

# Foreword: Federalism Bound

---

Joel Rogers\*

The essays gathered in this symposium of the *Harvard Law & Policy Review* consider state policy treatment of four issues of national, and even international, importance: global warming, elementary and secondary schooling, gun violence, and mass criminalization. The intrusive background to all of them is America's oldest and endless argument with itself: federalism. What is striking from these articles is how much the terms of that argument have changed over the past generation—not just what is in dispute, but the politics that surround it, who the leading parties to that argument are, and how they organize themselves.

## STATE AND LOCAL GOVERNMENT POWER

To motivate discussion, let us first “dispel the pervasive myth that the federal government runs the country.”<sup>1</sup> The federal government controls many public functions, some of them uniquely: macroeconomic policy and interstate commerce, the currency and its value, war and foreign policy. But on nearly everything else that government touches, state and local government play a far greater and more active role. Our national government is essentially a big insurance company, debtor, and gigantic military. Take away non-discretionary income transfers, debt service, and national defense, and its 2014 spending was only 0.7% of GDP, its total investment and consumption was only \$472 billion, its total non-defense civilian employment was only 1.3 million. By comparison, in that same year, state and local governments spent 10.3% of GDP, did \$1.9 trillion of investment and consumption, and employed 14.3 million people—respectively, fifteen, four, and eleven times as much as the federal government.<sup>2</sup> The difference between

---

\* Sewell-Bascom Professor of Law, Political Science, Public Affairs, and Sociology at the University of Wisconsin-Madison.

<sup>1</sup> Bruce Katz, *Toward a City-Led Federalism*, BROOKINGS INSTITUTION (Nov. 3, 2015), <http://www.brookings.edu/research/opinions/2015/11/03-toward-a-city-led-federalism-katz> [<https://perma.cc/3ND2-U2AD>].

<sup>2</sup> DEPT OF COMMERCE, BUREAU OF ECON. ANALYSIS, NATIONAL INCOME AND PRODUCTS ACCOUNTS, TABLES tbl.1.1.5 (Mar. 25, 2016), <http://bea.gov/iTable/iTable.cfm?ReqID=9&step=1#reqid=9&step=3&isuri=1&903=5> (showing a 2014 U.S. GDP of \$17.4 Trillion); OFFICE OF MGMT. & BUDGET, HISTORICAL TABLES tbl.14.5, <https://www.whitehouse.gov/omb/budget/Historicals> (last visited Apr. 11, 2016) (showing federal spending and investment numbers); DEPT OF COMMERCE, BUREAU OF ECON. ANALYSIS NATIONAL INCOME AND PRODUCT ACCOUNTS, TABLE tbl.3.9.5 (Mar. 25, 2016), <http://bea.gov/iTable/iTable.cfm?ReqID=9&step=1#reqid=9&step=3&isuri=1&903=98> (showing state and local spending numbers); OFFICE OF MGMT. & BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT FOR FISCAL YEAR 2016, tbl.16.1 (Feb. 5, 2015), <https://www.gpo.gov/fdsys/browse/collection.action?collectionCode=BUDGET&browsePath=fiscal+Year+2016&searchPath=fiscal+Year+2016&leafLevelBrowse=false&isCollapsed=false&isOpen=true&packageid=BUDGET-2016-TAB&yord=822> (showing federal non-defense civilian employment); U.S. CENSUS BUREAU, 2014

state and local government and the federal one is not just one of money and employment, but also power. State and local government has far more power than the federal government over most of the things that matter most to people in their daily lives. That includes, *inter alia*, the quality of their public schools (where state and local governments not only provide ninety percent of funding, but also control what and who is taught, by whom, and how); environment (through state and local government control of energy use, transportation, most water, and waste disposal); neighborhoods (through their control of land use, zoning, housing, parks and other public spaces, police, and emergency response); and our democracy (through their control of voting rights, campaign and election administration, and decennial redistricting). The power of the federal government is distant, and slight, compared to this.

### BAD FEDERALISM AND GOOD

Federalism comes in many modes and institutional styles. It can, with nearly infinite combinations and permutations among them, be cooperative or competitive, partisan or not, led by the federal government or states, and then by any of those governments' respective branches. But from the standpoint of the country's progress toward democracy—understood as an open-ended ideal of self-rule with equal respect, accompanied by an “affirmative state” that acts to realize that ideal—we may usefully distinguish bad federalism from good.

“Bad federalism” denotes oppressive local elites running riot, or joining with national elites, to resist or undermine civil rights, environmental protection, business standards, or the public goods and social wage other rich countries consider ingredients of a decent society. Such bad federalism has a long, ugly history in America. Indeed, it dominates federalism's presence here, which is why American Progressives have historically not been big fans of federalism. It is also one of the reasons why the American Right (both old and new) has long been a proponent of federalism. Even today, with or without explicit appeal to cherished degradations of the past, the new American Right finds selective support for competitive federalism, especially when obscured in its social effects and combined with red-meat populist appeals to get the federal government “off our backs” and “out of our lives,” an almost magical political formula. It alchemically combines and transmutes the general population's love of liberty, skepticism of government, and otherwise harmless local chauvinism to the Right's quite different project—to enfeeble and ultimately destroy the affirmative state, effectively repealing the 20th century and returning us to McKinley-era levels of business domination of public life.<sup>3</sup>

---

ANNUAL SURVEY OF PUBLIC EMPLOYMENT & PAYROLL (Mar. 29, 2016), <http://www.census.gov/govs/apes/>.

