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FEDERALISM, DEMOCRACY, AND THE CHALLENGE OF FERGUSON

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This Essay is about Ferguson, and more specifically about how the events that have occurred there and throughout our region over the past several months relate to Professor Gerken’s claims about federalism and democracy in the United States. Of course, I am acutely aware that events are still unfolding, and that the impact of events that have already occurred is still reverberating. And yet I want to discuss Ferguson here, however tentatively, for two reasons. First, I hope that thinking about federalism through the lens of Ferguson will take Professor Gerken’s arguments from the realm of the abstract and the theoretical to the immediate and concrete. Second, I think that the example of Ferguson provides some substantial support for some of the claims made by Professor Gerken, but it also raises some significant challenges.

Before we get to that support and those challenges, let me begin with some necessary background. On August 9, 2014, an interaction between 18-year-old Michael Brown and Officer Darren Wilson of the Ferguson Police Department resulted in Brown’s death.1 The circumstances surrounding Brown’s death—particularly the fact that he was unarmed and that his body remained in the street for an extended period of time—triggered an immediate response from the community.2 Over the next several days, protests and looting escalated in

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2. Tim Barker, Cleanup Begins for Businesses Hit by Looters, St. LOUIS POST-DISPATCH, Aug. 12, 2014, at A1; David Hunn & Kim Bell, Why Was Michael Brown’s Body Left There for Hours?, St. LOUIS POST-DISPATCH (Sept. 14, 2014), http://www.stltoday.com/news/local/crime-
Ferguson, and the St. Louis County Police Department coordinated a response that included riot gear, tear gas, and military-grade police equipment. Eventually, on August 14, 2014, Missouri Governor Jay Nixon placed the Missouri Highway Patrol in charge of security in Ferguson, and two days later, he declared a state of emergency and a curfew that remained in place until peace was restored. On August 20, 2014, St. Louis County Prosecutor Robert McCullough convened a grand jury to consider charges against Officer Wilson. Roughly three months later, Prosecutor McCullough announced that the grand jury had returned a decision not to indict Officer Wilson, setting off additional protests and another night of violence and destruction.


In many respects, these events were intensely local. An interaction between a police officer and a citizen is typically featured in the federalism literature as an example of traditional state power. In the old-fashioned rhetoric of dual federalism, police activity falls squarely on the state side of the ledger. And yet Ferguson developed into a national issue, and the cast of characters involved has included many federal actors. To some extent, the federal involvement has been a reflection of the federal government’s role in monitoring state activity to ensure compliance with constitutional rights and with federal nondiscrimination and civil rights laws. For example, federal judges were asked to assess speech and assembly claims of individuals involved in protesting and to evaluate the practices of police officials in controlling crowd behavior.

Many observers also expected additional federal

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9. The American Civil Liberties Union, on behalf of plaintiff Mustafa Abdullah and others, filed a suit against St. Louis County and the Missouri State Highway Patrol in the United States District Court for the Eastern District of Missouri on August 18, 2014. Abdullah v. County of St. Louis, Missouri, No. 4:14-cv-1436, 2014 WL 4979314, at *1, *3 (E.D. Mo. Oct. 6, 2014). The suit targeted practices by police forces in Ferguson that required protesters to keep moving even while engaged in peaceful and legal activity. Id. at *1. On October 6, 2014, Judge Catherine Perry issued a preliminary injunction barring such practices on the grounds that they constituted an unconstitutional infringement of rights to free speech and assembly. Id. at *10. For news coverage of the suit, see Wesley Lowery, Judge Tosses ‘5-Second Rule’ in Policing of Ferguson Protests, WASH. POST, Oct. 7, 2014, at A3; and Ben Kesling, Judge Suspends Rule Used to Police Protests, WALL ST. J., Oct. 7, 2014, at A5.


