

## FEDERALISM, DEMOCRACY, AND THE CHALLENGE OF FERGUSON

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

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

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1. Mark Berman, *What Do We Know About the Shooting of Michael Brown, and of Brown Himself?*, WASH. POST, Aug. 12, 2014, at A12, available at <http://www.washingtonpost.com/news/post-nation/wp/2014/08/11/what-you-need-to-know-about-the-death-of-an-unarmed-black-teenager-in-missouri/>; *Tracking the Events in the Wake of Michael Brown's Shooting: Updates on the Events in Ferguson, Mo., Following the Shooting of Michael Brown, an Unarmed Teenager, by a Police Officer on Aug. 9*, N.Y. TIMES (Nov. 24, 2014), [http://www.nytimes.com/interactive/2014/11/09/us/10ferguson-michael-brown-shooting-grand-jury-darren-wilson.html?\\_r=0](http://www.nytimes.com/interactive/2014/11/09/us/10ferguson-michael-brown-shooting-grand-jury-darren-wilson.html?_r=0).

2. Tim Barker, *Cleanup Begins for Businesses Hit by Looters*, ST. LOUIS POST-DISPATCH, Aug. 12, 2014, at A1; David Hunn & Kim Bell, *Why Was Michael Brown's Body Left There for Hours?*, ST. LOUIS POST-DISPATCH (Sept. 14, 2014), <http://www.stltoday.com/news/local/crime->

Ferguson, and the St. Louis County Police Department coordinated a response that included riot gear, tear gas, and military-grade police equipment.<sup>3</sup> Eventually, on August 14, 2014, Missouri Governor Jay Nixon placed the Missouri Highway Patrol in charge of security in Ferguson,<sup>4</sup> and two days later, he declared a state of emergency and a curfew that remained in place until peace was restored.<sup>5</sup> On August 20, 2014, St. Louis County Prosecutor Robert McCullough convened a grand jury to consider charges against Officer Wilson.<sup>6</sup> Roughly three months later, Prosecutor McCullough announced that the grand jury had returned a decision not to indict Officer Wilson, setting off additional protests and another night of violence and destruction.<sup>7</sup>

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and-courts/why-was-michael-brown-s-body-left-there-for-hours/article\_0b73ec58-c6a1-516e-882f-74d18a4246e0.html.

3. Julie Bosman & Matt Apuzzo, *In Wake of Clashes, Calls to Demilitarize Police: Trend for Armor Use Began as Response to 9/11 Attacks*, N.Y. TIMES, Aug. 15, 2014, at A1; Julie Bosman & Emma G. Fitzsimmons, *Grief and Protest Follow Shooting of Teenager: Police Say Officer Killed Unarmed Youth After Confrontation in Missouri Suburb*, N.Y. TIMES, Aug. 11, 2014, at A11; Wesley Lowery, *Police Use Tear Gas on Crowd in Ferguson, Mo. Protesting Teen's Death*, WASH. POST (Aug. 12, 2014), <http://www.washingtonpost.com/news/post-nation/wp/2014/08/12/police-use-tear-gas-on-crowd/>.

4. Mo. Exec. Order No. 14-08 (Aug. 16, 2014), available at [http://www.sos.mo.gov/library/reference/orders/2014/eo14\\_08.pdf](http://www.sos.mo.gov/library/reference/orders/2014/eo14_08.pdf); John Schwartz et al., *Troopers Move in as President Seeks Calm*, N.Y. TIMES, Aug. 15, 2014, at A1.