<sup>3</sup> Among proponents of competitive federalism, see generally RICHARD A. EPSTEIN & MARTIN S. GREVE, *FEDERAL PREEMPTION: STATES' POWER, NATIONAL INTERESTS* (2007). On

But there is also “good federalism.” This respects community and welcomes skepticism of big government, but appeals to our natural impulses to improve both. Following Brandeis’ famous dissent in *New State Ice Co. v. Liebman*, it values states as “laboratories of democracy.”<sup>4</sup> Applied literally to state and local politics, the metaphor is almost laughably misleading.<sup>5</sup> But since almost no progressive change in American national policy has ever occurred without prior anticipation in at least one state, and since states and especially local governments are always innovating and experimenting in policy and practice, it retains its force. So too does the appeal of “progressive federalism,” or a reform program aimed both at more deliberately encouraging such experiments and using their results to further national democratic progress. For example, by adopting a “floors-not-ceilings” approach to federal preemption which would remove limits on state innovation if that innovation was consistent with declared national aims; enabling more such innovation while building state capacity through tax harmonization and fiscal federalism; or through varied efforts to improve the measurement and quality of subnational experiments and spread their findings.<sup>6</sup>

In the essays that follow, you will see much of this good federalism—practical and rational local patriots, experimenting and sweating out the details of useful improvements for their communities, sharing what they’ve learned with other states and the federal government. But you will see at least as much of the bad federalism—not just skepticism toward national government, but blind irrational rage, and a fair amount of determinedly reactionary action encouraged by elite business interests—destroying the communities it claims to protect.

In truth, of course, very little of this “good” or “bad” belongs to the idea of federalism, per se, but rather to politics. When it is all said and done, federalism is more scaffolding than structure, a way to organize political

---

the characterization of the interests of the new American Right, see generally FERGUSON AND ROGERS, *RIGHT TURN: THE DECLINE OF THE DEMOCRATS AND THE FUTURE OF AMERICAN POLITICS* (1986); William Greider, *Rolling Back the 20th Century*, *NATION* (Apr. 24, 2003), <http://www.thenation.com/article/rolling-back-20th-century/> [<https://perma.cc/L96F-A7RC>].

<sup>4</sup> “It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

<sup>5</sup> As John Donahue observed nearly two decades ago, states are:

Laboratories for national policy in much the same way as a rain forest, say, is a laboratory for the biological sciences. There is a lot going on. Much of it has great potential relevance for improving the state of the art. But the rain forest’s drama of predator and prey, its roiling interplay of survival strategies, are not set in motion to test hypotheses or to speed the progress of theory. A great deal of this ferment of [state] activity, moreover, goes unobserved, doing little or nothing to advance best practice.

JOHN DONAHUE, *DISUNITED STATES* 45 (1997).

<sup>6</sup> See Richard B. Freeman & Joel Rogers, *The Promise of Progressive Federalism*, in *RE-MAKING AMERICA: DEMOCRACY AND PUBLIC POLICY IN AN AGE OF INEQUALITY* 205 (Joseph Soss., Jacob S. Hacker & Suzanne Melttler eds., 2007).

conflict, not decide its content.<sup>7</sup> The central problem with American federalism today is with that content.

#### THE RIGHT TURN IN STATES

Over the past half century, and notwithstanding clear progress in curbing social sadism (racism, sexism, homophobia, etc.), American politics has moved sharply right in virtually all its mundane and material terms: taxes, social budgets, wage compensation, wealth and income distribution, and political power. Long story short: in the early 1970s, the link between worker compensation and society-wide productivity growth was shattered, never (minus a very short period in the late 1990s) to be restored. This was followed, under the rule of both political parties, by deregulating mainstay industries in the “real” economy (like telecommunication and transport); deeply regressive tax changes; less support of cities; the effective abandonment of antitrust; wide and deep financial deregulation (first usury laws, then constraints on bank consolidation across state lines, then much more); forced exposure to international competition; a shift by United States-based multinationals away from domestic labor or investment; further regressive tax changes; effective deregulation of campaign finance; absolute declines in public revenue and working family income; a generation-long replacement of public revenue and private income by debt; and a groaning smorgasbord of new rents for business.<sup>8</sup>

Our government’s bipartisan complicity in, and enabling of, most of this, along with its manifest failure to oppose or correct almost any of it, is at the root of the declining confidence and trust in government, but its engineers are adept at avoiding blame. Leadership of the anti-government party, the GOP, demonizes the affirmative state as “the problem,” its activities amounting only to “waste, fraud, and abuse.” When in control of government, it pushes the standard model of regressive taxes, public austerity, and privatization; when not in control, it fights to hold onto past gains while promoting government gridlock and dysfunction as sort of existential proof of government incompetence. Leadership of the traditionally pro-affirmative-state party, the Democrats, regularly declares its sympathy for current victims of the forces it has abetted but emphasizes its powerlessness to do much for them. It focuses on damage control, or on recycling positive ideas originally suggested by a less conservative GOP.

---

<sup>7</sup> I am agreeing here with Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1095–96 (2014).

<sup>8</sup> For the institutional and policy history, see generally Frank Levy & Peter Temin, *Inequality and Institutions in 20th Century America* (Mass. Institute of Technology Working Paper Series, MIT-IPC-07-002, May 2007), <http://www.nber.org/papers/w13106.pdf> [<https://perma.cc/D2DA-KHYJ>]. On the smorgasbord of rents, see, in particular, Dean Baker, *Working Paper: The Upward Redistribution of Income: Are Rents the Story?* (Center for Economic and Policy Research, Dec. 2015), <http://cepr.net/documents/working-paper-upward-distribution-income-rents.pdf> [<https://perma.cc/96T3-JW57>].

The right turn is reflected in today's Congress. As compared to fifty years ago, we see a measurably more conservative Democratic Party, a radically more conservative Republican one, and, largely owing to the GOP's movement, the highest level of partisan polarization since the end of Reconstruction.<sup>9</sup> With little to no partisan overlap and more internal cohesion, both parties behave more as parliamentary ones, with party-line votes on most issues of contention (and in the GOP case, certain punishment for defectors). In state politics, we see much of the same. Again, the parties are more polarized and parliamentary, with the GOP again more disciplined and welcoming of dysfunction.<sup>10</sup>

In considering the essays that follow, however, two additional points deserve emphasis: current GOP dominance of states and, partly explaining that dominance, the effective nationalization of its state program.

