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## Abandoning Bad Ideas and Disregarding Good Ones for the Right Reasons: Reflections on a Festschrift

Heather K. Gerken

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# ABANDONING BAD IDEAS AND DISREGARDING GOOD ONES FOR THE RIGHT REASONS: REFLECTIONS ON A FESTSCHRIFT

Heather K. Gerken\*

Flummoxed. That's how I felt when the Tulsa College of Law generously offered to hold this festschrift. Forty-three year olds are not entitled to a festschrift. It's that simple.

But I am grateful. Intensely so. The opportunity to have such a fine group of young scholars<sup>1</sup> comment on my work is a gift. How often does one have an academic as deft as Guy Charles situate one's work in political theory?<sup>2</sup> How often does one have Ernie Young, the younger statesman of federalism scholars,<sup>3</sup> connect one's work to the broader projects of the field?<sup>4</sup> How often does one get called a *meliorist* in print,<sup>5</sup> as if it were a bad thing? Better yet, there is a great deal of thoughtful and original work contained within the volume. On the lighter side, Ernie Young's and David Schleicher's footnotes, standing alone, are worth the price of admission.<sup>6</sup> Moreover, the comments have fundamentally altered the dynamics in my personal life. My husband now has an official citation for the proposition that I'm ornery.<sup>7</sup> And if a law review footnote says that *Gerkenean* can be played in Scrabble,<sup>8</sup> it must be true.

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\* J. Skelly Wright Professor of Law, Yale Law School. Thanks to David Schleicher and Guy-Uriel Charles for serving as sounding boards for this piece.

1. I include the great Sandy Levinson in this group. The law review, at my request, agreed to invite mostly younger scholars to this event, but Sandy has long been entitled to that moniker despite his seniority.

2. Guy-Uriel Charles, *Dissent, Diversity, and Democracy: Heather Gerken and the Contingent Imperative of Minority Rule*, 48 TULSA L. REV. 493 (2013). I am particularly grateful for Professor Charles' lovely recasting of my core thesis: "the promise of self-rule must be kept for minorities as it is for majorities." *Id.* at 502 (citing Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1750 (2005)). Thanks, Guy.

3. At least chronologically. Ernie has acted like a seventy-five year old for the eighteen years I've known him. Even as a wet-behind-the-ears law clerk, he puttered around in cardigans and daydreamed about owning a bust of James Madison.

4. Ernest A. Young, *A Research Agenda for Uncooperative Federalists*, 48 TULSA L. REV. 427 (2013).

5. Sanford Levinson, *Meliorism v. "Bomb-throwing" as Techniques of Reform*, 48 TULSA L. REV. 477 (2013).

6. Compare Young, *supra* note 4, at 427 n.1 (a heavily footnoted disquisition on how bad states are at picking state birds and flags), with David Schleicher, *From Here All-the-Way-Down, or How to Write a Festschrift Piece*, 48 TULSA L. REV. 401, 401 n.2 (2013) (describing legal academic Mad Libs). I'd always thought Ernie Young's footnotes were the funniest in the industry, but David Schleicher is already giving him a run for his money. I was tempted to say that Professor Schleicher's footnotes reveal him to be far hipper than Professor Young. Compare *id.* at 401 n.1 (invoking Kanye West with irony) & 409 n.63 (quoting Arcade Fire with authority) with just about anything Ernie has ever written. But the baseline is so low that I didn't want to come off as sarcastic.

7. Young, *supra* note 4, at 428 n.13.

8. Schleicher, *supra* note 6, at 412 n.95.

More importantly, the contributions to this symposium have already led me to reorient my research agenda and push my thinking in a variety of directions. My work has been devoted to excavating the hidden features of our constitutional structure, the institutions that help our democracy work but are neglected by democratic theory. These features have long been overlooked because they don't fit neatly into doctrinal silos, they don't emerge seamlessly from our constitutional text, and they bear little connection to our original history. Or perhaps they simply fall within the blind spots of academics. Political and racial minorities, after all, are the darlings of most intellectuals. They are also the objects of constitutional solicitude, with amendments devoted to the fate of each. That confluence has led academics to treat rights as natural tools for promoting integration and dissent. That's all well and good. But this unduly narrow focus, combined with some genuinely ugly history, has also led scholars to endorse thin, even anemic visions of integration and dissent. It's led them to adopt a measure of democratic legitimacy — diversity — that turns out to involve very little power for the groups it's supposed to empower. And it's led most academics to be deeply skeptical of federalism and its homely cousin, localism. To the extent that scholars have anything positive to say about decentralization, what's offered is typically such an amorphous and deeply naïve vision of local participation that it makes sensible people break out in hives. What academics have not done is imagine localities as sites of minority empowerment. At least for minorities of the sort they care about.

It's not clear whether constitutional theory is the source of these academic tropes or merely mirrors and reinforces them (the latter, I assume). But you'll notice that even something as basic as the division of labor among scholars serves to buttress these notions while leaving our normative blind spots in place.

The worker bees of the academy have long divied up the three great projects of American constitutionalism. The first is governance — allocating power among institutions so that policymaking flourishes and a Leviathan does not emerge. These questions have been taken up by those interested in constitutional structure — federalism, the separation of powers, and the like. The rest of the work falls to those who labor on the rights side of the Constitution. Devotees of the First Amendment have done yeoman's work on the project of dissent — guaranteeing a healthy amount of debate and disagreement in the democratic sphere. Similarly, Fourteenth Amendment gurus have done most of the thinking on the project of integration — ensuring that our fractious polity remains a polity — with their First Amendment brethren putting in a laboring oar.

