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TAKING DISSENTING BY DECIDING ALL THE WAY DOWN

Ilya Somin

INTRODUCTION

Professor Heather Gerken has made numerous important contributions to our understanding of democracy and federalism. It is entirely appropriate that the Tulsa Law Review hold this symposium in her honor. Her work is especially notable for its ability to reach across ideological barriers. The debate over federalism is often ideologically polarizing, with liberals, conservatives, and libertarians alike, often failing to present ideas that have much interest for those who do not already share their views. Gerken is an unusual example of a scholar whose work has broad cross-ideological appeal.

Part I of this article summarizes two key contributions that Professor Gerken has made to federalism scholarship. The first is "taking federalism all the way down," the idea that many of the benefits of federalism can be enhanced by empowering local governments as well as states.1 The second is her insistence that federalism can be used to empower political dissenters, including racial and ethnic minorities.2 Subnational jurisdictions where nationwide minorities are in the majority enable these minorities to exercise power in their own right instead of relying on the good will of the national majority. In Gerken's trademark phrase, they can "dissent by deciding."3 This is a major challenge to the conventional wisdom among American constitutional scholars, particularly Gerken's fellow political liberals.

Part II proposes three extensions of Gerken's ideas, not all of which she would necessarily agree with. First, both "federalism all the way down" and the empowerment of minorities might be enhanced by greater attention to the benefits of "voting with your feet" as well as voting at the ballot box. "Foot voting" has several important advantages over ballot box voting as a tool for enhancing political freedom and expressing dissent.4

* Professor of Law, George Mason University School of Law. For helpful suggestions and comments, I would like to thank Heather Gerken, David Schleicher, Ernest Young, and other participants in the Tulsa Law Review's symposium in honor of Professor Heather Gerken.


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It makes it easier for individuals and small groups to act on their preferences, and also gives them stronger incentives to acquire and rationally evaluate information about the available alternatives. Gerken’s analysis of federalism focuses almost entirely on the potential benefits of ballot box voting at the local level while largely ignoring foot voting. Rectifying this omission would make her ideas even more powerful.

Second, for minorities to be able to “dissent by deciding” effectively, Gerken may wish to rethink her opposition to judicial enforcement of constitutional limits on federal power. If locally powerful minorities can, at any time, have their “dissent” overridden by a majority-controlled central government, their ability to make decisions for themselves might be severely constrained.

Finally, while Gerken argues that federalism may be beneficial for minority groups today, she accepts the conventional wisdom that it was largely detrimental to them throughout most early periods in American history. In reality, however, the situation was far more nuanced. Although state and local governments often oppressed minority groups, so too did the federal government. At many points in American history, African Americans and other minorities would have been even worse off with a unitary state than they were under federalism.

In the conclusion, I briefly suggest some ways that future scholars can build on Gerken’s ideas.

I. HEATHER GERKEN’S FEDERALISM

Heather Gerken’s challenge to the conventional wisdom on federalism rests on two key pillars: “federalism all the way down” and “dissenting by deciding.” Together, these ideas combine to form an interesting and coherent vision.

A. Federalism All the Way Down

In her 2010 article “Federalism All the Way Down,” Gerken argues that federalism theory should focus on institutions below the level of state governments, including cities and “special purpose” institutions, such as school boards, juries, specialized state agencies, and others. Empowering these sub-state government bodies enables more of the benefits of federalism to be realized, including greater policymaking diversity, and greater opportunity for various national minority groups to exercise majority power at the local level. With a greater number and variety of institutions than that offered by the fifty states, there is much more room for experimentation in policy and for many different groups to get an opportunity to exercise decision-making authority.

Unlike most other defenders of federalism and decentralization, Gerken rejects the idea that state or local governments should have “sovereign” authority that the federal
government is not permitted to override. She "join[s] the nationalists in insisting on the center’s ability to play the national supremacy card." This, she believes, undercuts traditional criticisms that federalism is dangerous to racial and ethnic minorities because it allows local majorities to discriminate against them. Gerken argues that retention of the "national supremacy card" does not deprive state and local governments of all meaningful autonomy because they can still wield "the power of the servant." Because states and localities play an important role in implementing and extending federal policy, they can also help shape its content. For example, state and federal governments depend on local school boards to implement education policy, which thereby gives the latter considerable leverage over what actually happens in the classroom.