On dominance, the facts are easily stated. Republicans hold thirty-one governorships and 55% of legislative seats, control 70% of the ninety-eight partisan legislative chambers, 60% of partisan legislatures, and twenty-two states (legislature plus governor). For political purposes, the last number is the most important. Its Democratic equivalent is only seven states, bespeaking a better than three-to-one (22-7) Republican advantage.<sup>11</sup>

On nationalization of the GOP state program, the story (if not the facts) is also simple. Essentially, since Lewis Powell's famous 1971 memorandum imploring business to improve its political game and reassert business dominance of American public life, GOP-friendly businesses have acted on his recommendations.<sup>12</sup> Over the past five decades, they dedicated billions to building a formidable political machine, with interconnected parts in policy, communications, training of operatives, leadership development, election campaigns, mass membership and elite business mobilization, and peak organizations and donors to coordinate them all.

A special focus of this effort was on the states, and state legislators within them. States have always been particularly vulnerable to business threats, since they operate in a competitive national environment with a low social wage. But state legislators are especially vulnerable to influence, since

---

<sup>9</sup> See NOLAN McCARTY ET AL., *POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES* 17-74 (2d ed. 2016) (Figures 2.3 and 2.4 on pages 28-29 are especially illustrative).

<sup>10</sup> An example is Illinois, where Republican Governor Bruce Rauner has been willing to let the state operate for close to a year without a budget approved by the state's Democrat-controlled legislature. See, e.g., Monique Garcia & Celeste Bott, *Chicago State Meltdown? Democrats' Fault, Rauner Says*, CHI. TRIB. (Mar. 31, 2016), <http://www.chicagotribune.com/news/local/politics/ct-bruce-rauner-higher-education-met-0331-20160330-story.html> [https://perma.cc/6W6Y-9SLF].

<sup>11</sup> See NAT'L CONFERENCE OF STATE LEGISLATURES, *STATE AND LEGISLATIVE PARTISAN COMPOSITION*, [http://www.ncsl.org/Portals/1/Documents/Elections/Legis\\_Control\\_2016\\_Mar17.pdf](http://www.ncsl.org/Portals/1/Documents/Elections/Legis_Control_2016_Mar17.pdf) [https://perma.cc/4UXK-AR6D].

<sup>12</sup> See Mem. from Lewis F. Powell, Jr., to Eugene B. Sydnor, Jr., Chairman, Education Committee, U.S. Chamber of Commerce (Aug. 23, 1971), <http://law2.wlu.edu/deptimages/Powell%20Archives/PowellMemorandumPrinted.pdf> [https://perma.cc/EW5N-J2C3].

they are, in general, paid little, meet infrequently, and vastly understaffed.<sup>13</sup> The post-Powell, GOP-allied state political machine (never matched by Democrats) offered state GOP politicians vast new resources: ready-to-go model legislation with built-in promises of lobbying support from the American Legislative Exchange Council (ALEC); training from the Leadership Institute, Koch Fellows program, and other leadership development efforts; media support from the Fox, Clear Channel, Salem, Sinclair, and other new right-wing radio and TV networks; policy validation from the State Policy Network of free-market think-tanks in every state; attacks on Democratic colleagues from the Franklin Center and Media Trackers; tight coordination in campaigns with mass-based conservative groups like the National Rifle Association, Focus on the Family, and many churches; hard money support from Americans for Prosperity and American Crossroads; access to colleagues and principals at all these organizations through a steady schedule of travel-paid-for conferences; and, less tangible but very important, a sense of community and safety in being a part of something bigger than yourself.<sup>14</sup> The only price was absolute loyalty.

One obvious effect of this machine was to raise GOP state political fortunes, which rose more steadily in the states than nationally. Another was the ability, once requisite GOP majorities were reached, to move like legislation, quickly, in many states. This is how, for example, picture voter identification laws, ostensibly intended to prevent the non-existent crime of voter impersonation,<sup>15</sup> jumped from two to nineteen states in the course of a few years. It is also how “stand your ground” laws morphed the ancient common law “castle doctrine” to vigilante protection, starting in one outlier state and spreading to twenty-two states about as quickly.

---

<sup>13</sup> For those state legislatures that even pay annual salaries (ten do not), the average salary is \$37,000 and the median is \$32,000. See NAT'L CONFERENCE OF STATE LEGISLATURES, *2015 State Legislator Compensation and Living Expense Allowances During Session* (May 14, 2015), <http://www.ncsl.org/research/about-state-legislatures/2015-state-legislator-compensation.aspx> [<https://perma.cc/HDD6-U4U8>]. Very few legislatures (less than twenty percent) are even close to “full-time,” a third (thirty-four percent) are less than half-time, and close to half (forty-four percent) meet less than ninety days a year. See NAT'L CONFERENCE OF STATE LEGISLATURES, *Full- and Part-Time Legislatures* (June 1, 2014), <http://www.ncsl.org/research/about-state-legislatures/full-and-part-time-legislatures.aspx> [<https://perma.cc/W47Y-TAU2>]. Staffing is minimal, with only 34,000 staff members for 7,383 legislators (and only 11,000 staff members assigned to any specific legislator). See Angela Andrews, *Personal Staff in State Legislatures*, 19 *LegisBrief*, no.17, 2011.

<sup>14</sup> See Alexander Hertel-Fernandez & Theda Skocpol, *How the Right Trounced Liberals in the States*, *DEMOCRACY*, Winter 2016, at 46–59; Gordon Lafer, *THE LEGISLATIVE ATTACK ON AMERICAN WAGES AND LABOR STANDARDS, 2011–2012* (Oct. 31, 2013), <http://www.epi.org/files/2013/EPI-Legislative-Attack-on-American-Wages-Labor-Standards-10-31-2013.pdf> [<https://perma.cc/KH7M-Q84P>].

