Gerken’s Federalism 3.0: Better or Worse Than It Sounds?

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INTRODUCTION

Mark Twain famously quipped, “Wagner’s music is better than it sounds.” How can music be better than it sounds, rather than exactly as good as it sounds? A listener hears the present but not the past or the future. Critics who know music’s history argue that Wagner’s operas solved the musical problems of his era. Although he composed in the nineteenth century, his music points to the twentieth century. In contrast, critics think that Puccini’s music does not point to the future. They characterize Puccini’s music as worse than it sounds, even though his soaring melodies of remorseful love can turn a bronze statue green with tears.

Like Wagner and Puccini, Professor Heather Gerken’s Federalism 3.0 sounds good. Federalism 3.0 will keep you turning the pages with pleasure. Her prose refreshes, her disrespect for authority stimulates, her novelties remake the categories, and her incomplete exposition challenges the reader to think. But is Federalism 3.0 better than it sounds (like Wagner), or worse than it sounds (like Puccini)? Does it point to the future or coin phrases without a future? To answer this question, I formulate and measure three of the major claims in her wide-
ranging yet brief lecture. My selection of three claims may not be entirely fair but, like her, I aim to stimulate.

Gerken’s first claim is that decentralization can be progressive. This claim contradicts the conventional American belief that decentralization is regressive. Her arguments for progressive decentralization are historical and contingent, whereas my arguments use social science to find the inherent tendencies of federalism. I explain that federalism shifts power from national to state majorities, which advances or retards progressive values depending on how progressive state majorities are relative to the national majority.

Gerken’s second claim is that federalism prescribes the terms of intergovernmental cooperation, like a contract for a smooth long-run relationship. Alternatively, I explain that federalism prescribes the terms of intergovernmental conflict, like a contract for a troubled long-run relationship. In this respect, federalism resembles a contract written for bankruptcy in the hope of avoiding it.

Gerken’s third claim is that federalism should be evaluated primarily by its effects on people—not its logical consistency. This line of reasoning prompts her to jettison the sovereignty doctrine and stand-alone interpretations of congressional power. I agree with her consequentialist evaluation in general and her doctrinal conclusions in particular. However, I suggest a different theoretical approach to predict the effects of federalism on people. Specifically, I explain a fundamental trade-off that she omits: when public goods cross state boundaries, decentralized provision causes collective action problems, and centralized provision causes information problems.

Next, I critique her three claims in turn.

I. PROGRESSIVE DECENTRALIZATION

Gerken explicitly judges federalism based on whether it promotes the progressive values of equality, social welfare, and environmental protection. The conventional conclusion is that decentralization retards these values. A conventional history supports the conventional conclusion. After the American Civil War abolished slavery, the victorious North attempted to impose racial equality on the South. However, the North’s political and legal reconstruction of the South mostly failed. The federal government controlled by the North pressed the southern states intermittently, and white southerners regained control over their state governments. This struggle defines the conventional history of federalism. Hence Gerken’s quote from William Riker: “[I]f one disapproves of racism, one should disapprove of federalism.”

Besides racial equality, the North and the South tend to disagree over other aspects of government. The North has been richer and more favorably disposed to large government than the South. Consequently, the North has favored a welfare state and environmental protection more than the South. The liberal North was right to think for many decades that the conservative South, if left to its own political processes, would pursue conservative values.

Given this history, progressives who favor equality, social welfare, and environmental protection favor centralized government over decentralized government. That is the conventional assessment of federalism by progressives.

Gerken’s first major claim for Federalism 3.0, which I term “progressive decentralization,” denies this view. According to Gerken, legal scholars underestimate the extent to which decentralized government promotes progressive values. Contrary to conventional beliefs, decentralization has often promoted equality, welfare, and the environment in the past, and it will do so even more in the future. Same-sex marriage is one example. Several state courts imposed it locally, and the Supreme Court subsequently imposed it nationally. Women’s suffrage is another example. In 1911, California revised its constitution through a ballot initiative (i.e., direct vote of the citizens) and gave women the vote. California’s progressive reforms in the early twentieth century also included the eight-hour workday, worker’s insurance and safety measures, and the Public Utilities Commission. More recently, the ballot initiative has produced both progressive and regressive legal reforms. A ballot initiative in 1972, Proposition 20, created the California Coastal Commission to preserve the wild, scenic beauty of the seacoast. California led progressive movements related to same-sex marriage, women’s rights, labor, and environmental protection, and the federal government followed California’s lead.