5. Mo. Exec. Order No. 14-08, *supra* note 4; Scott Neuman, *Mo. Governor Orders State of Emergency, Curfew in Ferguson*, NAT'L PUB. RADIO (Aug. 16, 2014), <http://www.npr.org/blogs/thetwo-way/2014/08/16/340943120/mo-governor-orders-state-of-emergency-curfew-in-ferguson>. Two days later, Governor Nixon mobilized the National Guard and lifted the curfew. *Nixon Taps National Guard to Help Bring Calm in Ferguson*, ST. LOUIS POST-DISPATCH (Aug. 18, 2014), [http://www.stltoday.com/news/local/metro/gov-nixon-taps-national-guard-to-help-bring-calm-in/article\\_1a915292-8ffe-5337-b953-910533e8e448.html](http://www.stltoday.com/news/local/metro/gov-nixon-taps-national-guard-to-help-bring-calm-in/article_1a915292-8ffe-5337-b953-910533e8e448.html); Mark Berman, *Gov. Nixon Lifts Curfew in Ferguson*, WASH. POST (Aug. 18, 2014), <http://www.washingtonpost.com/news/post-nation/wp/2014/08/18/governor-nixon-lifts-curfew-for-ferguson/>. The state of emergency was eventually lifted on September 3. Mo. Exec. Order No. 14-10 (Sept. 3, 2014), available at [http://www.sos.mo.gov/library/reference/orders/2014/eo14\\_10.pdf](http://www.sos.mo.gov/library/reference/orders/2014/eo14_10.pdf); Mark Berman, *Missouri Governor Lifts State of Emergency in Ferguson*, WASH. POST (Sept. 3, 2014), <http://www.washingtonpost.com/news/post-nation/wp/2014/09/03/missouri-governor-lifts-state-of-emergency-in-ferguson/>.

6. Alan Blinder & Campbell Robertson, *As Tension Eases on Ferguson's Streets, Focus Turns to Investigation*, N.Y. TIMES (Aug. 20, 2014), <http://www.nytimes.com/2014/08/21/us/ferguson-missouri-protests.html>; Ben Kesling & Mark Peters, *Prosecutors Present Evidence to Grand Jury in Michael Brown Shooting*, WALL ST. J. (Aug. 20, 2014), <http://www.wsj.com/articles/st-louis-prosecutors-to-present-evidence-to-grand-jury-in-brown-shooting-1408547283>.

7. Monica Davey & Julie Bosman, *Protests Flare After Ferguson Officer Not Indicted*, N.Y. TIMES (Nov. 24, 2014), <http://www.nytimes.com/2014/11/25/us/ferguson-darren-wilson-shooting-michael-brown-grand-jury.html>; Chico Harlan et al., *Ferguson Police Officer Won't Be Charged in Fatal Shooting*, WASH. POST (Nov. 25, 2014), [http://www.washingtonpost.com/politics/grand-jury-reaches-decision-in-case-of-ferguson-officer/2014/11/24/de48e7e4-71d7-11e4-893f-86bd390a3340\\_story.html](http://www.washingtonpost.com/politics/grand-jury-reaches-decision-in-case-of-ferguson-officer/2014/11/24/de48e7e4-71d7-11e4-893f-86bd390a3340_story.html).

In many respects, these events were intensely local. An interaction between a police officer and a citizen is typically featured in the federalism literature as an example of traditional state power.<sup>8</sup> In the old-fashioned rhetoric of dual federalism, police activity falls squarely on the state side of the ledger. And yet Ferguson developed into a national issue, and the cast of characters involved has included many federal actors. To some extent, the federal involvement has been a reflection of the federal government's role in monitoring state activity to ensure compliance with constitutional rights and with federal nondiscrimination and civil rights laws. For example, federal judges were asked to assess speech and assembly claims of individuals involved in protesting<sup>9</sup> and to evaluate the practices of police officials in controlling crowd behavior.<sup>10</sup> Many observers also expected additional federal

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8. *E.g.*, *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1994); ROBERT SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS 21–22 (2009); Jesse H. Choper & John C. Yoo, *The Scope of the Commerce Clause After Morrison*, 25 OKLA. CITY U.L. REV. 843, 846 (2000).