<sup>15</sup> The more than one billion ballots cast over the past several years generated only thirty-one even credible allegations of such voter impersonation, a rate under .0000031%. See Justin Levitt, *A Comprehensive Investigation of Voter Impersonation Finds 31 Credible Incidents Out of One Billion Ballots Cast*, *WASH. POST: WONKBLOG* (Aug. 6, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/> [<https://perma.cc/T439-468V>].

But as these examples, and many less familiar ones, may indicate, it had a third effect, which was to make the particulars of any given GOP-dominated state largely irrelevant to the party's local agenda. The laws and policies that move are the ones in the ALEC national playbook; policy issues not there generally do not. This has often led GOP-dominated states to act against their own interest, as in the recent rejection of high speed rail or Medicaid money by many cash-strapped states, or the resistance to working on energy efficiency even if their state is an energy importer.<sup>16</sup> More often, the state Republican leadership is simply indifferent to local variation, or the importance of standing up to some national business interests to protect its own local base. Actual people and their communities are largely absent from this discussion, except as a stage prop wheeled out to echo one or another political point in an argument begun and controlled by others. Along with a more general loss to democracy, this threatens federalism's single and universally acknowledged contribution to democratic governance: the ability to use state and local government, and the communities they govern, to learn about and better solve real problems. That loss is particularly disheartening now, when both the need and possibility of such learning and problem-solving has never been greater.

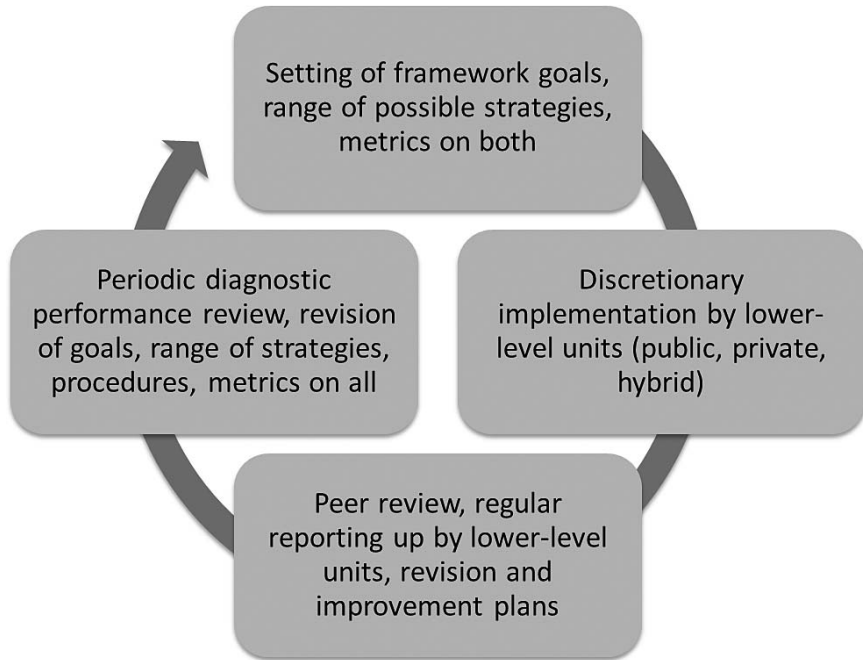
#### POSSIBILITIES LOST AND FOUND

The topics taken up in this issue make the prima facie case of the need for good federalism learning and problem-solving. Whether it be mitigating or adapting to catastrophic climate change, educating children for a radically different world than the one their parents faced at their age, making a fractured society safer from gun violence, or correcting the harm done by mass criminalization, no single and universally applicable solution to these problems exists, especially one that is imposed top-down. For all of them, instead, finding a solution will require engagement with and cooperation from diverse communities and individuals, with sometimes divergent interests, capacities, and problems. And what is true of these problems is true of many (indeed, nearly all) others, in areas ranging from health care, adult training, and housing to transportation, financial security, and public safety. They are "wicked" problems characterized by high uncertainty about just what to do, and how. Their prominence has only increased with our knowledge of the world and the shifting of many social welfare state functions toward customized, individualized, delivery of needed services.

---

<sup>16</sup> See Alison Kodjak, *States That Declined to Expand Medicaid Face Higher Costs*, NPR (Oct. 15, 2015 10:13 AM), <http://www.npr.org/sections/health-shots/2015/10/15/448729327/states-that-declined-to-expand-medicaid-face-higher-costs> [https://perma.cc/XKC8-KBCS]; Michael Cooper, *More U.S. Rail Funds for 13 States as 2 Reject Aid*, N.Y. TIMES (Dec. 9, 2010), <http://www.nytimes.com/2010/12/10/us/10rail.html> [https://perma.cc/6AUJ-SW6L]; *Energy Efficiency as an Alternative to Importing Electricity*, MIDWEST ENERGY EFFICIENCY ALLIANCE, [http://www.mwalliance.org/sites/default/files/uploads/advokit/MEEA-Advokit\\_2016\\_Net-Electricity-Imports-Factsheet\\_v2.0.pdf](http://www.mwalliance.org/sites/default/files/uploads/advokit/MEEA-Advokit_2016_Net-Electricity-Imports-Factsheet_v2.0.pdf) [https://perma.cc/LU7M-GS39].