Gerken’s first major claim—that decentralization can be progressive—surprises people who start from South Carolina and think that Congress must complete the human rights victory of the North over the South. However, the claim does not surprise people who start from California, where progressivism arguably began. Keep in mind that these tendencies can change abruptly: in the 2016 elections, President Trump won the nation and progressives won California. The federal government will assuredly be more conservative than California under the Trump administration.

Gerken’s account is historical: Federalism 1.0 is the New Deal of the 1930s, Federalism 2.0 is the Civil Rights Movement of the 1960s, and Federalism 3.0 is today. What about the future? Should progressives favor centralization and conservatives favor decentralization, as in the past, or should they reverse their positions? Federalism 3.0 has little to say in response to these questions, which brings the following joke to mind. After enjoying an evening in the village pub,

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an Irish farmer walked home towards his house. At an unmarked crossroads, he encountered a stranger who was puzzled about which way to go. “How do I get to Dublin?” the stranger asked. The farmer replied, “Don’t start from here.”

Scholars and activists want to predict and shape federalism’s future. Compared to centralization, will decentralization be more progressive or conservative? The question remains unanswered in Federalism 3.0. To answer it, we should look beyond historical contingencies to discover inherent tendencies. Progressives and conservatives want to know whether decentralization has an inherent political tendency and not just a historical bias. By “political,” I mean a tendency towards the left or right of the political spectrum. By “inherent,” I mean a tendency caused by the essential nature of federalism—not temporary events. Without an account of inherent tendencies, one cannot predict whether federalism’s future will resemble its past.

Finding the inherent tendencies of decentralization requires putting social science underneath history. To do so, I turn to Gerken’s second major claim, which concerns how the federal and state governments interact.

II.
BRAIDED FEDERALISM

Gerken divides the history of “Our Federalism” into three periods. Federalism 1.0 refers to the New Deal, a time when the federal government greatly increased spending and regulations. With expansion, federal influence extended “all the way down” below the state level to cities, counties, school boards, and special governments (e.g., transit authorities and water districts). However, the reach of its many programs, according to Gerken, does not create an authoritarian federal rule. Rather, the federal government needs state and local government to administer many of the activities that it seeks to influence. Being needed, state and local administrators are not slaves of federal officials because, as Gerken emphasizes, each level of government has power against the other. My term for vertical interdependence of governments is “braided federalism”—different levels of government twisted together like strands in a rope.

Power concerns getting what you want, especially through politics. In contrast, legality concerns justifying what you get, especially through law and morality. Gerken finds that power and legality evolve together in a federal system. The second major claim of Gerken’s Federalism 3.0 is that

3. Progressivism and conservatism aside, the bias could favor efficiency. The classical hypothesis that common law evolves towards efficiency has been extended to state competition for businesses. For example, Roberta Romano argues that charter competition among the states causes a race to the top in corporate law. See Roberta Romano, The State Competition Debate in Corporate Law, 8 CARDOZO L. REV. 709 (1987).

4. “Process federalism” stresses that states will leverage their power to increase their autonomy. Gerken stresses states’ use of power to accomplish their goals, which includes more than just increasing their autonomy.
interdependent power makes interdependent legality, or that braiding power braids legality.

This claim rests on a misperception in contract theory exposed in the 1990s. The economic analysis of contracts originally focused on modeling short-run bargains as one-shot games. In a one-shot game, the bargainers expect to encounter each other only once, as when a motorist buys fuel on an interstate highway. Since no one fears retaliation, one-shot games encourage short-run advantage-taking, including opportunism and sharp dealing.

In contrast, the bargainers in repeated games expect future encounters, as when a motorist buys fuel from a local gas station. In long-run games, advantage-takers fear future retaliation. The long arm of the future reaches back to discipline the present (but not always). Consequently, the parties seldom indulge in short-run advantage taking.

However, research revealed that long-run contracts are often written to prevent short-run advantage-taking. For example, on the Memphis cotton exchange, sellers weigh cotton before delivery. Contracts stipulate that the buyer of cotton must also weigh the cotton on delivery. Buyers who do not weigh cotton on delivery lose the right to claim later that the seller shorted them. Shorting seldom occurs because the parties deal repeatedly with each other. In a long-run relationship, most buyers would rather take the risk of short weighing than bear the certain cost of reweighing. As long as the relationship persists, buyers mostly accept the seller’s representation about weight. If, however, a change in the business environment jeopardizes a long-run relationship, a buyer may start reweighing deliveries of cotton.