This division of labor seems intuitive and obvious. It is also a mistake. It has blinded us to the crucial role that structure plays in furthering integration and fostering debate. And it has led us to privilege rights over governance, courts over politics, participation over power, outsiders over insiders, and minority rights over minority rule in thinking how best to empower and protect racial and political minorities. That matters both for constitutional theory and for the functioning of everyday politics. If my work convinces readers of anything, I hope it is that decentralization plays a crucial role in furthering the aims of the First and Fourteenth Amendment — that minority rule can be as important as minority rights for the great projects of American constitutionalism.

Though I write about the salience of minority rule, I am not describing your fa-

ther's federalism. Guy Charles once suggested my work is about federalism without federalism's trappings. I'm writing about a form of federalism shorn of sovereignty, shorn even of autonomy. The power that minorities wield in the institutions I describe is the power of the servant, the power of the agent, the power of the bureaucrat. One of the great oddities of constitutional theory is that we so often overlook the power wielded by agents in our Tocquevillian bureaucracy. Entire legal fields — administrative law, corporate law — are all but devoted to taming the power of the agent. My work focuses on what happens when we unleash the power of the agent, when we start to imagine that the principal-agent problem isn't always a problem. The work isn't antithetical to traditional understandings of state power. Instead, it's intended to show that power can take many forms. States don't need federalism's traditional trappings — particularly those associated with sovereignty and autonomy — in order to play an important role in our democracy. The contributions to this symposium have already helped me think more deeply about these questions, which is no mean achievement given that they have been a full-blown academic obsession of mine for several years.

It is hard to know how to respond to such a varied and astute set of comments as the ones in this symposium. My first impulse is simply to say thank you and to promise to work hard enough to generate work that could properly be the subject of a festschrift some day. In keeping with tradition, however, I thought I'd say a few words about the major critiques in the papers. Some of those criticisms seem right and will change the way I write. Others seem right but I plan to disregard them for what I hope are the right reasons.<sup>9</sup> Needless to say, there are many thoughtful comments that I don't have space to address here but will surely be answering for the rest of my career.

## I. FRAMING THE WORK

The first set of criticisms largely go to the way I've framed the work. Framing is a neglected art within the academy despite its importance. Academics tend to think that framing is just a superficial strategy for selling one's idea. But framing requires one to understand precisely how one's idea fits into the literature, and misframing an idea can lead one to understate or overstate its importance. For this reason, the comments on framing are particularly welcome.

### A. What Makes "Dissenting by Deciding" Different?

In his characteristically generous and sure-footed contribution to this symposium, Guy Charles takes me to task for framing my work on dissent incorrectly when I first wrote about it in the *Stanford Law Review*. He doesn't buy the distinctions I draw between traditional forms of dissent and "dissenting by deciding" — between expressing one's views through an editorial or a protest or a blog, on the one hand, and funneling those views through a governance decision, on the other.<sup>10</sup> I argue that one involves speaking while the other involves acting, that one is largely expressive while the other

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9. This is all you're going to get for a roadmap. After reading Professor Schleicher's exegesis on roadmap paragraphs, I may never write one again. *Id.* at 403 n.11.

10. Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745 (2005).

embodies real-world consequences, and that one is private while the other is public.<sup>11</sup>

Professor Charles resists the idea that I can draw clear distinctions between “acting and speaking, symbolism and consequentialism, and private and state.”<sup>12</sup> The last juxtaposition particularly worries Professor Charles. He is not only skeptical of whether a line can be drawn. He thinks that even if the categories hold, I’m not classifying “dissenting by deciding” correctly.<sup>13</sup> Charles argues that when dissenters wield the power of the state, they *are* the state and thus cannot meaningfully be termed dissenters.<sup>14</sup>

Yup. Professor Charles is correct that all three of these category sets are not categorical. They lie along a continuum, and I mostly wrote as if they didn’t. Were I writing that article now, I’d cede that point immediately. I’d then make a move similar to the one Professor Charles makes at the end of his essay, where he notes that it is not clear whether the “main lessons” of the article “hang on the distinctions between dissent and decisional dissent.”<sup>15</sup>

Here, though, I wouldn’t give up nearly as much as Professor Charles does. Something important does hang on the distinction between conventional dissent and dissenting by deciding. Professor Charles is absolutely right that the two blur at the margins. But that doesn’t mean that the categories are meaningless. Conventional dissent can sometimes involve consequential action that implicates the exercise of state power. Sometimes. When it does, it resembles “dissenting by deciding,” just as Professor Charles suggests. But it *usually* doesn’t, and that ought to matter to us. Put differently, something *does* ride on the fact that these activities fall along different parts of the continuum. But very little rides on drawing clean distinctions between these activities at the margins, for precisely the reasons that Professor Charles supplies.

Turning to Professor Charles’ deeper concern, I’ve spent a lot of time since the symposium thinking about his astute observation that when dissenters wield state power, they *are* the state and thus cannot be characterized as wielding state power against the state.<sup>16</sup> On reflection, I think that’s right. It would be more accurate — and a great deal better — to say that when dissenters wield state power, they are wielding the power of the majority against the majority.<sup>17</sup> Sometimes one uses slightly inaccurate categories (like “the state”) for ease of exposition. But here I just got caught up with my own rhetoric. Professor Charles is (characteristically) too generous when he leaves me an out on this one.