"Federalism All the Way Down" is a valuable contribution to federalism literature. It builds on previous literature that emphasizes the significance of sub-state government bodies for federalism. Gerken’s distinctive contribution is to combine the focus on sub-state government bodies with a rejection of dual sovereignty and an argument that federalism all the way down can benefit minority groups, often to a greater extent than states alone. Her point is reinforced by the dramatic contrast between the mere fifty state governments in the United States and the over 19,000 local and regional governments. It is only rarely the case that a racial, religious or ethnic minority in the United States can come to control a state government. The one clear case in American history is Utah, which was established for the specific purpose of giving the long-persecuted Mormon religious minority a state of their own. At the local level, however, it is much more common for national minorities to be in the majority or at least exercise a strong influence, as demonstrated by the existence of numerous majority-black jurisdictions and areas where there is a large, politically influential gay and lesbian minority.

B. Dissenting by Deciding

Gerken’s second major contribution to federalism theory is the notion of "dissenting by deciding," the title of an important 2005 article she published in the Stanford Law

10. Id. at 45–46.
11. Id. at 10.
12. Id. at 35–41; see also Jessica Bulman-Pozen & Heather K. Gerken, Uncooperative Federalism, 118 YALE L.J. 1256 (2009); Heather K. Gerken, Of Sovereigns and Servants, 115 YALE L.J. 2633 (2006).
15. As of 2007, the last year for which data was released, the Census Bureau estimated that there are 19,492 municipal governments in the United States, 3,033 county governments, and 16,519 townships. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 267 (2012).
17. Gerken herself has emphasized the importance of majority-minority jurisdictions for racial minorities. See, e.g., Gerken, A New Progressive Federalism, supra note 2, at 38. On the advantages of localism for gays and lesbians, see, for example, id. at 44, and Stephen Clark, Progressive Federalism? A Gay Liberationist Perspective, 66 ALB. L. REV. 719 (2003).
The traditional mechanism by which liberals have sought to protect minority rights and interests is through their inclusion in national political institutions and protection of rights by judicial review: what Gerken calls the “diversity paradigm.”

By contrast, majority-minority jurisdictions enable dissenters to be more than “objects of constitutional solicitude” for national institutions. “Minority rule,” she emphasizes, “allows racial minorities and dissenters to act as efficacious political actors, just as members of the majority do. . . . It empowers racial minorities and dissenters not by shielding them from the majority, but by turning them into one.” In this way, they can dissent from majority views not just by expressing contrary opinion, but by implementing their own preferred views through state and local institutions.

This insight is not a surprise to students of federal systems outside the United States. In many nations, federalism was adopted precisely for the purpose of giving locally dominant national minorities a jurisdiction of their own that they can control. Consider such examples as French Canadians in Canada, the Basques in Spain, French and Italian speakers in Switzerland, numerous minority groups in India, and the Kurds in Iraq. In all of these cases, federal systems were established largely for the purpose of creating an autonomous space for national minorities, and forestalling possible conflict between them and the majority.

In the United States, such majority-minority jurisdictions have historically been rare, with Mormon-dominated Utah being an unusual and generally ignored exception. As a result, state and local governments are usually seen as the enemies of minority groups rather than their friends. Gerken’s contribution to the federalism debate in this country is to suggest that American federalism may no longer be as anomalous as the conventional wisdom supposes. So far, she has not relied on foreign examples to make her case for what she has called a “New Progressive Federalism.” Perhaps she will take up this comparison in future work. But if she succeeds in persuading her fellow progressives of the virtues of “dissenting by deciding,” the American left’s view of federalism will move closer to that prevalent in most other nations with federal systems.

In Gerken’s view, the potential benefits of “dissenting by deciding” extend beyond the interests of locally dominant minorities themselves. By pursuing at the local or state level policies at odds with those of national majorities, they can create an example effect that might influence other jurisdictions to adopt the same approach, and even ultimately affect federal policy. The most prominent recent example is the rapid spread of support for gay marriage since Massachusetts became the first state to adopt it in 2003.