Ferguson has also highlighted ways in which the federal government routinely interacts with the states in the name of pursuing law enforcement goals. One of the ancillary issues emerging from Ferguson concerned the nature of the police response to initial protests after the Michael Brown shooting. St. Louis County Police patrolled the streets of Ferguson using military-grade equipment, and images of heavily armed police officers confronting protesters with weapons drawn were widely circulated and almost as widely criticized. Many wondered why police even owned much of the equipment on display in Ferguson and were surprised to learn that the equipment was actually supplied by the federal government. Under the Department of Defense’s Excess Property Program, or 1033 Program, military-grade equipment that is no longer needed for military purposes may be transferred to state and local police departments to further federal law enforcement goals such as the war on drugs or anti-terrorism. The Department of Homeland Security and the Department of Justice also have significant grant programs that supply funding for equipment and training to local law enforcement agencies. After the initial protests in Ferguson, these

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17. The Department of Homeland Security provides grants primarily through the Federal Emergency Management Agency’s Homeland Security Grant Program. In fiscal year 2014, this program awarded more than $1 billion in grant funds to law enforcement agencies in all fifty states either “to build capabilities to prevent, protect against, mitigate, respond to, and recover from terrorist attacks, disasters, and other incidents” or “to enhance cooperation and coordination
programs came under intense scrutiny. The President ordered a review, the Senate held hearings, and in a rare display of bipartisanship, members of Congress ranging from Claire McCaskill to Tom Coburn to Rand Paul were vocal in their criticism of these federal-state partnerships.

Taken together, all of this supports Professor Gerken’s point that as a descriptive matter, we live in a hopelessly blended world. Dual federalism is indeed dead, and even our “traditional areas of state concern” are increasingly characterized by a complex set of relationships between federal and state among local, tribal, territorial, state and federal law enforcement agencies to secure the United States’ borders.” EXEC. OFFICE OF THE PRESIDENT, REVIEW: FEDERAL SUPPORT FOR LOCAL LAW ENFORCEMENT EQUIPMENT ACQUISITION 14 (2014), available at http://www.whitehouse.gov/sites/default/files/docs/federal_support_for_local_law_enforcement_equipment_acquisition.pdf. The Department of Justice provides grants primarily through the Edward Byrne Memorial Justice Assistance Grant Program. Id. at 10. In fiscal year 2014, this program was allocated $290 million for grants to law enforcement agencies “to support a range of program areas, including law enforcement operations.” Id. For a thorough description of federal grant programs associated with law enforcement, see id. at 7–19.


entities, to the point where it no longer seems useful to argue about how we might protect states by vigorously defending their sovereign domains.\(^{21}\)

Professor Gerken also argues that the non-viability—or at least the extreme incompleteness—of a sovereignty account of federalism carries with it the implication that we need to think “beyond the states.”\(^{22}\) States may be our only non-federal actors who have any claim on sovereignty, but they are not the only non-federal actors who interact with, enforce, or resist federal actors and federal policies. As a result, it is useful to think about “federalism-all-the-way-down.”\(^{23}\)

Ferguson reinforces the appeal of this way of thinking. Consider again the cast of characters who have had roles to play in Ferguson. They include not just the federal government (through the President, members of Congress, and the Department of Justice) and the state of Missouri (through the Governor and the Missouri State Highway Patrol), but also a variety of local actors—from the municipality itself, including the Mayor, the City Council, and the Police Department, to broader county entities such as the St. Louis County Police Department, the St. Louis County Prosecutor, and the members of the grand jury.

The involvement of these various actors at different levels of our governmental structure has predictably led to questions that might be framed as questions either about federalism or its close relative—localism. Should the municipality or the state have conducted a review of Ferguson’s police practices, or was it appropriate for the Department of Justice to step in?\(^{24}\)

21. Heather K. Gerken, Federalism and Nationalism: Time for a Détente?, 59 ST. LOUIS U. L.J. 997, 1012 (2015). In part, this is because, as a descriptive matter, the scope of federal power has expanded to the point that “[t]he federal government can step in, one way or another, when the need arises.” Id. at 1006. As a result, “Federalism today is something that mostly comes—and goes—at Congress’s pleasure.” Abbe R. Gluck, Our [National] Federalism, 123 YALE L.J. 1996, 1998 (2014).

22. See Heather K. Gerken, Foreword: Federalism All the Way Down, 124 HARV. L. REV. 4 (2010) [hereinafter Gerken, Federalism All the Way Down] (arguing for “a more convincing nationalist account of ‘Our Federalism’” by “shed[ding] the assumption that minority rule must be accompanied by sovereignty” and “orienting federalism around ‘federalism-all-the-way-down’”); see also Heather K. Gerken, Federalism as the New Nationalism, 123 YALE L.J. 1889, 1910 (2014) [hereinafter Gerken, New Nationalism] (explaining how pushing federalism “all the way down” extends federalism “beyond the states”).