The case for possibility is also clear. The public's interest in solving these problems is evident in polling, in growing local activism in cities around the country, in a rise in public-minded volunteerism, and in an explosion of "civic tech." So too is the capacity and openness of more state and local government to working with the public. Perhaps the best-kept secret in American politics today is that government (if not governance) is actually improving: it is better in use of data, in benchmarking off practices elsewhere, in transparency, in public engagement, and in its own management.<sup>17</sup> And, recognizing the "wickedness" of the problems it confronts, it is increasingly using some variant of what has been called "democratic experimentalist governance." This is a multilevel and highly iterative approach to problem solving and policy formulation which presumes high levels of uncertainty and diversity in interest or capacity. It is pragmatic in the Dewey spirit of systematically questioning assumptions and holding all solutions as provisional, subject to improvement by experience. It then uses familiar management DNA—benchmarking, peer review, reporting up and out, diagnostic performance review—to construct an architecture that permits learning from diversity, as illustrated by the figure below.<sup>18</sup>



<sup>17</sup> See generally ROBERT D. BEHN, *THE PERFORMANCESTAT POTENTIAL* (2014).

<sup>18</sup> Figure adopted from that in Jonathan Zeitlin, *Introduction: Theoretical Framework and Research Agenda*, in *EXTENDING EXPERIMENTALIST GOVERNANCE? 2* (Jonathan Zeitlin ed., 2015).



Democratic experimentalist governance starts with high-level public and private stakeholders developing framework goals and possible strategies for reaching them. It proceeds to discretionary implementation by diverse lower-level actors, but with their autonomy conditioned on a requirement of regular peer review, reporting up on results and suggestions, and steadily revised plans for improvement in light of experience and review. And then, periodically, and involving independent outside parties as well, it does a more global diagnostic performance review and makes recommendation for any needed revisions back to the higher ups, to begin the cycle again. This is not rocket science, but something harder—ongoing discussion and action among diverse actors at different levels of authority, disciplined by self-inspection and shared purpose. It requires dedicated leadership to carry off. But the results of its application, across a very wide range of policy areas, are quite promising.<sup>19</sup>

So, in short, there is currently demand and supply for development of a very lively, broadly “good” federalism, but it seems in considerable danger of being foreclosed, or at least retarded, by the politics of this moment.

#### THE ESSAYS IN THIS ISSUE

With this as background, and before offering a brief conclusion, let me turn to the essays in this issue.

#### *Climate Change*

*State Innovation on Climate Change: Reducing Emissions from Key Sectors While Preparing for a “New Normal”*, by Vicki Arroyo, Melissa Deas, Gabe Pacyniak, and Kathryn Zyla, provides a careful and thorough review of state progress on mitigating anthropogenic contributors to climate change and adapting to the consequences that are inevitable (even with immediately zero carbon emissions), including higher temperatures, extreme weather events, and rising sea levels.

On mitigation, Arroyo et al. concentrate on transportation and power generation. On transportation, they note varied exemplary state efforts to increase vehicle fuel economy standards, promote plug-in hybrids and zero-emission vehicles, reduce the carbon intensity of vehicle fuels, change land use and zoning patterns to reduce demand for car usage, promote “active mobility” like walking and biking, and, of course, create more accessible and attractive options for mass transit. With regard to the power generation sector, they note the widespread use of regulatory standards to create new

---

<sup>19</sup> See Charles F. Sabel & Jonathan Zeitlin, *Learning from Difference: The New Architecture of Experimentalist Governance in the EU*, 14 EUR. L.J. 271, 289 (2008); Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53, 93 (2011). See generally Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998); Daniel E. Ho, *Does Peer Review Work? An Experiment of Experimentalism*, 69 STAN. L. REV. (forthcoming 2016).

markets for energy efficiency and renewable generation. Some twenty-nine states now have some sort of Renewable Portfolio Standard (RPS), requiring that a certain share of state energy consumption come from renewable sources; twenty-three states have Energy Efficiency Resource Standards (EERS), setting mandatory targets for the share of electricity demand to be met by greater efficiency. States have also banded together to create cap and trade carbon-reduction markets in their power generation sectors, both rate-regulated and competitive. A particularly dramatic example is the cap and trade system established by the Northeast's nine-state Regional Greenhouse Gas Initiative (RGGI), recently joined by a Western regional cap and trade system, anchored by California's leadership but stretching east and north into the Canadian provinces of Quebec and soon Ontario and Manitoba.

All this state action has had real effect. Limiting ourselves to power generation: along with federal tax policies, the RPS states largely account for the fact that: renewable energy generation has more than doubled over the last decade, rising to thirteen percent of all United States power generation; in 2014 investment in new renewable generation facilities exceeded all new investment in fossil fuel- (including natural gas-) based generation; and gains in efficiency and drops in the price of solar and wind generation are vastly exceeding estimates—solar alone has dropped nearly seventy percent in cost over the past decade. The EERS states account for eighty-five percent of all US gains in energy efficiency, which remains the largest and cheapest way of meeting increased energy demand. In just a few short years, 2005–2012, RGGI states reduced carbon emissions from their power generation sector by forty percent.

The story is less upbeat on adaptation. A not-insignificant number of states, including many of those most prone to damage from rising oceans or extreme weather events, are led by essentially professional “climate deniers.” They frustrate any effort to promote climate adaptation, since their leadership denies the existence of any anthropogenic climate crisis. But even in those states with more enlightened public leadership, strained state finances, generally weak planning capacity, and the public's general cognitive dissonance about the magnitude of the problem looming before it (combined with a good deal of simple illiteracy), has generally slowed or qualified efforts to get started on adaptation in earnest. California is again leading the way. Last year it passed S.B. 379, which mandated adaption measures in all local master plans while providing abundant technical resources to do so. Many other states are encouraging some version of adaptation planning. In a report a few years ago, Georgetown Climate Center (GCC), which Arroyo heads, found in their results that most “soft” mandates for adaptation planning were disappointing. But more recently, following a consultation process with a wide variety of stakeholders that GCC and the White House Council on Environmental Quality (CEQ) facilitated, GCC reported out more than one hundred consensus recommendations for federal action to improve state

progress on adaptation.<sup>20</sup> Arroyo et al. report that many are being acted on as you read this. Bottom line: at least some states are waking up to the adaptation task ahead, and the federal government is helping them figure out just how large the task is, and offering help with best practices.