18. Gerken, Dissenting by Deciding, supra note 3.
20. Gerken, Federalism All the Way Down, supra note 1, at 54.
22. Gerken, Dissenting by Deciding, supra note 3, at 1754–63.
23. For a discussion of many such examples, see DAWN BRANCATI, PEACE BY DESIGN: MANAGING INTRASTATE CONFLICT THROUGH DECENTRALIZATION 3 (2009); DIVERSITY AND UNITY IN FEDERAL COUNTRIES: A GLOBAL DIALOGUE ON FEDERALISM 3, 4 (Luis Moreno & César Colino eds., 2010).
25. See Gerkin, Federalism All the Way Down, supra note 1, at 10–11.
26. See id.
There are now nine states that allow gay marriage, including three that adopted it by popular referendum in the November 2012 election. CNN exit polls reveal a slight 49-46 plurality in favor of gay marriage, a vast change from opinion just a few years earlier, when only thirty-one percent supported gay marriage in 2004 and sixty percent opposed it. It is difficult to imagine such rapid change on the issue in the absence of local and state dissent from the dominant national view.

There is an important synergy between dissenting by deciding and federalism all the way down. As already noted, empowering local and special purpose governments along with states greatly increases the range of minorities who can take advantage of opportunities to dissent by deciding. In addition, increasing the number of governments able to experiment with policies that deviate from majority preferences at the national and state level also increases the range of policy experiments that could serve as examples that might later be adopted by other jurisdictions.

Gerken recognizes that the benefits of dissenting by deciding and federalism all the way down do not always outweigh other considerations, some of which support greater centralization. She merely seeks to “illuminate a set of arguments that are too often excluded from the equation.” Even so, they are important factors in the equation that should not be neglected.

II. EXTENSIONS

Heather Gerken makes a compelling case for the virtues of taking federalism all the way down and dissenting by deciding. But her position could be even stronger if combined with three potential extensions of her argument. Both federalism all the way down and dissenting by deciding would be more compelling if combined with an appreciation of the virtues of foot voting and limits on federal power. Gerken’s ideas could also be reinforced by a reevaluation of the conventional wisdom on the relationship between federalism and racism in American history

A. Dissenting with Your Feet

People dissatisfied with status quo public policies where they live can resort to either “exit” or “voice;” the former involves leaving the jurisdiction for one with more favorable laws, while the latter implies engagement in the local political process to try to effect change. Decentralized federalism enables citizens to exercise exit by “voting...
with their feet." Instead of being stuck with the policies of the state and local governments they currently live under, they have the opportunity to move.

Somewhat surprisingly, Gerken does not integrate foot voting into her analysis in either "Federalism All the Way Down" or "Dissenting by Deciding." She does consider a different distinction between exit and voice, suggesting that the traditional account of state sovereignty under which states are insulated from federal interference is an example of "exit" because it involves leaving the control of the central government. In truth, this kind of insulation of states from federal control is probably better interpreted as enabling local majorities to exercise voice at a different level of government. On the other hand, Gerken does not consider the relevance of exit of a more obvious kind: voting with your feet by moving from one jurisdiction to another.

This omission is unfortunate, because consideration of foot voting could strengthen Gerken's case significantly. Throughout American history, foot voting through migration has enabled a variety of persecuted minority groups to seek out more hospitable jurisdictions. The best-known and most important example is the case of African American migration away from the Jim Crow-era South during the early twentieth century. Between 1880 and 1920, some one million African Americans left the South for northern and western states, a number amounting to some ten percent of the black population of the United States in 1920. As a result, they greatly improved their situation, even though their new homes were far from free of racism.

In more recent years, groups such as Hispanics and gays and lesbians have also improved their situations by foot voting migration. The same goes for millions of people who moved in search of superior job opportunities, better public services, or lower taxes.

As a tool for dissenting by deciding, foot voting has some important advantages over ballot box voting. First, it is easier for individuals or a small group to use. In order to wield decisive influence at the ballot box, a group must be a majority, or at least large enough to exercise significant electoral clout. By contrast, small groups and even individuals can readily make decisive choices by voting with their feet.