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

10. On December 8, 2014, six plaintiffs filed suit against the St. Louis Metropolitan Police, St. Louis County Police, and the Missouri Highway Patrol in the United States District Court for the Eastern District of Missouri. Temp. Restraining Order at 1, *Templeton v. Dotson*, No. 4:14-cv-2019 (E.D. Mo. Dec. 11, 2014), available at <https://www.documentcloud.org/documents/1378608-templeton-vs-dotson-tro.html>. The suit targeted practices by police forces throughout the region that used tear gas to disperse crowds. *Id.* at 2. On December 11, 2014, Judge Carol Jackson issued a temporary restraining order that enjoined police from using tear gas to disperse lawfully constituted crowds engaged in protected First Amendment activity without providing advance warning and an opportunity to exit. *Id.* at 3–4. For news coverage of the suit, see Mitch Smith, *Judge in St. Louis Orders Limits on Police Tear Gas Use*, N.Y. TIMES (Dec. 11, 2014), <http://www.nytimes.com/2014/12/12/us/judge-in-st-louis-orders-limits-on-police-tear-gas-use-in-ferguson.html>; and Trymaine Lee, *Ferguson Protesters Win Injunctions to Stop Cops Using Tear Gas*, MSNBC (Dec. 11, 2014), <http://www.msnbc.com/msnbc/ferguson-protesters-win-injunction-stop-cops-using-tear-gas>. On January 6, 2015, Judge Jackson extended the initial order for another 45 days. *Missouri Extends Restraining Order Limiting Law Enforcement Use of Teargas*, THE GUARDIAN (Jan. 6, 2015), <http://www.theguardian.com/us-news/2015/jan/06/missouri-extends-restraining-order-reasonable-use-teargas-police>.

claims for civil rights violations to emerge, most notably in the form of a suit by Michael Brown's family against Wilson.<sup>11</sup>

But judicial monitoring of constitutional rights has not been the only axis of federal involvement in Ferguson. The relationship between civil rights and policing has also provided an entry point for the United States Department of Justice to be involved. On September 4, 2014, United States Attorney General Eric Holder initiated a "pattern and practice" inquiry under 42 U.S.C. § 14141 "to determine whether Ferguson Police officials have engaged in a pattern or practice of violations of the U.S. Constitution or federal law."<sup>12</sup> In addition, the Attorney General assigned the Community Oriented Policing Service to conduct a "collaborative reform effort" with the St. Louis County Police Department,<sup>13</sup> and the Community Relations Service has been conducting a series of closed-door meetings with Ferguson residents and officials in an effort to mediate tensions and develop collaborative solutions.<sup>14</sup>

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11. For discussion of that possibility, see Howard Koplowitz, *Will Michael Brown's Family Sue Darren Wilson? Why a Civil Suit Faces Hurdles*, IBTIMES (Dec. 1, 2014), <http://www.ibtimes.com/will-michael-browns-family-sue-darren-wilson-why-civil-suit-faces-hurdles-1731498>; Matt Sledge, *Darren Wilson Could Face Consequences Aside From Grand Jury Decision*, HUFFINGTON POST (Nov. 24, 2014), [http://www.huffingtonpost.com/2014/11/24/darren-wilson-consequences\\_n\\_6213706.html](http://www.huffingtonpost.com/2014/11/24/darren-wilson-consequences_n_6213706.html); and Nicky Woolf, *How Michael Brown's Family Could Still File a Lawsuit Against Darren Wilson*, THE GUARDIAN (Nov. 26, 2014), <http://www.theguardian.com/us-news/2014/nov/26/michael-brown-civil-lawsuit-against-darren-wilson>. On April 23, 2015, Michael Brown's parents did file a civil suit against Wilson and the City of Ferguson, but the suit was based on Missouri's wrongful death statute rather than any federal civil rights statute. Mark Berman, *Michael Brown's Family Files Wrongful Death Lawsuit Against Ferguson*, WASH. POST (Apr. 23, 2015), <http://www.washingtonpost.com/news/post-nation/wp/2015/04/23/michael-browns-family-files-wrongful-death-lawsuit-against-ferguson/>.

