

Foreword:

Blue State Federalism at the Crossroads

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Blue state federalism is at a crossroads. The reason? Progressives advocating for more state and local policymaking power may have been too successful for their own good. In the eyes of many, the 2006 congressional elections, in which Democrats made major gains in the House and Senate, presaged the transformative election of November 4, 2008. But the roots of this seemingly seismic shift in American politics may be traced back even further—to the work done over the last eight years in state houses and city councils across the country. As the two essays presented in this volume amply demonstrate, on issue after issue over this period of time, it was state and local leaders who often took the lead in proposing creative, progressive responses to the nation's most pressing problems. And, on issue after issue, it was national government actors who often stepped in to thwart them.

The subprime crisis? Many state and local governments were relatively quick to crack down on predatory lending,¹ but they soon found the nation's Comptroller of the Currency standing in their way.² Climate change? A coalition of states and cities came together to compel the Environmental Protection Agency to do something about greenhouse gas emissions,³ and they also took steps towards adopting a sub-national climate change regulatory structure all on their own. But here too, the feds sought to snuff out such bottom-up action, either by claiming the states and cities had no right to force federal government action or by asserting the authority to block these states and cities from acting independently.⁴ Health care? The federal government did little to address the growing rolls of the uninsured. In response, states and localities began to develop their own systems for providing coverage to those who lacked it, all the while running the risk that federal courts would strike down such efforts for conflicting with federal law.⁵ Lax over-

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¹ See *American Fin. Servs. v. City of Oakland*, 104 P.3d 813 (Cal. 2005) (describing the efforts of Oakland to regulate the secondary market for subprime mortgages); cf. Jonathan D. Glater, *Lender Agrees to Contribution of \$2 Million to a Student Fund*, N.Y. TIMES, Aug. 1, 2007, at A13 (describing New York State Attorney General Andrew Cuomo's efforts to crack down on abusive lending in the student loan industry).

² See Catherine M. Brennan & Meghan S. Musselman, *Consumer Credit: Preemptions and Regulations*, MD. B. J., Nov.–Dec. 2008, at 18, 20.

³ See *Massachusetts v. EPA*, 549 U.S. 497 (2007).

⁴ See Kirsten Engel, *State and Local Climate Change Initiatives: What Is Motivating State and Local Governments to Address a Global Problem and What Does This Say About Federalism and Environmental Law?*, 38 URB. LAW. 1015, 1017–18 (2006).

⁵ See John E. McDonough et al., *Massachusetts Health Reform Implementation: Major Progress and Future Challenges*, 27 HEALTH AFF. w285, w285, available at <http://www.healthaffairs.org> (search “Quick Search” for Vol. 27, Page w285) (web exclusive) (providing

sight on Wall Street? For a time, New York's attorney general operated as the vigorous market watchdog that the national Securities and Exchange Commission refused to be.⁶

These are but examples of how a blue-state political vision thrived at the state and local levels, offering a kind of mirror image of the governance vision espoused in Washington, D.C. In this way, a seemingly feeble progressive political movement managed to gain an institutional foothold even though red states had elected the President and controlled the Congress. And it mattered. This state and local political action provided a critical source of energy to a political party and, more importantly, a political outlook, which was struggling to win national elections and to find an authentic voice. But now, with the national electoral map turning blue, key questions arise for progressives who were just beginning to see the virtues of going local: Was blue state federalism just a second best strategy? Is it time for progressives to don their nationalist hats once again?

The two essays in this volume implicitly answer these questions with a resounding "No." Each recognizes how important it is to have an engaged and energized national government working to address the myriad crises the country now faces. But the primary aim of these essays is to affirm the important role states and cities have played—and can play—in the future. In doing so, these essays helpfully complicate the blue state/red state divide. Governor Sebelius is herself a Democratic governor of a so-called red state, while Professor Schapiro chronicles actions spearheaded by Republican governors and their judicial appointees in so-called blue states. They also offer helpful roadmaps for how federalism might be organized to remain relevant in this new world and provide much needed arguments for why it must.