There’s a second framing critique embedded in three of the contributions and central to two of them. The critique is cast as a substantive disagreement by all three au-

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11. *Id.*

12. Charles, *supra* note 2, at 501.

13. *Id.* at 500.

14. *Id.*

15. *Id.* at 501.

16. *See id.* at 500.

17. Professor Charles would not accept this formulation either, I suspect, because he thinks one cannot borrow one’s identity from one domain and use it to describe one in another. *Id.* I think the boundaries between domains are more porous than this. I hesitate to disagree with Professor Charles — he is one of the wisest scholars in my cohort, and his work radiates intelligence. But I find some comfort in the fact that Bickel is with me on this one. *See* ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 96–97 (1975) (arguing that the Freedom Riders and those staging lunch-counter sit-ins were dissenters even though both activities were designed to enforce national law or vindicate the national majority’s position).

thors. But there's less disagreement among us than the authors believe. That means it's a framing mistake on my part, one (I hope) I've begun to remedy.

Professor Tolson and Somin (and, in a footnote, Professor Young)<sup>18</sup> take me to task for not appreciating the importance of autonomy and sovereignty to my project.<sup>19</sup> Here, I'll focus on the arguments offered by Professors Tolson and Somin. Their critiques are more sustained, and their political and scholarly commitments are so disparate that the fact that they agree means that I am either completely wrong or indisputably correct. More seriously, if two of the liveliest minds in the field's youngest cohort think one has made a mistake, one ought to pay attention.

To oversimplify their nuanced arguments, Professors Tolson and Somin believe that if I really care about empowering racial minorities and dissenters, I should value the *de jure* and *de facto* protections that "Our Federalism" confers on some minority-dominated institutions.<sup>20</sup> Put more succinctly, they worry that I've missed the values associated with autonomy generally and sovereignty in particular.

It is very helpful to receive this critique because I've never understood my work to represent a rejection of the autonomy model. I certainly have my quarrels with its *de jure* cousin, the sovereignty model, but those mostly have to do with its relevance to a highly integrated, national system like our own. In my view, however, the conventional account for autonomy is well founded and well documented. Conventional wisdoms usually become conventional with good reason. I also understand the sovereignty model's attractions despite my practical and normative reservations about its operation.

My quarrel, then, isn't with the autonomy/sovereignty models *per se*, but with their ubiquity. These accounts so dominate constitutional theory that they crowd out other equally important models of power and influence. We usually miss, and we certainly undervalue, what I call the "power of the servant" — the power that states and localities wield when they are the *agents* of the center.<sup>21</sup> As a result, federalism scholars ignore a multitude of institutions where federalism's underlying values are vindicated. When I point out shortcomings of the autonomy/sovereignty models, then, it isn't to suggest that they lack value or that they're irrelevant to my project. Instead, I aim to show that neither autonomy nor sovereignty should be cast as the be-all, end-all account of power in a highly decentralized, partially politicized system like our own. Other forms of power offer advantages that autonomy and sovereignty cannot. The goal of my work, in short, is to show that there are forms of power neglected by the federalism canon, not to reject the canon itself. The fact that many view efforts to enrich and expand our understanding of state power as antithetical to the canon confirms the hold that the autonomy/sovereignty model exercises over our collective imaginations.

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18. It's an irresistible combination of critics. The three are so different intellectually that they could be the lead-in for the academic equivalent of a "three men walk into a bar" joke.

19. Ilya Somin, *Taking Dissenting by Deciding All the Way Down*, 48 *TULSA L. REV.* 523, 533–34 (2013); Franita Tolson, *Second-Order Diverse in Name Only?: Sovereign Authority in Disaggregated Institutions*, 48 *TULSA L. REV.* 455, 457–58 (2013); Young, *supra* note 4, at 439 n.81.

20. Somin, *supra* note 19, at 530–31; Tolson, *supra* note 19, at 464–67.

21. Heather K. Gerken, *Of Sovereigns and Servants*, 115 *YALE L.J.* 2633, 2635 (2006).

Two of my post-symposium pieces make these claims explicitly. The first, *Our Federalism(s)*,<sup>22</sup> mourns the tendency in the field to write as if we must have one theory to rule them all (with apologies to Tolkien). Perhaps because the sovereignty and autonomy camps have warred for so long, we write as if we must choose between different accounts of federalism — as if they cannot coexist with one another despite the presence of all three models in different parts of the federal system.<sup>23</sup> Although the assumption behind much of federalism scholarship is that the three models of state power — sovereignty, autonomy, and the power of the servant — are substitutes for one another, in fact they can serve as complements.<sup>24</sup> The question, then, is not which model we should choose, once and for all, but how best to strike the right balance between different types of institutional arrangements. Were scholars to write in this pluralist vein, I argue, arguments about federalism would be less about contests and more about context. We wouldn't see intellectual death matches between different accounts of state power, but would instead encounter more nuanced arguments about what form of state power is most appropriate in a given circumstances. Debates over devolution would involve not an "either/or" but a "both/and."<sup>25</sup>

A second piece, *Exit, Voice, and Disloyalty*,<sup>26</sup> begins to answer a second and related question that both Professors Tolson and Somin raise about my work. As they recognize, it's one thing to point out the many sites within "Our Federalism" where minorities exercise the power of the servant rather than the power of the sovereign.<sup>27</sup> But my work is both descriptive and normative; I argue that these sites of minority decisionmaking can further important democratic aims. Tolson and Somin thus wonder why I don't push for more autonomy for these institutions. Shouldn't I want the decisions that dissenters and racial minorities adopt to be shielded from reversal?

