONSUMER PSYCHOL. 113, 116 (2007). For a study on precisely this point, see John G. Lynch, Jr. & Gal Zauberman, *Construing Consumer Decision Making*, 17 J. CONSUMER PSYCHOL. 107 (2007).

136. *See* Derek J. Koehler, *Explanation, Imagination, and Confidence in Judgment*, 110 PSYCHOL. BULL. 499, 499 (1991).

137. *See* Stefan M. Herzog, Jochim Hansen & Michaela Wänke, *Temporal Distance and Ease of Retrieval*, 43 J. EXPERIMENTAL SOC. PSYCHOL. 483, 483 (2007).

138. Stavros Gadinis, *From Independence to Politics in Financial Regulation*, 101 CALIF. L. REV. 327, 357 n.147 (2013).

139. *See* Lawrence J. Grossback, Sean Nicholson-Crotty & David A.M. Peterson, *Ideology and Learning in*

The similarity that mitigates the relationship between the number of states and diversity of outputs can be defined many ways. In vertical federal relationships — the relationships between the federal government and states — the research suggests that the more demographic, ideological and other similarities there are between who is in power in the federal government and who is in power in state governments, the less diversity of outputs there is.¹⁴⁰ On the horizontal level, states are more likely to copy policies from states that seem similar in terms of the political ideology of the exporting state.¹⁴¹ States are more likely to copy policies from states that are geographically proximate.¹⁴² States are more likely to copy policies from other states that are socially similar in other ways as well, including demographically.¹⁴³

In other words, the relationship between the number of institutions and the diversity of outputs is contingent rather than inevitable. More institutions might be necessary for diversity, but more institutions are not sufficient. These institutions must interact in a way that produces diversity of outputs. Federal systems, then, might generate more diversity depending on whether there is sufficient interaction and also sufficient social distance between participants in the federal system.

C. The Relational Innovation of Dissenting by Deciding and Why it Matters

Given that relationships affect whether the number of institutions produces diversity of outputs, it is helpful to examine how DBD affects relationships between institutions in a federal system. DBD theorizes a new relationship between institutions in a federal system.¹⁴⁴ It is not framed this way, but the relational innovation of DBD is perhaps its most important contribution. It fills in one of the holes of federalism theory. It plugs in this hole by creating relationships that other literature suggests bridge the gap between the means federalism scholarship uses and the goals federalism scholarship desires. DBD is the goldilocks of federalism theory. It features the interaction lacking in some accounts along with the social distance missing in other accounts.

DBD is a relational innovation in two ways. First, DBD increases the frequency of interactions in the American federal system.¹⁴⁵ It creates tighter relationships. For relationships to promote or minimize diversity of outputs, there must of course first be meaningful interaction.¹⁴⁶

Policy Diffusion, 32 AM. POL. RES. 521 (2004).

140. See George A. Krause & Ann O'M. Bowman, *Adverse Selection, Political Parties, and Policy Delegation in the American Federal System*, 21 J.L. ECON. & ORG. 359 (2005).

141. See Grossback, Nicholson-Crotty & Peterson, *supra* note 139, at 526 (“The effect of a government adopting the policy will be greatest on states that are the most ideologically similar to the adopting government. Similarly, information from an ideologically dissimilar state will reduce the likelihood of adoption.”).

142. See Julianna Pacheco, *The Social Contagion Model: Exploring the Role of Public Opinion on the Diffusion of Anti-smoking Legislation across the American States*, 74 J. POL. 187, 187 (2012).

143. See Craig Volden, *States as Policy Laboratories: Emulating Success in the Children's Health Insurance Program*, 50 AM. J. POL. SCI. 294 (2006).

144. See Gerken, *Dissenting by Deciding*, *supra* note 7.

145. See *id.* at 1759–62.

146. See generally Barbara Wejnert, *Integrating Models of Diffusion of Innovations: A Conceptual Framework*, 28 ANN. REV. SOC. 297 (2002).

By providing political minorities with decisional authority, DBD incentivizes more interactions between institutions.¹⁴⁷ This is one of the primary goals of DBD according to Gerken — to be relevant, “dissent must be visible.”¹⁴⁸ As Gerken argues, under DBD the “federal government will be pressured to engage the state’s position.”¹⁴⁹ Now more people in the State of California or the United States of America know that the City of San Francisco can issue marriage licenses because a political minority, Gavin Newsom, ordered the City to issue those licenses.¹⁵⁰

By contrast, in federalism “of the servant,”¹⁵¹ otherwise known as “cooperative federalism,”¹⁵² the interaction between the federal government and state governments is less common. This is because the federal government or other parts of state government need not overrule a binding, final decision by an empowered official. American preemption is relatively easy for the federal government, and so relatively less interaction is required between the federal government and state governments. As compared to DBD, interaction is less frequent in cooperative federalism because political minorities can do less to attract the attention of political majorities.

In federalism “of the sovereign,”¹⁵³ neither the federal government nor state governments need engage deeply with one another. This is because “dual federalism” ensures that each sovereign political institution has a separate sphere to govern.¹⁵⁴ Let’s say, for instance, that California has broad jurisdiction over criminal law, and the federal government does not. California need not interact with the federal government in formulating California criminal law because the federal government can do very little to overrule California criminal law. The federal government need not interact with California because there is very little that the federal government can do in the criminal law area.