Let's start with the essays' roadmaps for reforming federalism. Important as they are, in my view they indicate the need to broaden the discussion of blue state federalism and its future. Our larger concern should be with the virtues of decentralization. Federalism, by contrast, refers only to a particular form of decentralization. It favors states, not cities. That matters because of the potential divergence between the states and their cities. State governments are central in their own right, and, as much as the national government often blocks state and local decisions, states too can hinder lower-level decision making. They suffer from the same hostility towards local innovation that afflicts all central governments. And, paradoxically, federalism is the structure that protects states' centralizing instincts from challenge.

Consider that the most important Supreme Court case on city power—*Hunter v. Pittsburgh*⁷—is perhaps best read as a case about federalism. It

an overview of the Massachusetts plan to ensure that all state residents receive health insurance); see also Henry J. Aaron & Stuart M. Butler, *A Federalist Approach to Health Reform: The Worst Way, Except for All the Others*, 27 HEALTH AFF. 725, 727–28 (2008) (describing the efforts of other states to make health care more accessible).

⁶ See Daniel Gross, *Eliot Spitzer: How New York's Attorney General Became the Most Powerful Man on Wall Street*, SLATE, Oct. 21, 2004, <http://www.slate.com/id/2108509/#sb2108525>.

⁷ 207 U.S. 161 (1907).

squarely holds that states are the masters of their local governments and that the federal Constitution—and thus federal judges and perhaps, by extension, federal executive officials as well as legislators—have precious little authority to meddle in state attempts to define the powers of their “creatures.”⁸ The state supremacist rhetoric in *Hunter* is excessive,⁹ and subsequent precedent suggests that the Court no longer subscribes to all of it.¹⁰ But the dominant view does still reflect *Hunter*’s position that—vis-à-vis the national government—there are only states. Cities are merely their components. If you want to reorganize city power, in other words, you must work through the states, not in opposition to them.

It’s far from obvious that advocates of progressive decentralization should be attracted to such a state-centric way of thinking. The green cities movement offers a nice example of why. New York City has been a leader in urban efforts to make “green” a central part of public policy.¹¹ It has quickly learned, however, that as aggressive as its own state government has been in challenging the national government’s refusal to do much about climate change,¹² Albany has itself been reluctant to empower its largest metropolis to pursue a bold vision for reducing greenhouse gas emissions. In fact, even though the city’s innovative congestion pricing plan had the political and financial backing of the national government, the state legislature refused to provide the city with the necessary authority to implement its plan. As a result, the plan died, leaving New York City without a key tool that its chief competitor among global capitals—London—enjoys.¹³

Suppose then, that the federal government now wanted to take things a step further. Say it wanted not only to fund the city’s congestion pricing plan but also to empower the City of New York to adopt the plan notwithstanding the state legislature’s refusal to do so. Can the federal government invest a city with powers that its own state has refused to grant? There’s a decent argument that current federalism doctrine makes such federal interference with state/local power relations an unconstitutional infringement of state sovereignty.¹⁴ But if so, it’s only because federalism and progressive

⁸ See *id.* at 179.

⁹ See, e.g., David J. Barron, *The Promise of Cooley’s City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 562 (1999).

¹⁰ See, e.g., *Romer v. Evans*, 517 U.S. 620 (1996) (holding that the state of Colorado was constitutionally barred from repealing Aspen’s, Denver’s, and Boulder’s antidiscrimination ordinances).

¹¹ PLANYC: A GREENER, GREATER NEW YORK, http://www.nyc.gov/html/planyc2030/downloads/pdf/full_report.pdf.

¹² New York State was one of the plaintiffs in *Massachusetts v. EPA*. See, *supra* note 3.

¹³ Posting of Nicholas Confessore to City Room blog, <http://cityroom.blogs.nytimes.com/2008/04/07/congestion-pricing-plan-is-dead-assembly-speaker-says/?hp> (Apr. 7, 2008) (blog post entitled “Congestion Pricing Plan Dies in Albany”).

¹⁴ The argument would be that such a change in the relationship between a state and one of its cities would effectively commandeer the state government in violation of the federalism principles articulated in *Printz v. United States*, 521 U.S. 898 (1997). In *Nixon v. Missouri Municipal League*, the Court’s uneasiness about federal intervention in state-local relationships led it to interpret an ambiguous federal statute in such a way as to avoid this intervention. 541 U.S. 125 (2003).

decentralization are two very different things. There are, of course, more conventional examples of this same state/city divide. There is the age-old issue of whether national urban policy should work directly through large cities or exclusively through their states, no matter how anti-urban state governors or legislatures may be. It's worth noting that the President has already announced an intention to create an Office of Urban Policy¹⁵—a title that acknowledges that states and their cities might not be best viewed as one and the same. After all, it's not called the Office of State Policy.