No. My work shows that decentralization is attractive even when it does not come with the traditional trappings of federalism. I'm thus skeptical of generic calls for "more autonomy" or "more sovereignty" throughout the system (though I'm always happy to think about such question in a specific context). My resistance stems from a blend of pragmatic and normative reasons. First, as a normative matter, I believe it's perfectly acceptable — and entirely sensible — for the national government to insist upon its right to overturn the decisions of those administering national policy.<sup>28</sup> Decentralization isn't a good unto itself, and the many forms power takes within a decentralized system aren't either. And as a pragmatic matter, I believe that calls for greater autonomy or sovereign-

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22. Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549 (2012).

23. *Id.* at 1562.

24. Professor Young's "to do" list for me, see *infra* text accompanying notes 46 to 70, includes acknowledging that these different forms of power interact. Young, *supra* note 4, at 447. Happily, I've taken a first step toward crossing this off the list. See Gerken, *supra* note 22, at 1561–64.

25. Gerken, *supra* note 22, at 1571–73.

26. Heather K. Gerken, *Exit, Voice, and Disloyalty*, 62 DUKE L.J. 1349 (2013).

27. Somin, *supra* note 19, at 529–31; Tolson, *supra* note 19, at 464–67.

28. I have argued that federalism is the new nationalism — that there are many reasons for a nationalist to value the highly decentralized, partially politicized system we call "Our Federalism." See Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 44–73 (2010). This claim, needless to say, is the sort of thing that gives Professor Young hives. See Young, *supra* note 4, at 450 (arguing that "a federalism theory that fails to impose" what Young calls "meaningful constraints on actions by the central government" is not "'federalism,' but nationalism").

ty are self-defeating strategies. The center would simply take a pass if it had to grant a robust form of de facto or de jure autonomy to the many state and local institutions that make up “federalism all the way down.” The federal government would instead prefer to construct an administrative system of its own rather than doing what it does now — integrating states and localities into the process of administering national policy.<sup>29</sup>

We’re thus presented with a trade-off, one I explore in *Exit, Voice, and Disloyalty*. If we value the benefits that come with “federalism all the way down,” we must take the good with the bad. In my view, it is still a trade-off worth making. To be sure, minorities acting as the center’s agent lose the benefits associated with autonomy and sovereignty, most notably the protections against reversal.<sup>30</sup> But while minorities lose the chance to preside over their own empire, they gain the opportunity to help administer the giant — and increasingly important — federal empire. As I explain in that piece, there are many reasons why a minority might desire to be a policy-making insider rather than an autonomous outsider, a critic from within rather than a dissenter from without.<sup>31</sup>

I understand that what I term “the power of the servant”<sup>32</sup> will not be entirely satisfactory to those who subscribe to a sovereignty model, in particular. But that, as I have written elsewhere,<sup>33</sup> is not the relevant question. In this day and age, the real question is this: Given the many areas where the national government plays a substantial regulatory role, should states and localities want to be in the game or on the sidelines? Should state and local officials prefer to help administer the burgeoning federal empire rather than preside over second-rate empires of their own?<sup>34</sup>

The rest of us stand to benefit from this trade-off as well. One of federalism theory’s touchstones is that states play an important role in checking national power. Shouldn’t we then want states to play that role inside the federal administrative structure, just as they do outside of it? Shouldn’t we want minorities exercising decision-making authority even where sovereignty is not to be had?<sup>35</sup>

Here again, I’m not proposing that the power of the servant is — or should be — the only model. In my view, all three models — sovereignty, autonomy, and servant — are useful in their own way and can serve as complements to one another. As I observed in *Federalism(s)*, one of the most admirable features about federalism theory is that it recognizes that the *ends* of federalism are plural.<sup>36</sup> It would be useful, in my view, if we

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29. The dissenters in *Printz* made precisely this observation. *Printz v. United States*, 521 U.S. 898, 959 (1997) (Stevens, J., dissenting) (“By limiting the ability of the Federal Government to enlist state officials in the implementation of its programs, the Court creates incentives for the National Government to aggrandize itself. In the name of State’s rights, the majority would have the Federal Government create vast national bureaucracies to implement its policies.”); *Id.* at 977 (Breyer, J., dissenting) (“Why, or how, would what the majority sees as a constitutional alternative—the creation of a new federal gun-law bureaucracy, or the expansion of an existing federal bureaucracy—better promote either state sovereignty or individual liberty?”) (citation omitted).

30. Gerken, *Exit, Voice, and Disloyalty*, *supra* note 26, at 1366–67.

31. *Id.*

32. Gerken, *supra* note 21.

33. Heather K. Gerken, *The Federalis(m) Society*, 36 HARV. J.L. & PUB. POL’Y (forthcoming Summer 2013).

34. *Id.*

35. See Gerken, *supra* note 28, at 60–71 (making the case); Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009) (same).