Second, foot voters have stronger incentives than ballot box voters to acquire relevant information and use it rationally. Because of the very low probability of any individual vote having a decisive impact on electoral outcomes, ballot box voters tend to be

37. Somin, Political Ignorance, supra note 4, at 202–03.
38. For the classic account of foot voting, see Charles Tiebout, A Pure Theory of Local Expenditures, 64 J. POL. ECON. 416 (1956).
41. For a discussion of this case and its relevance to foot voting and federalism, see id. at 215–21.
42. DANIEL JOHNSON & REX M. CAMPBELL, BLACK MIGRATION IN AMERICA: A SOCIAL DEMOGRAPHIC ANALYSIS 74–75, 77 (1981); Somin, Political Ignorance, supra note 4, at 215–16.
43. Somin, Political Ignorance, supra note 4, at 218.
44. See ILYA SOMIN, DEMOCRACY AND POLITICAL IGNORANCE (Stanford Univ. Press, forthcoming, ch. 5 (on file with author)) (surveying some of the relevant evidence).
45. For a more detailed discussion of these advantages, see Somin, Foot Voting, Federalism, supra note 5. The following discussion is in large part based on the more detailed analysis in that article.
46. See id.; SOMIN, supra note 44 (manuscript (ch. 5)).
“rationally ignorant.” If one’s only reason to acquire political knowledge is to be a “better” voter, that turns out to not be much of an incentive at all. As a result, most people tend to have very limited knowledge of politics, often being ignorant of even basic facts, such as which party controls which branch of government, or which policies have been adopted by incumbents. In addition, those voters who do choose to learn substantial amounts of political knowledge often do so for reasons other than truth-seeking; they act as “political fans,” who enjoy “cheering on their preferred” party or ideology. And like sports fans, they tend to overvalue any evidence that reflects well on their favorite team, while downplaying or rejecting any evidence that cuts the other way. Economist Bryan Caplan calls this “rational irrationality.” When the goal of acquiring knowledge is not to seek out the truth, but to enjoy being a “political fan” or pursuing some other objective inimical to truth-seeking, it is actually rational behavior to do a poor job of evaluating the information you learn. Unbiased, logical evaluation of information requires time and effort, and may interfere with one’s enjoyment of the “political fan” experience. As Caplan puts it, rationally ignorant voters limit not only the amount of information they acquire but “how rationally they process the information they do have.”

By contrast, foot voters have much stronger incentives to both acquire information and evaluate it rationally. When we decide what jurisdiction to live in, we know that the choices we make have a “high probability” of being decisive. That greatly increases foot voters’ motivation to acquire information and to try to evaluate it in an unbiased way. Foot voters still sometimes act irrationally and still fall short of being perfectly informed, but they generally do much better on both counts than ballot box voters.

Foot voting is therefore often a more effective mechanism for “dissenting by deciding” than the ballot box voting emphasized by Gerken. Her theory would become stronger by incorporating it.

There is also a synergy between foot voting and Gerken’s “federalism all the way down.” One of the main obstacles to effective foot voting is the problem of moving costs. Moving from one jurisdiction to another is costly, not just in terms of having to

47. The concept of rational ignorance was first introduced in ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 239–43 (1957). For my recent defense of the idea, see SOMIN, supra note 44 (manuscript).
48. SOMIN, supra note 44 (manuscript (Chapter 3: “The Rationality of Political Ignorance”)).
49. For extensive surveys of the evidence, see, for example, SCOTT ALTHAUS, COLLECTIVE PREFERENCES IN DEMOCRATIC POLITICS (2003); MICHAEL X. DELLI CARPINI & SCOTT KEETER, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS (1996); RICHARD SHENKMAN, JUST HOW STUPID ARE WE? FACING THE TRUTH ABOUT THE AMERICAN VOTER (2008); SOMIN, supra note 44 (manuscript at 1–18 (Chapter 1: “Introduction: Political Ignorance and the Exercise of Power Over Others”)).
50. SOMIN, supra note 44 (manuscript at 21 (Chapter 3)).
51. See id.
53. SOMIN, supra note 44 (Chapter 3: “The Rationality of Political Ignorance”)).
54. Id.
55. Caplan, Rational Ignorance, supra note 52, at 5 (emphasis added).
56. I discuss these points much more fully in Somin, Political Ignorance, supra note 4, at 210–12; and SOMIN, supra note 44 (Introduction).
57. For a more detailed discussion of the problem of moving costs and the reasons why it does not completely negate the case for foot voting see Somin, Foot Voting, Federalism, supra note 5 (manuscript at 16).
pay for transportation, but because it often entails changing jobs or losing contact with friends, relatives, and business associates. Devolving greater authority to lower-level jurisdictions reduces this problem. The costs of moving from one local jurisdiction to another are often much lower than those of moving from one state to another.