12. Eric Holder, Att'y Gen., Dep't of Justice, Remarks at Press Conference Announcing Pattern or Practice Investigation into Ferguson Police Department (Sep. 4, 2014), *available at* <http://www.justice.gov/opa/speech/attorney-general-holder-delivers-remarks-press-conference-announcing-pattern-or-practice>; *see* Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141 (2012) (permitting the Attorney General to bring a civil action to seek equitable or declaratory relief in response to "a pattern or practice of conduct by law enforcement officers . . . that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States"). The results of the Department of Justice inquiry were released on March 4, 2015. DEP'T JUST., DEPARTMENT OF JUSTICE REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON (Mar. 4, 2015), *available at* [http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj\\_report\\_on\\_shooting\\_of\\_michael\\_brown\\_1.pdf](http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown_1.pdf).

13. Holder, *supra* note 12.

14. David Hunn, *The Justice Department's Soft Side: How One Federal Agency Hopes to Change Ferguson*, ST. LOUIS POST-DISPATCH (Oct. 12, 2014), [http://www.stltoday.com/news/local/govt-and-politics/the-justice-department-s-soft-side-how-one-federal-agency/article\\_591a2e64-7dd1-5008-b300-0ab9ad8b9168.html](http://www.stltoday.com/news/local/govt-and-politics/the-justice-department-s-soft-side-how-one-federal-agency/article_591a2e64-7dd1-5008-b300-0ab9ad8b9168.html). The Community Relations Service, which was created

Ferguson has also highlighted ways in which the federal government routinely interacts with the states in the name of pursuing law enforcement goals. One of the ancillary issues emerging from Ferguson concerned the nature of the police response to initial protests after the Michael Brown shooting. St. Louis County Police patrolled the streets of Ferguson using military-grade equipment, and images of heavily armed police officers confronting protesters with weapons drawn were widely circulated and almost as widely criticized.<sup>15</sup> Many wondered why police even owned much of the equipment on display in Ferguson and were surprised to learn that the equipment was actually supplied by the federal government. Under the Department of Defense's Excess Property Program, or 1033 Program, military-grade equipment that is no longer needed for military purposes may be transferred to state and local police departments to further federal law enforcement goals such as the war on drugs or anti-terrorism.<sup>16</sup> The Department of Homeland Security and the Department of Justice also have significant grant programs that supply funding for equipment and training to local law enforcement agencies.<sup>17</sup> After the initial protests in Ferguson, these

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as part of the Civil Rights Act of 1964, has no "prosecutorial" or "law enforcement authority." *Community Relations Service*, DEP'T JUST., <http://www.justice.gov/crs> (last visited Apr. 5, 2015).

15. See *supra* notes 3–5 and accompanying text. For other criticisms of the police response, see Paul Szoldra, *This Is the Terrifying Result of the Militarization of Police*, BUS. INSIDER (Aug. 12, 2014), <http://www.businessinsider.com/police-militarization-ferguson-2014-8>; and Jamelle Bouie, *The Militarization of the Police*, SLATE (Aug. 13, 2014), [http://www.slate.com/articles/news\\_and\\_politics/politics/2014/08/police\\_in\\_ferguson\\_military\\_weapons\\_threaten\\_protesters.html](http://www.slate.com/articles/news_and_politics/politics/2014/08/police_in_ferguson_military_weapons_threaten_protesters.html).

16. The 1033 Program was created in its present form in the National Defense Authorization Act of Fiscal Year 1997. National Defense Authorization Act for Fiscal Year 1997, H.R. 3230, 104th Cong. § 1033 (1996). Since 1997, more than 8,000 federal and state law enforcement agencies have participated in the program. *Frequently Asked Questions (FAQs)*, DEF. LOGISTICS AGENCY: DISPOSITION SERVICES, <http://www.dispositionservices.dla.mil/leso/Pages/1033ProgramFAQs.aspx> (last visited Apr. 5, 2015). The total value of the equipment transferred under the program totals more than \$5 billion. *About the 1033 Program*, DEF. LOGISTICS AGENCY: DISPOSITION SERVICES, <http://www.dispositionservices.dla.mil/leso/Pages/default.aspx> (last visited Apr. 5, 2015). For additional information on the 1033 Program, see RADLEY BALKO, *THE RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA'S POLICE FORCES* (2014); and Arezou Rezvani, et al., *MRAPs and Bayonets: What We Know About the Pentagon's 1033 Program*, NPR (Sep. 2, 2014), <http://www.npr.org/2014/09/02/342494225/mraps-and-bayonets-what-we-know-about-the-pentagons-1033-program>. On the role of the 1033 Program in Ferguson, see Taylor Wofford, *How America's Police Became an Army: The 1033 Program*, NEWSWEEK (Aug. 13, 2014), <http://www.newsweek.com/how-americas-police-became-army-1033-program-264537>.