Thus, the contractual rights of the parties do not correspond to their usual practices. On the Memphis cotton exchange, the parties write contracts as if the long-run transactions were short-run. The preference for short-run contractual rights rests on a solid generalization in game theory. Experimental evidence and


6. Behavior in repeated games parallels behavior in one-shot games when the values at stake over-shadow the values at stake in future encounters, such as when two people sell and buy a house. The same is true at the end of a repeated game in which everyone knows when the game will end—the “endgame problem.” See ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 55–69, 276–306 (6th ed. 2016).

7. The parties could easily rewrite these contracts, but they do not. Given this fact, judges should respect the agreements of informed parties and enforce the terms as written. If contracts have gaps, the courts should mostly enforce the terms that the parties would have negotiated. Alternatively, courts should sometimes apply legal doctrines that create incentives for the parties to close the gaps. For example, when one party withholds information from the other, courts may impose “information-forcing” legal rules that cause the parties to disclose information instead of withholding it. See Ian Ayres & Robert Gertner, Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules, 101 YALE L.J. 729 (1992).
case studies confirm that bargaining is more likely to succeed if the “threat points” of the parties are clear.8

In bargaining games, “threat point” refers to what each party can get without the other’s cooperation. In other words, the threat points in a long-run relationship are what each party can get if the relationship dissolves and they stop dealing with each other. By stipulating the terms for dissolution, a long-run contract clarifies the threat points of the parties, which increases the probability that the parties will cooperate. Contracts in the Memphis cotton exchange are presumably written for dissolving relationships in the hope of preserving them.

Much of the preceding discussion of long-run contracts applies to federalism. Federal and state governments often contract explicitly with each other. When they do not contract explicitly, their practices are often contract-like. Indeed, the contractarian tradition in political philosophy, which is important in American constitutional law, regards all democratic government as contract-like. Consequently, the analogy between federalism and long-run contracts is close. Braided federalism can be analyzed as executory contracts, or contracts for future acts.

In federalism, the vertical levels of government have long-run relationships. To lubricate cooperation, the parties need to know the consequences of their failure to cooperate. For example, to lubricate participation by states in a federal expenditure program, the state governments need to know what will happen if the program gets reduced or terminated. Restated in the language of game theory, each government’s threat point corresponds to what it can get without the cooperation of other governments in the federal system. Clarity over threat points corresponds to clarity over the rights and powers of governments in the federal system. Clear threat points in the event of non-cooperation generally increase the probability of cooperation among the levels of government.

The rights and powers of governments in a federal system concern their threat points. These rights and powers do not necessarily change when cooperative practices change. Consequently, changes in the terms of intergovernmental cooperation do not necessarily require changes in intergovernmental powers. In federalism, braiding practices do not necessarily braid legality.9

8. Perhaps the most famous proposition in law and economics is the Coase Theorem, which states that resources will be allocated efficiently if the transaction costs of private bargaining are nil. Ronald H. Coase, The Problem of Social Cost, 3 J.L. & ECON. 1 (1960). An early empirical test of the Coase Theorem showed that subjects in experiments cooperate in bargaining games when threat points are clear. Elizabeth Hoffman & Mathew L. Spitzer, The Coase Theorem: Some Experimental Tests, 25 J.L. & ECON. 73 (1982).

III.
CONSEQUENCES OF COLLECTIVE ACTION FEDERALISM

Alexis de Tocqueville remarked that the “[f]ederal system was created with the intention of combining the different advantages which result from the magnitude and the littleness of nations.” In economic terms, the federal system aims for an optimal allocation of vertical powers. Assessing the advantages resulting from the magnitude and littleness of nations requires predicting the effects of alternative allocation of powers. Like de Tocqueville, Gerken evaluates federalism according to what really matters—its effects on people. This is her third claim, which is pervasive though mostly implicit in Federalism 3.0.

I agree but want to find the inherent—as opposed to historically contingent—effects of federalism on people. To put social science into Gerken’s history, I start with the relationship between political competition among candidates and the political preferences of citizens. In elections, political competition usually responds to the citizens’ preferences for laws and policies, so elections usually deliver what most citizens want. However, citizens disagree about what they want: their preferences form a distribution, not a unique point. The winner in a democracy is usually located somewhere in the center of the distribution of the citizens’ political preferences.