Devolution of power "all the way down" also increases the range of choices available to foot voters. Instead of choosing between fifty states, they can choose between thousands of smaller jurisdictions. Through foot voting, federalism all the way down can facilitate a much wider array of options for those who wish to dissent by deciding.

Moving costs can be further reduced and options further increased by taking federalism all the way down a step further than Gerken advocates in her article. As she briefly notes, "[i]n theory, we could push federalism down to private associations, even to individuals."58 Gerken herself does not expand on this insight. But the implications for foot voting are significant. Allowing individuals and private associations to decide more issues for themselves is likely to reduce moving costs and increase choices even beyond those offered by local governments.59 There is room for a much larger number of private sector organizations than governments in any given area, thereby reducing the moving costs of switching from one to another. Over fifty million Americans already live in private planned communities, such as condominium associations.60 Devolving more authority to these and other private organizations could greatly facilitate the effectiveness of foot voting.

None of the above proves either that we should strive to maximize decentralization in government or maximize the transfer of power from government to the private sector. There is a wide range of arguments for centralization and government intervention that are unrelated to foot voting, "dissenting by deciding," or "federalism all the way down." Like Gerken herself,61 I am not attempting to make a comprehensive cost-benefit evaluation of federalism or the free market. In any given situation, the case for centralization or the case for intervention might outweigh the benefits of promoting foot voting. Here, I advance only the more limited claim that foot voting can increase the advantages of federalism all the way down and dissenting by deciding emphasized by Gerken.

B. Rethinking the History of Federalism and Racism

The most influential critique of federalism in the United States damnits for its historic association with racism. Longstanding conventional wisdom holds that federalism was a disaster for minority groups, while the growth of federal power greatly benefitted them.62 As the leading political scientist William Riker put it in 1964, "[t]he main beneficiary [of federalism] throughout American history has been the Southern Whites, who

58. Gerken, Federalism All the Way Down, supra note 1, at 22 n.59.
61. See, e.g., Gerken, Federalism All the Way Down, supra note 1, at 10–11.
have been given the freedom to oppress Negroes . . . [I]f in the United States one approves of Southern white racists, then one should approve of American federalism.\(^6\) Heather Gerken contends that the received wisdom no longer holds true under modern conditions.\(^6\) But she largely accepts its analysis of the past.\(^6\)

There is much truth to the conventional wisdom on federalism and race. It is indisputable that state governments engaged in massive oppression of racial minorities, particularly in the eras of slavery and Jim Crow segregation. It is also true that federal intervention was decisive in putting an end to slavery in the 1860s and state-enforced segregation a century later.

But the overall history of federalism and racism is much more complex than the conventional wisdom suggests. If state governments often oppressed minorities, the same can be said for the federal government, which throughout much of its history promoted slavery and segregation rather than racial equality.\(^6\) During the antebellum period, the federal government was often controlled by pro-slavery interests who enacted legislation such as the Fugitive Slave Acts of 1793 and 1850.\(^6\) After federal efforts to promote equality for African Americans largely ended in the late 1870s, the federal government often promoted segregation in those areas it completely controlled, including the District of Columbia, the U.S. military, and the federal civil service.\(^6\) The federal government also played a major role in oppressing other racial and religious minorities, including driving Native Americans off their land, persecuting the Mormons, and imprisoning Japanese Americans in concentration camps during World War II.\(^6\)

During many periods in American history, African Americans and other racial minorities might well have suffered more under a unitary state than under federalism.\(^7\) A unitary policy on race at the time of the founding would likely have resulted in nationwide slavery, preventing northern states from abolishing the institution as most did in the late eighteenth and early nineteenth centuries. A unitary policy on racial segregation during the Jim Crow era might well have led to nationwide policies closer to those of the South than those that prevailed in the North, as was in fact the case in the federally controlled District of Columbia.\(^7\)