23. Gerken, Federalism All the Way Down, supra note 22, at 8.

24. Compare Armando, Ferguson and the Department of Justice, DAILY KOS (Sept. 1, 2014), http://www.dailykos.com/story/2014/09/01/1325614/-Ferguson-and-the-Department-of-Justice ("Justice has been much too slow and timid in investigating the practices of local law enforcement regarding the Ferguson demonstrations."); with Paul Callan, Justice Department Jeopardizes Ferguson Case, CNN.COM (Sept. 9, 2014), http://www.cnn.com/2014/09/09/opinion/callan-justice-department-jeopardizes-ferguson-case/ (“The Department of Justice is likely to be impeding justice by proceeding prematurely with a federal investigation while local law enforcement authorities struggle with the facts of the complex and controversial case.”).
Should Prosecutor McCullough have been permitted to run the grand jury to determine whether to bring an indictment, or should the governor have appointed a special prosecutor?25 Should the St. Louis County Police Department have been left to control the scene in Ferguson in the immediate aftermath of Brown’s death, or was it appropriate for the State Highway Patrol to have been called in?26 Was it appropriate for the Governor to mobilize the National Guard in anticipation of the grand jury announcement, and were those resources used in a way that successfully complemented the local police forces?27

These are questions about the relationship between levels of government and the proper way of ensuring that state and national policies are being fulfilled. And while they are often invoked as “pure” questions of institutional design or constitutional command, it is difficult to assess the circumstances without wondering whether the institutional argument is being deployed to advance a political purpose. This point bolsters Jessica Bulman-Pozen’s descriptive account of partisan federalism, which emphasizes the various ways that federalism can facilitate national partisan debate.28 It also undermines accounts for preserving zones of state autonomy that are based on some conception about interests that are unique to an individual state. Those who argued against involvement by the Department of Justice do not appear to be


doing so in the service of a special Missouri interest at stake that warrants protection. Rather, they are asserting a national interest—an interest in aggressively fighting crime—that conflicts with another national interest—an interest in equal protection and in protecting civil rights. Federalism just provides the canvas for that partisan warfare to take place.

Now, let me to turn to what is perhaps the core argument put forward by Professor Gerken in her attempt to establish a détente. Contrary to what is often explicitly stated or assumed by proponents of nationalism, Professor Gerken presses the descriptive point that the devolution of power away from the federal government (or, the “center”) does not always equate to a diminution of federal power or an erosion of federal interests. Instead, “devolution can further nationalist aims.” Federalism can be a means to nationalist ends—thus, the nationalist school of federalism.

The justifications for this claim are numerous and are recounted eloquently in Professor Gerken’s Article. For present purposes, I want to emphasize one: the “discursive benefits of structure.” The core idea is that decentralized locations of power can provide additional points of contact at which citizens can engage with the government, and that those multiple points of contact can, in Cristina Rodriguez’s phrase, “simultaneously shape political consensus and channel ideological diversity.”

Some of what we have seen in response to the events of Ferguson may be viewed through this lens. State and local structures have certainly served as sites of contestation and pluralist competition, and they have arguably facilitated interactions and conversation that may not have occurred through federal channels alone. That said, there is a dimension to the Ferguson experience that is deeply at odds with the descriptive account. As part of the “discursive benefits of structure,” Professor Gerken posits that federalism can benefit racial minorities and dissenters by providing them with localized opportunities to “turn the tables” and wield the power of the majority.

29. Perhaps it would be more accurate to say that the two interests are perceived to conflict. For an argument that in fact they do not conflict, see Tracey L. Meares, The Good Cop: Knowing the Difference Between Lawful or Effective Policing and Rightful Policing—and Why It Matters, 54 WM. & MARY L. REV. 1865 (2013).


32. Gerken, supra note 21, at 1001.

33. Id. at 1001–07.

34. Id. at 1002; Gerken, New Nationalism, supra note 22, at 1894–97.


an account that runs counter to the traditional narrative of the nationalists that casts federalism as a threat to minority rights. It is an account that preferences insider status and the ability to exercise real power (even if subject to override) over tokenism that allows minorities to always be present but never to rule. And it is an account that sets up structure as a companion to rights in the quest to further the federal project of protecting and empowering minorities.