17. The Department of Homeland Security provides grants primarily through the Federal Emergency Management Agency's Homeland Security Grant Program. In fiscal year 2014, this program awarded more than \$1 billion in grant funds to law enforcement agencies in all fifty states either "to build capabilities to prevent, protect against, mitigate, respond to, and recover from terrorist attacks, disasters, and other incidents" or "to enhance cooperation and coordination

programs came under intense scrutiny. The President ordered a review,<sup>18</sup> the Senate held hearings,<sup>19</sup> and in a rare display of bipartisanship, members of Congress ranging from Claire McCaskill to Tom Coburn to Rand Paul were vocal in their criticism of these federal-state partnerships.<sup>20</sup>

Taken together, all of this supports Professor Gerken's point that as a descriptive matter, we live in a hopelessly blended world. Dual federalism is indeed dead, and even our "traditional areas of state concern" are increasingly characterized by a complex set of relationships between federal and state

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among local, tribal, territorial, state and federal law enforcement agencies to secure the United States' borders." EXEC. OFFICE OF THE PRESIDENT, REVIEW: FEDERAL SUPPORT FOR LOCAL LAW ENFORCEMENT EQUIPMENT ACQUISITION 14 (2014), available at [http://www.whitehouse.gov/sites/default/files/docs/federal\\_support\\_for\\_local\\_law\\_enforcement\\_equipment\\_acquisition.pdf](http://www.whitehouse.gov/sites/default/files/docs/federal_support_for_local_law_enforcement_equipment_acquisition.pdf). The Department of Justice provides grants primarily through the Edward Byrne Memorial Justice Assistance Grant Program. *Id.* at 10. In fiscal year 2014, this program was allocated \$290 million for grants to law enforcement agencies "to support a range of program areas, including law enforcement operations." *Id.* For a thorough description of federal grant programs associated with law enforcement, see *id.* at 7–19.

18. David Nakamura & Niraj Chokshi, *Obama Orders Review of Military Equipment Supplied to Police*, WASH. POST (Aug. 23, 2014), [http://www.washingtonpost.com/politics/obama-orders-review-of-military-equipment-supplied-to-police/2014/08/23/6316b8aa-2b03-11e4-8593-da634b334390\\_story.html](http://www.washingtonpost.com/politics/obama-orders-review-of-military-equipment-supplied-to-police/2014/08/23/6316b8aa-2b03-11e4-8593-da634b334390_story.html). On December 1, 2014, the White House released the results of that review in a report titled *Review: Federal Support for Local Law Enforcement Equipment Acquisition*. EXEC. OFFICE OF THE PRESIDENT, *supra* note 17. In response to Ferguson, President Obama has also announced the creation of a Task Force on 21st Century Policing and a proposal to spend \$263 million in federal funds to purchase body cameras for state and local police officers. David Hudson, *President Obama Creates the Task Force on 21st Century Policing*, WHITE HOUSE BLOG (Dec. 18, 2014, 5:28 PM), <http://www.whitehouse.gov/blog/2014/12/18/president-creates-task-force-21st-century-policing>; Justin Sink, *Obama to Provide Funding for 50,000 Body Cameras*, THE HILL (Dec. 1, 2014, 1:00 PM), <http://thehill.com/homenews/administration/225583-obama-to-provide-funding-for-50000-police-body-cameras>. For coverage and criticism of the White House reform proposals, see Mark Landler, *Obama Offers New Standards on Police Gear*, N.Y. TIMES, Dec. 2, 2014, at A1.