Most important of all, a unitary policy on racial issues would have denied blacks and other minorities the opportunity to vote with their feet for relatively less oppressive jurisdictions, as millions ultimately did. This would have harmed not only the migrants themselves, but even blacks who remained in the South, who were ultimately freed in part because of the political influence of blacks who moved to the North, where African

\(^6\) See, e.g., Gerken, A New Progressive Federalism, supra note 2.
\(^6\) See id. at 37 (noting that history gives progressives "good reason" to be "skeptical of federalism").
\(^6\) I discuss the federal record in more detail in Somin, Foot Voting, Federalism, supra note 5 (manuscript at 24–27).
\(^6\) Id. (manuscript at 25).
\(^6\) For a discussion of the federal role in promoting segregation during this era, see Desmond King, Separate and Unequal: African-Americans and the US Federal Government (rev. ed. 2007).
\(^6\) For a brief review of these cases, see Somin, Foot Voting, Federalism, supra note 5 (manuscript at 26).
\(^7\) For a more detailed discussion of the examples mentioned in this paragraph, including relevant citations, see id. (manuscript at 23–29).
\(^7\) See id. at 24.
Americans were allowed to vote.\textsuperscript{72} Under a unitary nationwide policy on race, it is far from clear whether northern African Americans would have been given the right to vote as early as they were.\textsuperscript{73}

In a nation where majority opinion was as racist as it was in the United States throughout much of its history, racial minorities were likely to face extensive discrimination regardless of whether the political system was unitary or federalist. But, in many cases, federalism made the situation marginally better rather than the worse.

It would be a mistake to completely reverse the conventional wisdom and claim that federalism was uniformly a "boon" to racial minorities. Its actual effect varied over time. But recognizing this variation would be an important step forward from the conventional assumption that federalism was overwhelmingly a boon for racists and a tragedy for their victims.

A more nuanced and accurate understanding of the relationship between federalism and racism in American history is valuable in itself. It is a natural extension of Heather Gerken's reevaluation of federalism's relationship to minority interests today. And if we come to understand that federalism was not always a racist devil in the past and centralization not always on the side of the angels, we might be more open to Gerken's case for federalism as a tool that enables minorities to dissent by deciding.

C. Rethinking the Need for Limits on Federal Power

Despite her emphasis on several key benefits of federalism, Gerken remains opposed to enforcement of structural limits on the scope of federal power. She "insist[s] on the center's ability to play the national supremacy card."\textsuperscript{74} But, as she herself recognizes, there is a serious tension between this position and her defense of federalism as a tool that enables minorities to dissent by deciding. As she puts it, "[o]ne might object that the power to decide is meaningless for dissenters as long as the centralized authority can overrule it."\textsuperscript{75}

It would seem that if Gerken is committed to the idea that dissenting by deciding is an important advantage of federalism, she should support at least some significant limits on federal power, including judicial enforcement thereof. At the very least, she should consider endorsing relatively modest constraints on federal authority like those enforced by the Supreme Court in decisions such as \textit{United States v. Morrison},\textsuperscript{76} \textit{United States v. Lopez},\textsuperscript{77} and, most recently, \textit{NFIB v. Sebelius}.\textsuperscript{78} Even if expanded significantly, these decisions would pose little, if any, threat to Congress' authority to ban racial, ethnic, and religious discrimination. They do, however, give local and state governments a sphere of

\textsuperscript{72} Id. (manuscript at 26–27).
\textsuperscript{73} For more detailed discussion of the points developed in this paragraph, see \textit{id.} at 24–30.
\textsuperscript{74} Gerken, \textit{Federalism All the Way Down}, \textit{supra} note 1, at 10.
\textsuperscript{75} Gerken, \textit{Dissenting by Deciding}, \textit{supra} note 3, at 1763.
\textsuperscript{76} United States v. Morrison, 529 U.S. 598 (2000).
\textsuperscript{78} Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012). Although the Court narrowly upheld Obama's health care plan's individual health insurance mandate in this case, it did emphasize that the law was outside the scope of Congress's powers under the Commerce and Necessary and Proper Clauses. It also struck down a provision of the act requiring states to greatly expand their Medicaid programs or give up all federal subsidization of their Medicaid programs. \textit{See id.} at 2587–608.
autonomy within which minorities could dissent by deciding without fear of being over-riden by the federal government.