36. Gerken, *supra* note 22, at 1573.



also took a pluralist view of the means and models that can best achieve those ends.<sup>37</sup>

This brings me to Professor Young's passing footnote on the subject.<sup>38</sup> Professor Young argues that I am, in fact, describing the autonomy model in my work on the "power of the servant."<sup>39</sup> Professor Young is certainly right that much of what I call "dissenting by deciding" involves the "affirmative capacity to govern."<sup>40</sup> Young hints that the "affirmative capacity to govern" exists when states and localities are playing the servants' role.<sup>41</sup> If *that* is what one means by autonomy — and it is certainly not the dominant account in the literature,<sup>42</sup> despite Professor Young's best efforts<sup>43</sup> — then we are in rough agreement. Call it autonomy, call it power, call it a rose.

### *B. My New "To Do" List*

One of the most heartening take-aways from the symposium is that there's still a lot of work to do on this project. Many of the symposium's contributors identify areas where my work is undertheorized or underdeveloped. Others note where I have failed to answer prior questions on which my claims depend or have not yet fully explored the implications of my claims.

This may be the only reason to hold a festschrift for a forty-three-year old. I imagine it would be depressing to discover one's project remains unfinished at the end of one's career (though maybe by the time one reaches the proper age for a festschrift, one realizes that every project remains unfinished). But now? Now it's energizing. Especially since I've been working on a number of the items the contributors have placed on my "to do" list, something which satisfies the anal-retentive, leave-no-task-unfinished, restless creature that dwells inside every high school nerd. More importantly, the suggestions offered here provide a roadmap not just for me, but for everyone interested in thinking about the relationship between federalism and democratic practice.

While several of the contributors touch on these issues, Professor Young devotes almost his entire essay to the tasks that remain undone.<sup>44</sup> Perhaps that's not surprising. My brother-in-all-but-birth has long tried to run my life. Usually I've resisted strenuously, but this is the rare instance when Professor Young is as reasonable as he typically fancies himself to be. His points are extremely helpful and definitely well taken. They are also exceedingly generous. Much of my work is destined, if not designed, to irritate Professor Young. That is why he recently asked me if I'd begun a new project. The rea-

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37. *Id.*

38. Young, *supra* note 4, at 439 n.81.

39. *Id.* at 432–34.

40. *Id.* at 439 n.81.

41. *Id.*

42. Gerken, *supra* note 28, at 11–21 (describing and criticizing the dominant account).

43. See Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 13–15 (2004).

44. While I focus on the most important ones below, I should note that Professor Young is also correct in suggesting I need to think more about the Spending Clause generally and Sibelius in particular. Young, *supra* note 4, at 443–44. I have, in fact, started to do so already. See Gerken, *supra* note 33. Professor Young has a number of other, ridiculously interesting suggestions — including his suggestion that I fit my work into the extant literature on fiscal federalism, Young, *supra* note 4, at 449–54 — that will keep me plenty busy. As to Professor Young's suggestion of the term *overcooperative federalism*, *Id.* at 447 (citing his student), it is nothing less than a gift, one made all the better because it's accompanied by a Shel Silverstein reference. *Id.* at 447 n.128.

son he was sure I'd started something new? He'd broken out in hives, and he was confident my writing had something to do with it.

While I won't detail each claim, Professor Young's advice about my research agenda comes in two main flavors. The first goes to the normative attractiveness of the phenomena I'm describing, and the second goes to their origins.

### 1. Is the Game Worth the Candle?

On the first, Professor Young asks whether uncooperative is "normatively appealing" and whether there are good reasons to "value state-based dissent."<sup>45</sup> They are both excellent and entirely fair questions, ones I've been asked by almost every good reader I've had. In all of my work thus far, I have offered a weasely response to this sort of question. To be sure, I've stuck by my descriptive claims. I've even pounded the table for the idea that there are normatively attractive features to "dissenting by deciding" and "uncooperative federalism." But I haven't defended the idea that these phenomena are "normatively attractive," tout court, as Professor Young has suggested I do. Instead, I have offered better and worse formulations of what I have said in the *Foreword*:

I could try to offer some broad generalizations about how these cost and benefits balance. But I am deeply skeptical that anything meaningful can be said at such a high level of generality. . . . [C]osts and benefits can only be sensibly assessed institution by institution, domain by domain, issue by issue, group by group. The point [of the work] is not to do the math in advance, but simply to illuminate a set of arguments that are too often excluded from the equation.<sup>46</sup>

Here I come to one of the critiques I'm going to ignore for what I hope are the right reasons. I'm going to ignore it for precisely the reasons Professor Young identifies, in fact. "[I]t is hard to go further [on these questions] without a normative baseline and good tools for measurement," he writes.<sup>47</sup>

Exactly. We are bereft on both fronts. Measurement tools have always been elusive in federalism theory, and what normative baselines we possess are cast at such a high level of generality that they prove of little use when one tries to get traction on the merits of this or that institutional choice. Inevitably, questions of devolution boil down to a balancing test — a messy, inchoate balancing test with more factors than one can coherently take into account.

That's not to say we can't do a better and worse job of balancing or that there aren't easy cases and hard cases. It's simply to say that my efforts to balance the costs and benefits don't seem any more likely to persuade you than your own efforts. I'm often bewildered by the scholars who devote hundreds of pages to such questions. It is certainly helpful to see someone else work systematically through these issues, but I don't see why these authors think it is going to change anyone's mind. Preaching to the choir is the only preaching that can be done on this front.