Nothing about states *qua* states, in other words, makes them the right scale for thinking about bottom up problem solving. In thinking about the institutional forms or conceptualizations that we need to develop going forward, we must remember that this is a three level game—federal, state, and local—and that each level has its own unique set of interests, concerns, and ideas. What we should be after is not progressive federalism but progressive decentralization.

Another institutional design issue that merits attention arises precisely because the majority of the Electoral College has turned blue. More than half the states now have Democratic governors, but, prior to Obama's inauguration, not a single one had spent a day in office with a Democratic President. Inevitably, there will need to be coordination between progressive executive officials at the state and national levels. In past administrations, there has been effective coordination along these lines. Perhaps the most well known example is from the Reagan Administration, with its powerful Office of Intergovernmental Affairs.¹⁶ It was through that office that the block-grant approach to federal funding really gained traction. A similar coordinating entity in the new White House—obviously with different aims—may well be needed to harness the energy from below that has developed over these last many years. That the new President has more experience in state than national government bodes well for the future of fostering such dynamic local/state/federal alliances.

But even if we do broaden the lens, there's no underestimating the depth of the challenge that advocates of progressive decentralization face now that red state dominance of the national political scene has come to an end. Two concerns in particular seem worth highlighting: "crowding out" and "easing off."

"Crowding out" refers to the fact that success at the national level can make it difficult to remember the value of active state and local participation in policymaking. It's all too easy to think that, once you've won, you get to make the decisions. And what's more, it's easy to think that, once you've won, you must be the best decision maker there is. The temptation will be particularly great for national officials in the current environment. The cri-

¹⁵ Posting of Al Kamen to 44 The Obama Presidency: Transition to Power blog, http://voices.washingtonpost.com/the-trail/2008/11/10/white_house_to_establish_offic.html (Nov. 10, 2008, 15:55 EST) (posting entitled "Whitehouse to Establish Office of Urban Policy").

¹⁶ Mitch Daniels, *Telling Local Officials that the Administration Cares*, N.Y. TIMES, July 3, 1985, at A18.

tique of national governance for the last eight years has focused so much on its deregulatory bias that it will be hard to resist the idea that the solution inheres in more vigorous national governmental action. There's nothing wrong with that judgment as a general proposition, but once this logic gains momentum, it can easily take on a life of its own.

What exactly should the role be for state and local governments under the incoming administration if the problem during the past eight years was that the feds weren't doing enough? We may have cheered states and cities on when they were fighting for better regulatory frameworks that the feds resisted, but perhaps that just suggests the feds should now implement those frameworks as national policy. After all, climate change can't be solved locally, can it? Inadequate health care coverage is a national problem, isn't it? And the financial system is too integrated globally to be properly regulated in a decentralized manner, right?

The arguments for centralization are as easy to produce as they are familiar. But because they have the ring of truth around them, they threaten to crowd out the reasons for thinking there is value in making space for state and local regulatory action and input. It will be easy enough for the newly ascendant Democrats to understand the crowding-out problem in the abstract, but that also means it may be easy enough for them to sweep objections under the rug with vague statements about the virtues of something as elusive as better "cooperation" between central and local levels of government. Fortunately, neither essay in this volume settles for such comforting assurances. Each tries to flesh out what a cooperative relationship between central and local actors would actually require.

To see just how serious the concern about crowding out is, it is useful to think about how it might play out in the real world. Imagine how a debate over national health care reform or climate change legislation might proceed. At some point in the legislative negotiations, the question will surely arise as to whether the federal legislation should be made exclusive of state and local efforts to augment or supplement it. It will be tempting at that moment for health care advocates or environmental supporters to surrender the preemption issue in order to secure support for federal standards that are marginally tougher than they might otherwise be. But there are real costs to doing so—costs that take the form of cutting off future outlets for social learning, reducing institutional mechanisms that pressure the government to remain dedicated to tackling underlying problems too fundamental to be solved in one fell national swoop, or shrinking the public space for the kinds of citizen participation and mobilization that are always the preconditions to meaningful social change.