### *Education*

Betheny Gross and Paul T. Hill's article, *The State Role in K–12 Education: From Issuing Mandates to Experimentation*, departs from the very recent, bipartisan, and overwhelming passage of the ESSA (Every Student Succeeds Act), widely billed as returning control of the nation's schools to state and local government. ESSA is the latest reauthorization of the ESEA (Elementary and Secondary Education Act), the landmark 1965 law that initiated major federal involvement in K–12 schools. ESSA effectively does away with many of the requirements and expectations of its last great reauthorization, the famous and soon-thereafter infamous No Child Left Behind (NCLB), which was also passed with enthusiastic bipartisan support in 2001. ESSA repeals many of NCLB's requirements on teacher evaluation, testing, charter schools, curriculum standards, and school turnaround, and it also will eventually supersede the many waivers offered to some forty-two states to the NCLB requirements which the Obama administration had used to buy political time while moving education reform forward.

Hill and Gross argue that, while it is certainly possible that states will revert to their old ways—when they paid less attention to outcomes (i.e., learning, typically as demonstrated on standardized tests) than inputs (i.e., funding, class size, etc.)—there is a very good chance that they will not. Almost any reform creates “policy feedbacks” in the form of new constituencies, administrative routines, and even value commitments encouraged by the policy. These, in turn, have a life of their own, often surviving that reform's formal abandonment. So it may be with NCLB, which added huge incentives and resources for outcome-oriented state reforms, many of which preceded ESSA's passage.

Hill and Gross have a long list of such reforms. They include: more than occasional wholesale reordering of school leadership and administration following mayoral or state takeovers, like those seen in New Orleans after Katrina, or New York City during the Bloomberg administration, but expanded to many states; the growth of “pilot” and “charter” schools, inside and outside the public system, which are free of some conventional regulation and reporting, or more targeted in their student population and curriculum than general-purpose public schools; wholesale waiver of requirements for some targeted schools or districts, or trading of performance

---

<sup>20</sup> See generally JESSICA GRANNIS ET AL., GEORGETOWN CLIMATE CTR., PREPARING OUR COMMUNITIES FOR CLIMATE IMPACTS: RECOMMENDATION FOR FEDERAL ACTION (2014), <http://www.georgetownclimate.org/sites/www.georgetownclimate.org/files/GCC%20-%20Recommendations%20for%20Federal%20Action%20-%20September%202014.pdf> [<https://perma.cc/U5Q7-ZT78>].

requirements for administrative freedom from other reporting and collective bargaining obligations; “student-based” funding, in which supports for schools are tied more closely to needs of their student populations and which are often enhanced by consolidating categorical funding streams; voucher programs of all kinds which use public money to support private schools; changes in student assessment, permitting students to receive degree credits based on demonstrated mastery of a subject rather than course time in it; the growth of “blended” and “virtual” schools that substitute online instruction or out-of-school experiences for classroom instruction; dual enrollment programs, enabling high school students to attend college part-time, with tuition paid by their high school districts; and alternative certification programs allowing individuals without education training to serve as teachers or school administrators.

Hill and Gross are not naïve about such reform efforts. They understand that many are simply anti-union or predatory in their lust to make money off what used to be a public good. But they also believe that at least some of this experiment is good-willed and actually useful, potentially containing at least seeds of serious and positive educational reform.

What they are most concerned we still lack, as a nation, is anything like a commitment to implementing these reforms systematically, with both geographic coverage and depth. Such an effort would not require the top-down and punitively enforced demands of NCLB. But it would require something still lacking in virtually all states, that is, an infrastructure for widening accountable experimentation and learning. Hill and Gross are, for example, enthusiasts of the democratic experimentalist governance approach to service improvement, but they generally do not see the political leadership needed to implement its architecture. They fear the worst case, that states will use ESSA’s passage to return to mediocrity, or limit their education experiments to forms of union busting. They are hopeful that reform will proceed, given its many benign constituencies. But they wonder how many states will stay on that path, given unending further pressures for austerity and myopia in policymaking.

### *Gun Violence*

Allen Rostron’s *A New State Ice Age for Gun Policy* is in some sense the most disheartening entry in this volume, at least for those with an interest in public safety. As everyone reading this likely knows, the United States has long suffered from a plague of gun violence and has done very little about it. We have more guns than people in the country, with thirty to forty percent of our households holding one or more of them.<sup>21</sup> We use these guns

---

<sup>21</sup> See Christopher Ingraham, *There Are Now More Guns Than People in the United States*, WASH. POST (Oct. 5, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/10/05/guns-in-the-united-states-one-for-every-man-woman-and-child-and-then-some/> [<https://perma.cc/PDA6-RS77>]; Jack Linshi, *This Chart Shows the Hidden Problem in America’s Gun*

for sport, security, and recreation, and to regularly kill each other and ourselves. Excluding suicides, human deaths by firearms have long averaged around 11,000 annually. There is also more than one “mass shooting,” defined as injury or death of four or more people by firearms, per day.<sup>22</sup>

In global comparative terms, these figures are, to say the least, anomalous. Homicide by a gun is, for example, more than 100 times more likely in the United States than Japan, which has much lower rates of gun ownership. But it’s also greater than four times that in Switzerland, which has gun ownership about half that of the United States.<sup>23</sup> Other anomalies appear in the public reaction to well publicized mass shootings of sympathetic innocents—like those, all during Obama’s presidency, in Tucson, Arizona; Sandy Hook, Connecticut; Aurora, Colorado; Charleston, South Carolina; Roseburg, Oregon; and San Bernardino, California. In other countries in which such tragedies have occurred, they have prompted national reflection and swift action to curb gun use. Here, the reaction after such events in many states has included increased gun sales and increased advocacy for lifting restrictions on their purchase, sale, and use. Those who argue in this vein typically then point out that the shooters, in almost all these cases, purchased their guns perfectly legally, in order to demonstrate that no regulation can ever work.