The work still matters, however. I don't have to convince you that I have correctly balanced the costs and benefits of a given devolutionary choice for my arguments to be

45. Young, *supra* note 4, at 434, 444.

46. Gerken, *supra* note 28, at 11.

47. Young, *supra* note 4, at 435.

relevant to your assessment of the choice at hand. The goal of my work is to change your mind about what's put on the scale, not to recalibrate — let alone reinvent — the scale itself. If I could offer a better scale, I might deserve a festschrift. Maybe two. Federalism, after all, has always been plagued by the balancing problem, and no one has ever solved it.

I'm not embarrassed by my failure to solve the balancing problem, and I don't think the federalism tribe need be, either. It is, after all, a problem that plagues most of constitutional theory. It tortures those who study the separation of powers or the First Amendment or the Fourteenth Amendment as much as it torments federalism scholars. We try to alleviate our discomfort by inventing presumptions or multi-part checklists or elaborate burden-shifting rules. But don't let those decision-making aids give you much comfort. For any question that is hard, atmospheric balancing takes place at some point. The tests we devise to make that process seem routinized don't eliminate the many complex institutional and normative issues that elude easy measurement; they just push those issues into the background.

For this reason, I do what any sensible scholar does when faced with an intractable question. I work on the subsidiary questions that *are* tractable. We may all strike the balance differently, but we can make progress about what belongs on the scale and what doesn't. And here Professor Young is correct. I *do* have more work to do in describing what gets placed on the scale. There *is* more to say about the costs and benefits of the phenomena I am describing, particularly the costs.

The question for me has always been *which* costs are worth describing and which aren't. Much of my work challenges the conventional wisdom about the relationship between diversity and democratic legitimacy. There are, of course, real benefits associated with the conventional approach and real costs associated with mine. Obviously. I accept the wisdom behind the conventional wisdom. I merely want to insist that it's far from complete. Many of the costs to my approach stem from the fact that it requires us to sacrifice the benefits associated with the conventional approach. And given how familiar those benefits are to us, it seems pointless to list them just for the sake of listing them.

My past and future work is thus focused on the costs that are less familiar — the costs that remain invisible until we frame decentralization in the terms I do. Once one imagines that it's possible to dissent by deciding, for example, one realizes that there are costs to pouring dissent into the narrow policy-making space left open by national mandates.<sup>48</sup> Once one realizes that institutions can be either first-order or second-order diverse, one can see that there are trade-offs involved in concentrating a group's members in one place and thus depleting their numbers elsewhere.<sup>49</sup> Once one acknowledges that cooperative federalism is paired with uncooperative federalism and cooperative localism is paired with local resistance, one immediately sees that the anti-commandeering doctrine does not just make it more difficult for the federal government to execute its projects; it also deprives federal agencies of useful channels for dissent.<sup>50</sup>

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48. Gerken, *supra* note 10, at 1784–86.

49. Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099 (2005).

50. Bulman-Pozen & Gerken, *supra* note 35, at 1295–1302.

There are also normative questions left unanswered by my work, just as Professor Young insists. As I said, I don't see the point in trying to convince you of the big one — to persuade you that, all things considered, the decentralization game is worth the candle. But there are many other normative questions raised by my work that lend themselves to tractable answers. The most important one is *when?* — when is it acceptable for minorities to wield the power of the majority against itself? When should dissenters take advantage of their power to decide? There must be conditions under which dissenting by deciding is appropriate, just as there must be limits upon its use.

In that respect, dissenting by deciding bears some resemblance to civil disobedience. Neither should be purely oppositional. Neither should be indulged in solely for the “agonistic flair.”<sup>51</sup> We thus require a set of rough-and-ready principles to help us sort dissenting by deciding from lawlessness, principled resistance from a refusal to accept the dictates of democracy, efforts to move us toward a national settlement and efforts to unsettle what's settled. One of the tasks I hope to achieve in my next book is to identify those principles.

## 2. How Does the Game Begin?

A second set of issues on my “To Do” list fall under the second, main category Professor Young discusses in his contribution. They all involve nitty-gritty details about the mechanics of state and local resistance. How does it work in practice? And how does it get off the ground in the first place?

Professor Young asks a fundamental question — “what are the wellsprings of state-based dissent?”<sup>52</sup> His own view is that “states embody a distinctive and meaningful identity of their own.”<sup>53</sup> Professor Young has waged a long and not-so-merry war on this front with Professors Malcolm and Feeley, thereby generating some of the best-titled articles in the field.<sup>54</sup>

While Professor Young's concern is well taken, I'm not giving an inch on this one. All that federalism and localism need to get off the ground — for my purposes, at least — is salient differences in opinion and lumpy residential patterns.<sup>55</sup> We clearly have that. Under those conditions, decentralization can further a national conversation even if interest groups and political parties are simply running national fights through state and local sites.

Professor Young is either going to love — or be completely dismayed by — the different answer offered by my dazzling co-author, Jessica Bulman-Pozen. She offers a middle ground between my position and Professor Young's. She argues that partisan affiliations — the semi-tribal identities we call “Republican” and “Democrat” — help

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51. The phrase comes from Jeremy Waldron, who warns against endorsing such an account of politics. JEREMY WALDRON, *LAW AND DISAGREEMENT* 240 (1999).

52. Young, *supra* note 4, at 444.

53. *Id.* at 446.