"Easing off" presents the flip-side concern to "crowding out." There has been a tremendous surge of progressive energy at the state and local levels in recent years. An entire infrastructure—represented by the founding of groups like the Progressive States Network—has developed around the blue state federalism ideal. This activity marks the recognition that no successful political movement can afford to ignore the governing capacities of

the nation's 50 states and nearly 20,000 cities and towns. There's simply too much potential in such places for experimentation, for practical problem solving, and for sheer democratic deliberation to write them off as threats to national authority or, worse, beachheads of parochialism and prejudice.

What's more, a whole new generation has come of age with an unusually strong affinity for community-based political action. For people in their twenties, personal knowledge of national politics likely begins with the waning days of the Clinton Administration, dominated as it was by the Lewinsky scandal and the impeachment drama, and ends with the final term of President Bush. It is no wonder, then, that many of them have turned away from Washington, D.C., and begun to think about the good work that may be done outside of government or at the city and state levels. Perhaps that's why, when I decided to co-teach a course on green cities this year, in conjunction with the Law Department of the City of New York, more than three times as many students expressed interest as there was room for. Not so long ago, to stay local was to fail, as Wright Mills put it.¹⁷ But during the period of red state national dominance, the local became cool again. It was in the cities and towns, the state capitols and state houses, that real change seemed to be happening. It was there that the tired partisan debates so dominant in national political discourse seemed to give way to a more robust and innovative discourse focused on solving real problems.

Now, of course, particularly for millions of young people, there's nothing cooler than national politics. And that means there is a risk that many of the very same people who were beginning to see the value in becoming active locally may soon come to think of federalism as the dirty word in the progressive political vocabulary that it was for so long—a word that symbolizes the problem the nation needs to overcome rather than the means by which solutions to national problems might be discovered. In other words, even if the federal government does not go out of its way to preempt state and local initiatives, there still needs to be the energy from below to generate them. Decentralization, it must be remembered, is a two way street. Central governments have to give states and localities the room to run, but states and localities must take the initiative and exploit their opportunities. One worries that the creative local activism of recent years may give way to passivity or the uncreative instinct to resort to lobbying for little more than increased federal funding.

President Barack Obama burst onto the national political scene with an electric speech that derided the very idea that our nation was divided into red states and blue states. There was, he said, only “the United States.”¹⁸ It was a call to unity as old as the nation. It harkened back to Lincoln's famous admonition that a house divided against itself cannot stand, and even further

¹⁷ FRANK BEALEY, *THE BLACKWELL DICTIONARY OF POLITICAL SCIENCE: A USER'S GUIDE TO ITS TERMS*, 75 (1999) (quoting Wright Mills).

¹⁸ Senator Barack Obama, Keynote Address at the 2004 Democratic National Convention (July 27, 2004), available at <http://www.pbs.org/newshour/vote2004/demconvention/speeches/obama.html>.

back to the founding generation's effort to forge a nation out of a disparate collection of antagonistic states. But as much as that speech sounded nationalist notes—emphasizing the virtues of collective national will over the pathologies of a balkanized and fragmented local populace—Obama's campaign also tapped into a very different strain of American political thought. Over and over again, the candidate insisted that his listeners remember that “change comes from the bottom up.”¹⁹ Obama championed the local work of community organizers, the on-the-ground efforts of homegrown civil rights activists, the experimentalist philosophy of progressive era reformers like Brandeis, and, implicitly, the decentralizing spirit of De Tocqueville, who hailed local political participation and warned of the way centralization induces a drowsy reliance on “a powerful stranger.”²⁰ In fusing nationalism and localism into one coherent American story, Obama melded two distinct narratives of social and political progress into one intoxicating account of what the future might hold for America. The challenge is formidable for those newly enamored of blue state federalism—or what I prefer to think of as progressive decentralization—as it stands at the crossroads that Obama's stirring victory has brought about. But there has never been a moment in American history when one would have more reason to be optimistic that it will be met.

¹⁹ Senator Barack Obama, Speech following the North Carolina Democratic Primary (May 6, 2008), *available at* <http://www.youtube.com/watch?v=KI-oMjmwIU>.

²⁰ ALEXIS DE TOCQUVILLE, *DEMOCRACY IN AMERICA* 92 (Phillips Bradley ed., Henry Reeve and Francis Bowen trans., Alfred A. Knopf 1987) (1835).