Gerken’s response to this potential critique is that state and local governments that dissent by deciding have some ability to protect their decision even if the central government retains its trump card. By pursuing their own policy preferences, they can begin a political dialogue that might ultimately influence opinion elsewhere, including perhaps at the federal level.79

It is certainly true that the “demonstration effect” created by local experiments may sometimes sway opinion. As noted above, this seems to have happened in the case of gay marriage.80 But this answer undercuts one of the main advantages of dissenting by deciding over conventional political dissent in Gerken’s theory. As she puts it, federalism “gives racial minorities the chance to shed the role of influencer or gadfly and stand in the shoes of the majority” by making policy in their own jurisdictions.81 But so long as the national majority retains the power to override the minorities’ decisions at will, the latter are again relegated to the role of “influencer or gadfly.”82 They can retain their autonomy only so long as they can persuade the national majority to let them have their way. To be sure, as Gerken notes, they now benefit from the force of inertia and endowment effects, which may make it harder for the central government to override their decisions.83 But that force is unlikely to prevent the national majority from overriding a state or local decision that the former believes is seriously antithetical to its values or policy objectives. In this way, minorities can dissent by deciding only so long as they do not deviate too greatly from the preferences of the national majority.

Moreover, it is not clear that state and local governments will actually use their overridable authority to try to persuade the national majority to let them have their own distinct policies. In many cases, state governments have strong incentives to go along with adverse federal decisions, especially if doing so results in higher federal subsidies.84

This point does not definitively prove that judicial enforcement of limits on federal power is desirable. Many other considerations would have to be weighed before reaching such a conclusion.85 And even if the basic idea of judicial enforcement is accepted, there is still the difficult question of determining how tight enforcement should be.

Here, I do not attempt to resolve these broader questions. Rather, my point is the more limited one that enforcement of limits on federal power may be a better fit for Gerken’s theories than her own embrace of a federal trump card. Dissenting by deciding is more likely to be viable if the dissenters actually have the power to make decisions that are final.

80. See discussion supra §I.B.
81. Gerken, A New Progressive Federalism, supra note 2, at 42.
82. Gerken, Federalism All the Way Down, supra note 1, at 56.
83. Gerken, Dissenting by Deciding, supra note 3, at 1763–64.
85. For a broader defense of such enforcement, see id. at 90.
CONCLUSION

Heather Gerken's theories of federalism all the way down and dissenting by deciding are valuable contributions to the debate over federalism and democracy. Scholars of differing ideological persuasions can build on them, as I have tried to do in some of my own work, despite fundamental political disagreements between us.86 Gerken's ideas might be even more compelling if combined with a greater emphasis on foot voting, a reconsideration of the conventional wisdom on the history of federalism and race, and an appreciation for the synergy between dissenting by deciding and enforcement of constitutional limits on federal power.

Gerken’s theories also raise some questions that federalism scholars and students of democratic theory should try to pursue in the future. Her emphasis on the benefits of dissenting by deciding in the United States can be usefully integrated with an analysis of the experience of federal systems elsewhere, where something like this idea has long been the main rationale for establishing federalism in multiethnic societies. Similarly, her idea of federalism all the way down can be extended to include private organizations as well as governmental ones.87

Other scholars with backgrounds and research interests different from mine will no doubt have their own potential extensions of Gerken’s theories.88 Since Gerken’s major articles are all only a few years old, we cannot yet fully assess their ultimate impact. What we can say is that she has already done much to enhance understanding of what the Supreme Court calls “Our Federalism.”89

86. See, e.g., Somin, Foot Voting, Federalism, supra note 5 (manuscript at 2).
87. See id. (manuscript at 29).
88. For example, in his contribution to this symposium, my colleague David Schleicher argues that Gerken's theories can be used as a guide for improving the design of electoral districts. See Schleicher, From Here All-the-Way-Down, Or How To Write a Festschrift Piece, 48 TULSA L. REV. 401, 403 (2013).
89. See, e.g., Younger v. Harris, 401 U.S. 37, 44 (1971) (noting widespread use of this phrase).