According to the simple “median rule” model, the winning location is the median in the distribution, in which case political competition satisfies the political preferences of the median voter. The median rule predicts the behavior of government in a democracy. Now I apply it to a federalism democracy.

Federalism contrasts with the unitary state. In a unitary democracy, the central government is the only level of elected government. For purposes of administration, centrally elected officials divide the country into districts or prefectures headed by appointed officials. France and Japan approximate the ideal of a unitary democracy. Unlike a unitary democracy, a federal democracy divides the country into states headed by separately elected officials. The United States, India, and Mexico exemplify federal democracies.

The median rule predicts the difference between federalism and unitary democracy. Applying the median rule to a unitary state, the national majority controls the central government and satisfies citizens’ political preferences. Applying the median rule to a federalist state, the national majority controls the central government and satisfies citizens’ political preferences, and state majorities control the state governments and satisfy their political preferences.

11. For an exposition of the median rule, see ROBERT D. COOTER, THE STRATEGIC CONSTITUTION (2000). Note, however, that a democracy ideally recognizes human rights that constrain majority rule.
Assuming the median rule describes democracy, the inherent tendency of federal democracy is to satisfy the political preferences of the median voter in each state. In contrast, the inherent tendency of the unitary state is to satisfy the political preferences of the median voter in the nation. When the national and state majorities agree, federalism and unitary democracy produce similar results. This is not the case when they disagree. With disagreement, federalism empowers state majorities to prevail by exercising powers reserved for them. Compared to the unitary state, federal democracy empowers national minorities by making them state majorities.

Whether the outcome is progressive or conservative depends on the distribution of political preferences. Democratic federalism satisfies progressive preferences where progressives form the majority, as in early twentieth century California. Democratic federalism satisfies conservative preferences where conservatives form the majority, as in contemporary South Carolina.

Instead of considering whether centralization is more progressive or conservative, we consider whether centralization or decentralization better satisfies the preferences of citizens. Our analysis illuminates a conventional argument for decentralization based on local knowledge. The analysis requires three assumptions. First, some goods supplied by a government affect people within its jurisdiction more than people outside of it. Abstracting from this fact, define a pure state public good as one whose supply affects the public in only one state.\(^\text{12}\)

Second, people have different preferences about public goods. However, the people within one state often agree with each other more than they agree with outsiders. Abstracting from this fact, the preferences for pure state public goods are the same for people within a state and different from the preferences of people in other states.

Our third assumption concerns information. Supplying public goods requires information about preferences and production possibilities. “Local knowledge” refers to information known in one place but not another. Compared to outsiders, the people within a state have more information about their own preferences and production possibilities. Our third assumption is that supplying state public goods requires that people possess local knowledge about their own state, but not other states. Consequently, national government lacks some of the information known to state governments.

The implication of these three assumptions—state public goods, same preference within states (but not between them), and local knowledge—is that states can provide state public goods better than a national government. The three assumptions isolate the conditions that give decentralization an advantage over centralization.

\(^{12}\) By definition, a pure state public good affects everyone inside of a state and no one outside of it. Thus, the preferences and production possibilities are separable between people inside and outside of a state. The supply of a pure state public good affects utility or production within a state but not outside of it. For the definition of a pure public good and its application to constitutional law, see id. at 105.
centralization. This advantage lies behind some fundamental laws, notably the reserve powers clause in the US Constitution and the EU Principle of Subsidiarity.

By definition, pure state public goods do not spill across state lines. In reality, however, public goods are impure. Their costs and benefits spill across state lines, as with military defense, interstate highways, and environmental protection. Interstate spillovers create a collective action problem when states gain collectively and lose individually from supplying the good. Given a collective action problem, individuals “free ride” by paying less than their share of the costs of supplying the public good. To illustrate, under the Articles of Confederation, the finance system allowed each state to avoid paying its share of the costs of maintaining the army, so self-defense was inadequate. Besides military defense, the other main problems were repayment of national debts and state restrictions on national trade.

A power whose effects spill over from one state to another poses a collective action problem for the states. By pursuing their own welfare, individual states undermine the general welfare. The central government can solve collective action problems that frustrate the states. In contrast, a power that affects a single state does not pose a collective action problem for the states. Instead, it poses a problem of local knowledge. State governments can obtain local knowledge better than the central government. Consequently, state governments can solve problems of local knowledge that frustrate the central government.