Early in Barack Obama’s first term, Rostron, a seasoned veteran of many political battles over private firearms regulation, had high hopes for bipartisan national action on at least some sensible policies to mitigate this plague. For example, he was optimistic about background checks on gun purchasers, more even-handed regulation of their sales, or perhaps a system of universal licensing for gun ownership, with training requirements to obtain a gun. Rostron no longer has those hopes. Despite repeated attempts, the Obama administration has gotten nowhere with Congress and has had to resort to modest executive orders. And while a few states—California, Connecticut, Colorado, Maryland, New York, Oregon, and Washington among them—have made significant progress on the aforementioned reforms as well as other sensible reforms, with clearly demonstrated improvements in public safety, many more have moved toward deregulation or non-enforcement. Some have joined such actions with strident legislative declarations of their independence from any federal law limiting gun freedom, and asserted the alleged “constitutional carry” right of their citizens to carry whatever guns they want, anywhere, without compliance with any prior government regulation or licensing requirement.

---

*Debate*, TIME (Mar. 10, 2015), <http://time.com/3739370/guns-gss-pew-gallup/> [<https://perma.cc/7G9V-G8SZ>].

<sup>22</sup> See *A Tally of Mass Shootings in the U.S.*, NPR.COM: THE TWO WAY (Dec. 4, 2015), <http://www.npr.org/sections/thetwo-way/2015/12/03/458321777/a-tally-of-mass-shootings-in-the-u-s> [<https://perma.cc/YH9W-VYFA>].

<sup>23</sup> See Simon Rogers, *Gun Homicides and Gun Ownership by Country*, GUARDIAN (July 22, 2012), <http://www.theguardian.com/news/datablog/2012/jul/22/gun-homicides-ownership-world-list> [<https://perma.cc/3VS2-PPWA>].

Rostron bets the gun slaughter will continue. His only hope is that the dwindling number of states engaged in new forms of gun control will learn from and improve on each other's work. Eventually, the nation will gain some shared sense of what are the most effective means of domesticating our large store of private firearms. But he worries that any individual state's efforts will be undermined by interstate trafficking in guns, with prospective purchasers in a regulated state simply going to "free" states and then returning home to start shooting people. And he is acutely sensitive to the fact that, in America, gun ownership is as much a cultural statement—denoting devotion to autonomy and freedom—as the satisfaction of a need for sport, security, or aggression. Politically, devotion to freedom is a very hard thing to argue with, especially as a multibillion dollar advocacy, dealership, and manufacturing industry profits greatly from a murderous distortion of freedom's meaning.

### *Criminal Record Expungement*

Finally, Brian Murray, in *A New Era for Expungement Law Reform? Recent Developments at the State and Federal Levels*, takes up state action aimed at expunging criminal records—records for arrest or conviction. Between a quarter and a third of adult Americans have such records now, and each day the FBI adds another ten thousand new names to its arrests database, which already contains records on eighty million individuals. An entire industry exists to make as much of this information conveniently available to the general public and, more relevant, to government, private employers, and institutional sources of jobs, credit, mobility, housing, education, and other social services. Those with such records are routinely denied all sorts of opportunities, services, and full rights. Even records of relatively trivial and juvenile brushes with the law, and dropped arrests, can have these effects.

Such "mass criminalization" is different, and affects even more people, than the more familiar phenomenon of "mass incarceration," the more than quadrupling of our prison population over the past forty years.<sup>24</sup> States share much of the blame for the growth of both problems, of course. Again, the national government may announce and fund America's many domestic "wars"—on crime, on drugs, on undocumented immigrants. And certainly the federal role in intelligence gathering and prosecution is vast. But most of the actual work in policing goes on at the state and local level. It was state political actors who took the lead with mandatory sentencing, denial of voting rights, denial of other political rights, racist prosecutorial as well as police actions, the militarization of police, the privatization of public safety functions, and handing out their newly digitalized criminal records to anyone willing to pay.

---

<sup>24</sup> See generally THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES (Jeremy Travis et al. eds., 2014).

Now, at least some states are trying to partially domesticate the beast they have created, but they are finding it difficult. Expungement has long been a neglected area of state law, typically resting on some sleepy old statute that sets out obstacles to this partial public redemption. As Murray summarizes, reformers now seek two kinds of changes: “forgetting” statutes that ease requested removal or seal of records and “forgiving” statutes that seek to mitigate the long-term effects of a record. These statutes work by establishing some formal process for certifying rehabilitation, or permitting courts, after sentence completion, to offer relief. Focusing on the former, “forgetting” statutes, he looks at state efforts in Maryland, Louisiana, Indiana, and Minnesota. He finds the first two promising, but quite limited and compromised by critical exceptions to the relief they offer, toothless enforcement, or, in Louisiana, exceptional wait-times for eligibility. Indiana, perhaps surprisingly, appears the most progressive state. It is generous in the range of crimes that can be expunged; has no blanket waiting time for petitioners; sensibly prioritizes movement on its docket of petitions by taking lesser crimes before greater ones; and, probably most importantly, categorically takes denial of employment or license for an expunged conviction to be unlawful discrimination. Murray faults Minnesota’s law, which he judges to fall midway between Maryland/Louisiana and Indiana, for requiring petitioners to present a presiding judge with “clear and convincing evidence” that the social benefit of expungement is at least equal to whatever cost to criminal justice administration may result from a record’s disappearance. He reasonably finds this procedure unnecessarily cumbersome and costly, and the standard imposed too high.