54. Compare Edward L. Rubin, *Puppy Federalism and the Blessing of America*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 37 (2001), with Ernest A. Young, *The Volk of New Jersey? State Identity, Distinctiveness, and Political Culture in the American Federal System* (Apr. 8, 2013) (unpublished manuscript) (on file with the Tulsa Law Review).

55. Gerken, *supra* note 28, at 15–16.

build citizens' affiliation to their states, particularly when their party has lost control of the presidency.<sup>56</sup> Partisanship, then, helps build the state-based affiliations that some believe federalism requires to function.

In my view, federalism can function even if partisan affiliations are just that — partisan affiliations. It works even if Democrats in Massachusetts are loyal to the blue government they elected rather than to the state itself. It also functions when they are deeply divided parties rather than the ideologically coherent one Bulman-Pozen describes. When the parties are not as polarized as they are now (and even when they are), state and local governments become sites for both the interparty wars that Bulman-Pozen describes and the intraparty wars that also occur in a fractious and robustly democratic party system like our own.<sup>57</sup> Whether our differences are refracted through the prism of party or intraparty faction or ideology or interest group, “federalism all the way down” gets off the ground as long as members of the relevant groups are unevenly distributed across the region and thus able to rule in different parts of the system.

Professor Young is not the only one to ask what gets my work off the ground. Both Professor David Schleicher and David Fontana devote their comments to similar questions.

Professor Schleicher — who has more ideas per square inch of paper than anyone in the academy and is making a splash in both election law and local government law — comes at this question from a completely different perspective than Young. Whereas Professor Young is confident that citizens' involvement in state government is a meaningful part of their identity,<sup>58</sup> Professor Schleicher thinks that state and local elections simply mirror citizens' views on national politics.<sup>59</sup> People aren't voting on what they want to happen at the state or local level, Schleicher argues.<sup>60</sup> They're voting based on national party preference, in his view, and laws, rules, and institutions limit the ability of the party system to provide voters with the tools they need to comment meaningfully on state and local governance through elections.<sup>61</sup> Professor Schleicher thinks that the powerful effect of the national party heuristic is relevant to the dynamics of dissent and resistance I identify in my work.<sup>62</sup>

Professor Schleicher is pulling his punches here. He suggests that there is more to say about the relationship between his work and mine,<sup>63</sup> but the truth is that his work poses a serious challenge to mine, at least to the extent that I imagine the decisions of elected state and local officials to be *representative* in some meaningful sense. I agree with him that the checking function provided by state and local units depends at least in part upon national parties running their fights through local sites,<sup>64</sup> but I think we see —

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56. Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. (forthcoming 2014) (on file with the author).

57. See Michael S. Kang, *The Hydraulics and Politics of Party Regulation*, 91 IOWA L. REV. 131, 146–49 (2005).

58. See Young, *supra* note 4, at 439–40.

59. Schleicher, *supra* note 6, at 417–18.

60. *Id.* at 416–18.

61. *Id.*

62. *Id.* at 417–18.

63. *Id.* at 421.

64. *Id.* at 417–18. As I noted above, Jessica Bulman-Pozen has devoted much of an article to developing

and it matters that we see — more state and local variegation than that. In addition, while many of my arguments — particularly those involving the discursive benefits of decentralization — don't depend on the sort of representational relation between minority group members and those they elect, it matters for some. There is thus another reason I need to grapple with Professor Schleicher's work.

Here, luckily, I'm in very good company. If Schleicher's work poses a threat to my work, it poses a threat to the work of almost everyone who has written on the participatory dimensions of federalism and localism and on the possibilities associated with "voice" and devolution. That is, it poses a threat to everyone who writes about federalism and localism. As Professor Schleicher slyly observes, anyone who writes in this vein "expect[s] local democracy to work."<sup>65</sup> That is, in fact, what's so fantastic about Schleicher's burgeoning opus. The more you think about its implications, the less sanguine you become about your own work.

I do think there is an answer to these questions, one that would admittedly require more thought about what it means to be "representative" in an elite-driven, nation-centered democracy like our own. The answer would be two-fold. First, to the extent that groups are teeing up issues for national debate, the national heuristics function effectively enough. Second, to the extent that isn't the case, we need to focus on how pluralist politics function at the local level — the ways in which interest groups and elite networks competing within the national parties move policy through state and local sites. Indeed, in wake of the symposium, I've been trying to concoct a paper that Professor Schleicher and I can write together on this subject. Professor Schleicher's contribution, then, is the opening gambit in the conversation, and I can't wait to continue it

A final "what makes it tick?" paper is David Fontana's extremely interesting essay on what he terms "relational federalism" — the way in which relations among diverse institutions matters as much as the quantity of diverse institutions.<sup>66</sup> Professor Fontana's essay draws on a literature I'd never read or even thought to read, and it's a testament to Fontana's own breadth and creativity that he spotted the connection when I did not (authors, after all, tend to think their work is connected to *everything*). Perceptions of whether another institution or another set of decision makers is different from one's own can shape the way one's decision is absorbed, Fontana writes.<sup>67</sup> The effect can be good or bad, depending on one's goals. But the bottom line is that social distance affects how decisions are absorbed and understood by others.<sup>68</sup> Fontana's view is that "dissenting by deciding" works precisely because it produces enough social distance to generate the diversity of outcomes we seek in a decentralized system.<sup>69</sup>

Kathleen Sullivan calls lawyers "magpies" because they "pick up things from other disciplines and bring them back to their nests."<sup>70</sup> Fontana's contribution showcases the

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this claim. See Bulman-Pozen, *supra* note 56.