Does centralization or decentralization better satisfy the preferences of citizens? The answer depends on whether the public good in question is interstate or intrastate. For interstate public goods, the primary obstacle is collective inaction among the states. The central government can solve collective action problems among the states and should have the power to do so. For intrastate public goods, the primary obstacle is the need for local knowledge. The state governments can solve problems of local knowledge and should have the power to do so. When each level of government has the power to do what it does best, the federal government supplies interstate public goods and the state governments supply intrastate public goods.

A principle of political economy summarizes these considerations. According to the internalization principle, a constitution should assign power to the smallest unit of government that internalizes the effects of its exercise. For interstate public goods, the federal government is usually the smallest unit that effectively internalizes benefits and costs. For intrastate public goods, state government is the smallest unit that effectively internalizes benefits and costs. Accordingly, the internalization principle justifies federal power over interstate
public goods and state power over state public goods. This fact animates the history and structure of federalism in the United States.

These considerations lead to the prediction that the preferences of citizens are satisfied best in a federal system when the central government has power over interstate public goods and the state governments have power over state public goods. Progressive and conservative politics sometimes follow and sometimes depart from this prescription, but I cannot go further into that question here.

IV. STATE ELECTIONS AS CONVOCATION

The preceding discussion concerns the advantages of federalism for satisfying the preferences of citizens. Besides satisfying political preferences, democracy forms them. Gerken’s concern with the effects of laws on people extends beyond the satisfaction of preferences to their formation. Her general approach is that better preferences are formed from more information. So the question of federalism is whether centralization or decentralization provides more information for the formation of political preferences.

Preferences over laws and policies are especially formed through political competition. In competing for office, candidates and their supporters uncover facts and arguments to present to voters. Competition for office creates information about the results of alternative policies. Citizens use the information to judge the success of alternative laws and policies. Better information improves the quality of political debate and persuades citizens to change their political preferences.

To explain this fact, Gerken introduces the attractive phrase, “discursive benefits of structure.”14 This phrase makes a state election sound like a convocation on policy. The debate is concrete, not merely theoretical, because the winner of the state election will enact some of the policies it advocates, thus providing a test for their success. Each state election is another political convocation seeking citizens’ support. The national parties converge on the state to debate their policy disagreements. Later, national debate in federal elections invokes evidence of the successes of state policies.

In contrast, the unitary state has no elections at the state level, so there are no state convocations on policy. Compared to unitary democracy, federal democracy fills more offices by vote of the citizens. Up to a point, increasing the number of elected offices increases the amount of political competition, which changes the preferences of citizens. Consequently, more elections cause faster change in political preferences. According to this line of reasoning, faster change in political preferences is an inherent tendency of federal democracy relative to unitary democracy.

14. Gerken, supra note 1, at 1714.
Does faster change in political preferences favor progressive or conservative values? Various arguments can be made on this point. Some people think that democracy favors justice. Martin Luther King famously said, “The arc of the moral universe is long, but it bends towards justice.” Many progressives think that they are more just than conservatives. Progressives may conclude from this line of thought that democratic federalism is biased in their favor. Gerken’s discussion of political competition and freedom of speech in a federal system can be understood in this way. Are progressive values really more just than conservative values? Progressives and conservatives will certainly disagree, and this Comment does not make either argument. Instead, I turn to the doctrinal implications of Federalism 3.0.

V.

OBSOLETE DOCTRINES

Federalism 3.0 advocates updating legal doctrines that lag behind changes in power. Gerken writes:

Our Federalism, then, is not your father’s federalism, and it’s certainly not your grandfather’s federalism. And yet constitutional theory is still geared around these past debates.15

Doctrines should be evaluated primarily based on their effects on people, not on their logical consistency. For Gerken, the interpretation of a law affects its correctness. Gerken asserts that constitutional interpretation should follow extended causal chains more than extended logical chains. This reasoning prompts her to jettison the sovereignty doctrine and stand-alone interpretations of congressional power. I strongly agree with her consequentialist evaluation and her doctrinal conclusions, and I would add to her arguments the insights of collective action federalism.