One might expect that St. Louis County would be Exhibit A for this vision of decentralization as empowerment. St. Louis County is characterized by a highly fractured set of governance sites. And unlike in the federal context, where redistricting can distort the effects of shifts in residential patterns, the electoral boundaries for municipalities are (relatively) fixed. Thus, if residential patterns shift, electoral power should shift with it. The structure of St. Louis County government therefore seems well-suited to produce plentiful opportunities for minorities to be cast in the role of insider, to protect themselves through politics rather than through courts, and to build loyalty and promote civic identity.

And yet the experience in Ferguson does not bear that out. At the time of the Michael Brown shooting, roughly two-thirds of Ferguson’s residents were African American. But the mayor of Ferguson was white, five of six City Council members were white, the police force was overwhelmingly white, and six of seven members of the school board (which also includes parts of nearby Florissant) were white.

37. See, e.g., William H. Riker, Federalism: Origin, Operation, Significance 155 (1964) (“If one disapproves of racism, one should disapprove of federalism.”); see also Jesse H. Choper, The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review, 86 Yale L.J. 1552, 1618 (1977) (discussing the negative effects upon minority participation and power of federalism on a local scale).

38. Gerken, Federalism All the Way Down, supra note 22, at 44–48.

39. Gerken, supra note 21, at 1006 (“[F]ederalism and rights have served as ‘interlocking gears,’ moving our grand democratic project forward.”); Gerken, Federalism All the Way Down, supra note 22, at 61.

40. Radley Balko, How Municipalities in St. Louis County, Mo., Profit From Poverty, Wash. Post (Sept. 3, 2014), http://www.washingtonpost.com/news/the-watch/wp/2014/09/03/how-st-louis-county-missouri-profits-from-poverty/ (“There are 90 municipalities in St. Louis County, and more in the surrounding counties. All but a few have their own police force, mayor, city manager and town council, and 81 have their own municipal court.”)


42. See Ian Millhiser, This Is the Most Important Reform Ferguson Can Enact to Give Its Black Residents a Voice, Think Progress (Aug. 18, 2014), http://thinkprogress.org/justice/2014/08/18/3472278/this-is-the-most-important-reform-ferguson-can-enact-to-prevent-another-standoff/ (describing the racial composition of the municipal government in Ferguson); Tanzina Vega & John Eligon, Deep Tensions Rise to Surface After Shooting, N.Y. Times, Aug. 17, 2014, at A1
Much of the concern recently expressed by residents of Ferguson relates to their feeling that their government—their municipal government—is not responsive to their needs or respectful of their rights. And the actions taken in response to the events there have largely been the actions of outsiders. Rather than being in the position of a minority who feels oppressed by the tyranny of the majority, what has been expressed by residents of Ferguson are the frustrations of a majority who feels oppressed by the tyranny of the minority.

Why has this occurred? Part of the story may be the relatively rapid changes in demographics in the area. In 1990, Ferguson was seventy-four percent white; in 2000, it was fifty-two percent black; and in 2010, that new black majority had risen to sixty-seven percent. Because elections are occasional events, it may take time for electoral outcomes to catch up to the reality on the ground. More importantly, however, this is a story of turnout. Like many municipalities across the country, Ferguson holds municipal elections in odd-numbered years, and it holds them in April rather than November. One result of this scheduling is to substantially reduce voter turnout. Consider: in the 2012 general election, voter turnout in Ferguson was somewhere around fifty-four percent, but in the 2013 municipalities election a few months later, turnout was a relatively paltry 11.7%. This alone might be cause for some concern. Even more concerning is the fact that this reduction is far from uniform. Although Missouri does not track the race of voters, fairly sophisticated modeling suggests that the turnout among black and white voters was almost identical in the general election—fifty-five percent for whites and fifty-five percent for blacks.
fifty-four percent for blacks. In the municipal election, on the other hand, turnout was both much lower and dramatically skewed—seventeen percent for whites and only six percent for blacks. This three-to-one difference in turnout is enough to overcome the two-to-one difference in overall population, meaning that whites constituted the majority of voters in the municipal elections. There are a number of potential explanations for this discrepancy in turnout. First, the rapid shift in demographics in Ferguson is reflected in the average age of the white and black population. The white population is older, and older citizens tend to vote more regularly. Patricia Bynes, the Democratic committeewoman for Ferguson, and others have also pointed to the transience of the minority population in Ferguson as an explanation for why blacks may be less inclined to participate in local elections. This explanation is roughly consonant with William Fischel’s “homevoter hypothesis,” which posits that homeowners are more likely to vote than renters in local elections because they are more invested in the community. If homeownership is not evenly distributed across races—and it is not in Ferguson or many other places—