65. Schleicher, *supra* note 6, at 415.

66. David Fontana, *Relational Federalism: An Essay in Honor of Heather Gerken*, 48 TULSA L. REV. 503, 510 (2013).

67. *Id.* at 511–12.

68. *Id.*

69. *Id.* at 512–14.

70. Kathleen M. Sullivan, *The Good That Lawyers Do*, 4 WASH. U. J.L. & POL'Y 7, 19 (2000).

best of the magpie's qualities. As is true of all of his work, it is smart, synthetic, and careful. And the essay raises intriguing questions about the institutional design issues with which I am obsessed. Indeed, even the difference between the first and second drafts of this paper confirm Fontana's scholarly chops. The piece went from an interesting think piece to an idea that deserves a symposium of its own.

As with Professor Schleicher's contribution, the essay feels like the beginning of the conversation rather than the end, and I cannot imagine a better interlocutor than Professor Fontana. The question that has been haunting me since he presented his argument is this: Are those who "dissent by deciding" perceived as socially distant or socially close (or somewhere in between)? Many of my claims about dissenters who decide pivot off their unusual status. They are political outsiders who are temporarily political insiders. They are making decisions inside city hall instead of staging protests outside of it. Moreover, they are both like and unlike those who disagree with them. That is because the institutions where dissent is occurring aren't completely separate and apart from the rest of the country. When San Francisco marries same-sex couples, for example, city officials were certainly perceived as liberals.<sup>71</sup> But they were also understood to be Californians and Americans. I assume, therefore, that those decisions registered differently than a decision to legalize same-sex marriage by France or the Netherlands or the Planet Xenon. And San Francisco, of course, is likely to be the most socially distant dissenter for the rest of the country. But how does middle America view the decision when Maine or Iowa decides to marry same-sex couples? Sure, they're not Arkansas. But they're not part of the ACELA corridor, either. I've always found the special status of minorities who rule to be fascinating, and Professor Fontana's work only makes it more so.

### III. AND NOW FOR SOMETHING COMPLETELY DIFFERENT

While the rest of the symposium participants focused on my federalism work, as per instructions, Professor Levinson — as he is wont to do — forged his own path<sup>72</sup> and wrote about my election law work. Specifically, he reviewed my book proposing the creation of a "Democracy Index," that would rank states and localities based on how well they run the election system.<sup>73</sup>

In his characteristically wide-ranging and generous review, Professor Levinson wonders why I would spend my time on a mere "meliorist" project when I ought to be taking aim at bigger problems.<sup>74</sup> Actually, Professor Levinson is far kinder than that. He acknowledges the need for meliorism and moderation while insisting that academics need to do some metaphorical bomb-throwing as well.<sup>75</sup>

One response to Professor Levinson's review would be, of course, the meliorist one. Smaller and more manageable ideas often have the most influence in the real world.

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71. See Gerken, *supra* note 10, at 1748.

72. Sandy always forges his own path and yet is always generous to those who choose a different one. This is why he manages to be both one of the country's great legal scholars and one of the academy's most beloved figures.

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

74. Levinson, *supra* note 5, at 483–84.

75. *Id.* at 484–85.

This may be why no foundation has thought to fund “federalism all the way down,” but the Pew Charitable Trusts, a nonpartisan organization well known for promoting data-driven governance, has put my meliorist idea into action and created the nation’s first Election Performance Index.<sup>76</sup> While I have proposed a number of ideas Professor Levinson is likely to find more congenial to his vision of the scholar, it is my modest proposal<sup>77</sup> that actually found its way in the world.

Second, I do think — as Professor Levinson graciously acknowledges<sup>78</sup> — that the Democracy Index is the sort of small reform that makes bigger, better reform possible. Much of my election law work focuses on what one might call election-reform studies<sup>79</sup> — it is an effort to map and systematize the election-reform process. I’m interested in election-reform studies precisely because getting reform passed is so difficult. In most instances, the people who know the most about reform and care the most about reform are the policymakers who oppose reform (and have the power to do so). Needless to say, when the foxes guard the henhouse, it’s hard to pry them off that powerful perch. Projects like the Democracy Index — and shadow districting commissions and model election codes — are all designed to soften the terrain on which reform battles are fought.<sup>80</sup> While Levinson might term these discrete projects meliorist, the *end* goal — fixing our election system — is surely ambitious enough even for Professor Levinson.

Finally, if Professor Levinson is looking for a bit of bomb-throwing, he should tune in next week, same Bat time, same Bat channel. My next book, *The Loyal Opposition*, borders on the polemic even if it doesn’t reach Levinsonian heights. And it will be all the better for the generous and insightful contributions to this symposium. I can’t thank you all enough.

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76. *Elections Performance Index*, THE PEW CHARITABLE TR. (Feb. 7, 2013), <http://www.pewstates.org/research/analysis/elections-performance-index-85899449153>.

77. With apologies to Jonathan Swift.

78. Levinson, *supra* note 5, at 484.

79. Thanks to Bruce Cain for suggesting the frame.

80. Heather K. Gerken, *Getting From Here to There in Election Reform: A Trio of Ideas* (June 3, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1619915](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1619915).



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