First and foremost, we must jettison sovereignty. This term refers to the power of a state to govern itself, rather than being governed by another state. Federal and state governments are called “dual sovereigns,” which means that each government governs itself even though they both belong to the federal system. Dual sovereignty is invoked to justify the division of constitutional power between federal and state governments. According to Gerken and other scholars, American constitutional law treats the police power over ordinary crimes as belonging to state governments. Consequently, the federal government lacks the constitutional power to criminalize assaults on women or to require state prosecutors to enforce federal gun control laws. In contrast, the federal government can regulate the pollution from interstate commerce or the working hours of employees in interstate commerce. The federal government can also penalize states that fail to enforce its regulations.

15. Id. at 1696.
Can sovereignty explain why the federal government can punish polluters more widely than muggers? To do so, sovereignty theory should distinguish between the essential powers for self-government that the sovereign state must have, and the inessential powers that it may or may not have. To use the concept of sovereignty to explain the essential powers of self-government is to use a greater obscurity to explain a lesser obscurity (i.e., *obscurum per obscurius*).

The doctrine of sovereignty is even worse when applied to Indian tribes. Whereas federal and state governments are “dual sovereigns,” the Indian tribes are “dependent sovereigns.” How can a state be both independent and dependent? No one can understand the meaning of “dependent sovereign” because it is an oxymoron like “unmarried husbands.” Sovereignty theorists, to paraphrase the apocryphal words of Friedrich Nietzsche, muddy the water to make it seem deep.

Another approach to constitutional interpretation can dispense with the sovereignty doctrine. Article I, Section 8 lists the powers of Congress. Any power on the list belongs to Congress. Interpreting the list requires defining each of the powers, which can be done in various ways. One mode of interpretation looks at the plain meaning of words in their historical context. To illustrate, the Interstate Commerce Clause can be interpreted according to the contemporary dictionary definition of “commence” as supplemented by historical usage. Beyond plain meaning, interpretation may draw from a law’s purpose, intent, political bargain, past legal doctrine, or applicable political theory.16

These modes of interpretation often define a congressional power without referencing state powers. Gerken rejects all modes of interpretation in which the powers of the Congress stand alone from the powers of the states. Rather, Gerken interprets the enumerated powers of Congress in light of the historical powers of the states. Federal and state legal powers must be defined historically and interdependently. Thus, the federal regulatory powers must be defined by reference to the states’ criminal powers and vice versa.

Gerken believes stand-alone interpretation inevitably causes power to slip away from the states and towards the federal government. She notes that congressional power is explicit in the Constitution whereas state power is residual. When adjudicators explore the logical scope of explicit powers, they extend them over the residual powers. Stand-alone interpretation, in her view, provides no edge to arrest the slide towards more federal power. Unlike stand-alone interpretation, interdependent interpretation of federal and state powers provides edges to resist the slide of power to the center.

Instead of sovereignty or stand-alone interpretation, Gerken approaches problems of interpretation from the viewpoint of the effects of law on people.

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16. This list of resources can be reformulated as principles of interpretation where the best interpretation of a law (i) most satisfies its purposes; (ii) most satisfies the present needs of government; (iii) is the one intended by the lawmakers; (iv) is the deal struck by the lawmakers who created it; or (v) is the one with the best consequences.
Collective action federalism provides a social scientific theory for predicting these effects and thus, complements Gerken’s approach.

CONCLUSION

This Comment identifies and critiques three of Gerken’s claims in *Federalism 3.0*. First, she claims that decentralization can promote progressive legal values, which I term “progressive decentralization.” As evidence, she cites historical contingencies, whereas I consider inherent tendencies. I claim that democracy tends to satisfy the political preferences of the median voter, so federalism is more or less progressive than state spending depending on whether the national median voter lies to the left or right of the state’s median voter. Second, she explains that federal and state powers evolve interdependently, which I term “braided power.” Whereas Gerken thinks that cooperation shapes constitutional powers, like practices in a smooth, long-run contract, I think that federal-state conflict shapes constitutional powers, like threats in a troubled, long-run contract. Third, she argues that federalism should be evaluated primarily based on its effects on people, not its logical consistency. Following this line of reasoning, she jettisons the sovereignty doctrine and stand-alone interpretations of congressional power. I agree but think that predicting the effects of alternative interpretations on people requires more social science, especially the balancing of local knowledge favoring decentralization and collective action problems favoring centralization. Collective action federalism is my constitutional theory that complements Gerken’s Federalism 3.0.

Is Gerken’s Federalism 3.0 better or worse than it sounds? You must decide for yourself. But whatever you decide, Gerken should be delighted if you pose the question, “Is she the Wagner or the Puccini of federalism?”