48. Schaffner et al., supra note 45.
49. Id.
50. Id.
51. Millhiser, supra note 42 (“Ferguson’s white population tends to be older than its black population, and older voters tend to turnout at higher rates than younger voters.”); see Paul Taylor & Mark H. Lopez, Six Take-aways From the Census Bureau’s Voting Report, PEW RES. CENTER (May 8, 2013), http://www.pewresearch.org/fact-tank/2013/05/08/six-take-aways-from-the-census-bureaus-voting-report/ (showing higher voting rates by older voters).
52. Vega & Eligon, supra note 42, at A22.
54. According to information from the 2012 American Community Survey, the homeownership rate in Ferguson is forty-six percent for blacks and eighty-five percent for whites. Randal O’Toole, What Ferguson Means for Urban Planning, REAL CLEAR POL’Y (Aug. 21, 2014), http://www.realclearpolicy.com/blog/2014/08/21/whatferguson_means_for_urbanplanning_1050.html. This disparity is replicated nationally. For example, the most recent data available shows an overall homeownership rate of 72.6% for non-Hispanic whites, 45.6% for Hispanics, and 42.9% for blacks. U.S. CENSUS BUREAU, RESIDENTIAL VACANCIES AND HOMEOWNERSHIP IN THE THIRD QUARTER 2014 tbl.7 (2014), available at http://www.census.gov/housing/hvs/files/currenthvspress.pdf. For a chart of this rate over time, see U.S. CENSUS BUREAU, QUARTERLY HOMEOWNERSHIP RATES BY RACE AND ETHNICITY OF HOUSEHOLDER FOR THE UNITED STATES: 1994–2013, available at https://www.census.gov/housing/hvs/data/charts/fig08.pdf.
then this hypothesis has implications for the demographics of who actually votes in local elections relative to the voting population.\textsuperscript{55}

Ultimately, this mismatch between demographics and electoral outcomes poses a challenge to the “discursive benefits of structure.” Indeed, one prominent defender of localism has worried openly that Ferguson suggests the “problem of promoting the power of racial minorities through local autonomy . . . seems to face some intractable obstacles.”\textsuperscript{56} More worrying still is that these obstacles are not unique to Ferguson, but are instead created by voting behavior and our democratic process.\textsuperscript{57}

The response to these obstacles may simply be to say that they have little to do with a theory of federalism. After all, politics will always be imperfect, and yet we still have to come up with a workable system. By calling attention to them, perhaps I am just casting myself in the role of Mary Hume by claiming “almost perfect . . . but not quite.”\textsuperscript{58} But many of these problems are unique to local elections, or are at least exacerbated by local elections. As a result, I worry that they pose a particular challenge to the claim that we may use decentralization as a mechanism to produce structural benefits for minorities. Professor Gerken’s argument ultimately is that we need federalism to secure “a well-functioning democracy.”\textsuperscript{59} But the experience of Ferguson suggests that it may be equally true that we need democracy to secure a well-functioning federalism.

\textsuperscript{55} Indeed, the problem may be even worse if discrepancies exist between the voting population and the overall population. If voter registration is not equally distributed across races, then the reported discrepancies in turnout may actually under-describe the extent to which votes cast in a municipal election do not represent the underlying general municipal population.

\textsuperscript{56} Hills, supra note 53.

\textsuperscript{57} Occasionally, these obstacles may also reflect practices that are susceptible to legal challenge. For example, the American Civil Liberties Union (ACLU) filed a lawsuit on December 18, 2014 in the United States District Court for the Eastern District of Missouri that raises a Voting Rights Act challenge to the way that school board elections are structured in the Ferguson-Florissant School District. Complaint at 5, Missouri NAACP v. Ferguson-Florissant Sch. Dist., No. 4:14-cv-02077 (E.D. Mo. Dec. 18, 2014), available at https://www.aclu.org/sites/default/files/assets/001_-_complaint.pdf. But perhaps the most noteworthy aspect of the ACLU suit is its limited scope. The municipal elections for mayor and city council were not targeted, presumably because they are not legally suspect, even though they produce questionable electoral outcomes.

\textsuperscript{58} Gerken, The Loyal Opposition, supra note 36, at 1976 (quoting SHEL SILVERSTEIN, Almost Perfect, in A Light in the Attic (1981)).

\textsuperscript{59} Gerken, supra note 21, at 1000.