In addition to increasing the frequency of interactions, in DBD interaction changes from collegial to combative. As Gerken describes DBD, interaction would include discussions that range “from restrained disagreement to fighting words.”¹⁵⁵ Gerken states that “[i]f you think that our political system already has a sufficient amount of deliberative froth, there is little point in giving dissenters the power to set the agenda.”¹⁵⁶

In other words, DBD increases the social distance featured in relationships.¹⁵⁷ Social distance is created in part by the absence of “similarity” between interacting parties.¹⁵⁸ DBD creates and reinforces this dissimilarity because it only empowers those

147. See Gerken, *Dissenting by Deciding*, *supra* note 7, at 1749.

148. *Id.*

149. Bulman-Pozen & Gerken, *Uncooperative*, *supra* note 18, at 1287.

150. See Gerken, *Dissenting by Deciding*, *supra* note 7, at 1754.

151. See Gerken, *Of Sovereigns and Servants*, *supra* note 7.

152. See sources cited *supra* note 18.

153. See Gerken, *Of Sovereigns and Servants*, *supra* note 7.

154. See Gerken, *Foreword*, *supra* note 5, at 9.

155. Bulman-Pozen & Gerken, *Uncooperative*, *supra* note 18, at 1271.

156. See Gerken, *Foreword*, *supra* note 5, at 68.

157. See Gerken, *Dissenting by Deciding*, *supra* note 7, at 1748–49.

158. See Elena Stephan, Nira Liberman & Yaacov Trope, *The Effects of Time Perspective and Level of Construal on Social Distance*, 47 J. EXPERIMENTAL SOC. PSYCHOL. 397 (2011). For articles making the same point about how social distance can be created by disagreement, see Bernadette Park & Charles M. Judd, *Measures and Models of Perceived Group Variability*, 59 J. PERSONALITY & SOC. PSYCHOL. 173 (1990).

with a “minority view.”¹⁵⁹ DBD is dissenting by deciding, meaning that only those who disagree are empowered.¹⁶⁰ Disagreement is hardwired into the system, and this disagreement creates distance.

If states were interacting with little social distance, then they would produce the same outputs. If all mayors were like Gavin Newsom, even if all mayors talked more, there would be more jurisdictions with San Francisco-style gay marriage. It is because Gavin Newsom’s gay marriage decision caused him to interact with a moderate Republican Governor and a conservative Republican President that a range of approaches to gay marriage was produced.

As with its encouragement of more interactions, its encouragement of interactions premised on disagreement and distance is part of what leads DBD to create a better relational account of federalism. Cooperative federalism might feature more frequent interactions. But the frequent interactions of cooperative federalism do not feature as much social distance between interacting parties because everyone “depend[s] on one another to get anything done.”¹⁶¹ The federal government is the principal, and given this “interdependence”¹⁶² there are incentives to create the most similar agent to the federal government’s principal.¹⁶³

For dual federalism, with the power of the sovereign, the federal government and state governments disagree. But the federal government and state governments do not interact as much as with DBD because each level of government has its own “separate” regulatory spaces.¹⁶⁴ If California disagrees with the policies of the federal government, it will be able to express this disagreement by exercising its own separate, sovereign powers. California can act more in its own, and more without fear of any federal preemption, though, so there is less interaction than with DBD.

There are contexts in which scholars have noted the poisonous effects of greater group interaction premised on disagreement. In some situations, these interactions can polarize, creating what one scholar has called the “law of group polarization.”¹⁶⁵ When faced with opposing information, members of one group might “move toward a more extreme position.”¹⁶⁶ When Republicans listen to what Democrats have to say, after they finish listening they become more conservative rather than less conservative.¹⁶⁷

Because of the relational innovation of DBD, DBD is more immune from these laws of group polarization. Group polarization does not result when deliberating groups receive “sustained exposure to competing views.”¹⁶⁸ Real dialogue — even if contentious dialogue — does not polarize. DBD creates a sustained exposure to the “minority

159. Gerken, *Dissenting by Deciding*, *supra* note 7, at 1748.

160. *Id.* at 1759–60.

161. Gerken, *Foreword*, *supra* note 5, at 34.

162. *Id.*

163. See Eric A. Posner, *Agency Models in Law and Economics*, in CHICAGO LECTURES IN LAW AND ECONOMICS 225, 230 (Eric A. Posner ed., 2000) (highlighting ways to minimize agency slack).

164. See Gerken, *Foreword*, *supra* note 5, at 9.

165. Cass R. Sunstein, *The Law of Group Polarization*, 10 J. POL. PHIL. 175 (2002).

166. *Id.* at 74.

167. See Dominic Abrams et al., *Knowing What To Think by Knowing Who You Are: Self-Categorization and the Nature of Norm Formation, Conformity and Group Polarization*, 29 BRIT. J. SOC. PSYCHOL. 97, 112–13 (1990).

168. Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 75 (2000).

view” on an issue because the minority view has decisional power.¹⁶⁹ Overturning Mayor Newsom’s decision to issue same-sex marriage licenses took an elaborate back-and-forth with the State of California and the United States.¹⁷⁰

Higher levels of government had their agenda set by Newsom’s decision, and if they disliked it they had to go through the formal process of overruling it. It might be that otherwise the State of California or the President of the United States would have ignored Newsom, and thus the “law of group polarization” would have applied.¹⁷¹ But the decisional power that DBD gives minorities ensures the “sustained exposure to competing views”¹⁷² that can overcome further polarization.

CONCLUSION

Gerken’s primary focus in her writings on DBD has been federalism, and therefore that has been the primary focus of my contribution to this Symposium. But the innovation of DBD is a larger one, not confined to federalism or necessarily even to public law. The innovation of DBD is in realizing that relationships matter, and we must configure relationships in a certain way to produce certain outputs. This is an insight that scholars beyond just constitutional law should take note of and use to reconfigure their fields as well. Relationships matter in all areas of life, and so they matter in all areas of public law as well.

169. See Gerken, *Dissenting by Deciding*, *supra* note 7, at 1748.

170. See *id.*

171. See Sunstein, *supra* note 165.

172. Sunstein, *supra* note 168, at 75.