These mixed state efforts on expungement policy have informed federal efforts. For instance, the recently introduced REDEEM Act,<sup>25</sup> with bi-partisan co-sponsorship by New Jersey Democratic Senator Cory Booker and Kentucky Republican Senator Rand Paul, begins to move toward some federal standards on the matter. Murray rightfully concludes that this bill is probably condemned to have little significant effect on expungement.

Part of the problem is that a private market has been created on the Internet, a realm with a permanent memory. Even if the public overcomes its reluctance to get rid of records, and even if there was an adequate federal standard that was accepted by the states, the problem of criminal records would be far from solved, given the privatization of many of those records, the unevenness of private record-keeping, the incentives private vendors have to remain over-inclusive in a relatively open market with low barriers of entry, and the difficulties of prosecution. In addition, the problem of where to draw the line between what gets revealed about one’s past, and what does not, is one that will continue to be argued about for the foreseeable future. And the more substantive problems of reentry from incarceration, or recovery from any encounter with our justice system, still remain. At present, despite many promising experiments, our criminal justice system,

---

<sup>25</sup> REDEEM Act, S. 675, 114th Cong. (introduced into the Senate on March 9, 2015).

writ large, remains an expensive and immoral national disaster. Better expungement processes can help, of course, and are to be applauded. But they are only a tiny ray of light in a very dark surround.

#### CONCLUSION

So what are we to make of these stories? Well, obviously, it is a very mixed bag. Nearly all point to the existence of some good will, energy, intelligence, and a fair degree of innovation in state policy. In almost all cases, even the more discouraging ones, there is also evidence of some positive state influence on national policy.

But it is also hard not to be discouraged by the broadly unfavorable political environment in which all this proceeds. Where there is a clear emerging industry with a stake in good policy—as in the case of the renewable energy, electrified transportation, or energy service industries that provide backing and support for much of what Arroyo et al. document—then progressive reform has a chance of spreading beyond partisan boundaries. Shortly after Arroyo et al. submitted their article for this issue, seventeen governors entered into a noisily bipartisan agreement to boost their state's investment in clean energy infrastructure; intent on avoiding unnecessary fights, they were careful to not even mention climate change as a possible motivation for their action.<sup>26</sup> But where such industry support is lacking, progressive reform naturally slows to its partisan boundaries. Unfortunately, no matter how many social impact bonds one might imagine to excite private investors, there is not enough private money to be made from actually improving education, or persuading people that homicides are not a good way to spend their time, or undoing the fantastic damage done to people by assigning them a criminal record.

Of course, it is possible that reform can spread by stealth. It already has, as these essays indicate, through a form of executive federalism.<sup>27</sup> This works around the partisan polarization and dysfunction of the “normal” legislative process by putting elected chief executives in charge of policy reform. That, essentially, is what was going on in the complex deal-making and revisions described by Arroyo et al., which had some authorizing legislation, but proceeded largely through the White House and governors' offices. The same was true of the school reform example. No Child Left Behind was a bit of a disaster. The President recognized this and granted extensive waivers to its requirements, while pushing Race to the Top and other initiatives forward to keep the idea of measured progress and experi-

---

<sup>26</sup> Debra Kahn, *17 Governors Agree to Pursue Clean Energy Goals*, SCI. AM. (Feb. 17, 2016), [www.scientificamerican.com/article/17-governors-agree-to-pursue-clean-energy-goals](http://www.scientificamerican.com/article/17-governors-agree-to-pursue-clean-energy-goals) [<https://perma.cc/2ABC-YX9C>].

<sup>27</sup> For a useful discussion of the rise of executive federalism, once a phenomenon largely confined to parliamentary system, see Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. (forthcoming June 2016) (available for download at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2687205](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2687205)).



mentation in schooling alive. Such executive action carries its own risks. NCLB's successor, the Every Student Succeeds Act, was motivated, in substantial part, not by interest in defending the states from federal intrusion, but by Congressional interest in taking power over this major policy back from the President.<sup>28</sup>

For the moment, executive federalism can be defended as a rational response to partisan polarization and legislative dysfunction. And certainly it can be justified and legitimated on terms friendly to the open-ended democratic ideal with which we started. That is about getting things done for the people, not just to and by them. But for all the welcome *kratos* delivered by it, or the inventive deliberative bureaucrats and policy elites of experimental governance, at some point a bit more *demos* would be welcome, and may be necessary. Today—in addition to the many battles between and among states, and between states and the federal government, described in the essays below—many states, especially among those twenty-two GOP-controlled ones, are using state preemption to block even modest local efforts at constructive reform policy areas in health, environment, civil rights, wage-setting and government reform, among other policy areas.<sup>29</sup> This is the sort of no-nothing, no-learning, let's shoot-ourselves-in-the-head abuse of states' powers that any practical democratic politics, of whatever partisan persuasion, should abhor, and cannot indefinitely sustain without becoming unrecognizable as a legitimate system of public decision-making. Let us hope that it, and all the unnecessary chaining of good federalism described here, will end, or be ended, by the American *demos* soon.

---

<sup>28</sup> See Alia Wong, *The Bloated Rhetoric of No Child Left Behind's Demise*, ATLANTIC MONTHLY (Dec. 9, 2015), <http://www.theatlantic.com/education/archive/2015/12/the-bloated-rhetoric-of-no-child-left-behinds-demise/419688/> [<https://perma.cc/X4G6-SECK>] (“In many ways, what most conservatives seem to be rejoicing about the Every Student Succeeds Act is that it’s replacing Obama’s waiver system.”).

<sup>29</sup> For regularly updated reviews of such state preemption of progressive local law, see *Preemption Watch*, GRASSROOTS CHANGE, <http://grassrootschange.net/issues/preemption> [<https://perma.cc/2S6Z-J755>].