19. Matt Apuzzo, *Senate Studies Police Use of Military Gear*, N.Y. TIMES, Sept. 10, 2014, at A17; Niraj Chokshi & Sarah Larimer, *Ferguson-Style Militarization Goes on Trial in the Senate*, WASH. POST (Sept. 9, 2014), <http://www.washingtonpost.com/blogs/govbeat/wp/2014/09/09/ferguson-style-militarization-goes-on-trial-in-the-senate/>; *Police Use of Military Equipment* (C-SPAN television broadcast Sept. 9, 2014), available at <http://www.c-span.org/video/?321337-1/hearing-militarization-police-forces>.

20. Tim Devaney, *Senators Blast DOD Program That 'Militarized Police'*, THE HILL (Sept. 9, 2014), <http://thehill.com/regulation/217136-senators-blast-dod-program-to-militarize-police>; Rand Paul, *Rand Paul: We Must Demilitarize the Police*, TIME (Aug. 14, 2014), <http://time.com/3111474/rand-paul-ferguson-police/>; Emma Roller, *Senators Find Bipartisanship in Being Pissed Off About Police Militarization*, NAT'L J. (Sept. 9, 2014), <http://www.nationaljournal.com/congress/senators-find-bipartisanship-in-being-pissed-off-about-police-militarization-20140909>.

entities, to the point where it no longer seems useful to argue about how we might protect states by vigorously defending their sovereign domains.<sup>21</sup>

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

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

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

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

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

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

24. Compare Armando, *Ferguson and the Department of Justice*, DAILY KOS (Sept. 1, 2014), <http://www.dailykos.com/story/2014/09/01/1325614/-Ferguson-and-the-Department-of-Justice#> (“Justice has been much too slow and timid in investigating the practices of local law enforcement regarding the Ferguson demonstrations.”), with Paul Callan, *Justice Department Jeopardizes Ferguson Case*, CNN.COM (Sept. 9, 2014), <http://www.cnn.com/2014/09/09/opinion/callan-justice-department-jeopardizes-ferguson-case/> (“The Department of Justice is likely to be impeding justice by proceeding prematurely with a federal investigation while local law enforcement authorities struggle with the facts of the complex and controversial case.”).

Should Prosecutor McCullough have been permitted to run the grand jury to determine whether to bring an indictment, or should the governor have appointed a special prosecutor?<sup>25</sup> Should the St. Louis County Police Department have been left to control the scene in Ferguson in the immediate aftermath of Brown's death, or was it appropriate for the State Highway Patrol to have been called in?<sup>26</sup> Was it appropriate for the Governor to mobilize the National Guard in anticipation of the grand jury announcement, and were those resources used in a way that successfully complemented the local police forces?<sup>27</sup>

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

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25. See Ed Silverstein, *Attorneys, Law Professors Weigh in on Whether McCulloch Should Step Aside in Fatal Shooting Case*, INSIDE COUNS. (Aug. 21, 2014), <http://www.insidecounsel.com/2014/08/21/attorneys-law-professors-weigh-in-on-whether-mccul> (discussing contrasting viewpoints in the debate over whether Prosecutor McCulloch should step aside).

26. Compare Leslie Savan, *Is Ferguson's Ron Johnson the New Captain America?*, THE NATION (Aug. 16, 2014), <http://www.thenation.com/blog/181297/media-fergusons-ron-johnson-new-captain-america#> ("[T]here's no denying the service Johnson has done for his community by defusing an apparent police riot that had gone on for most of a week."), with Kim Bell, *DAY FIVE WRAPUP: McCulloch Blasts Nixon for Replacing St. Louis County Police Control*, ST. LOUIS POST-DISPATCH (Aug. 14, 2014), [http://www.stltoday.com/news/local/crime-and-courts/day-five-wrapup-mcculloch-blasts-nixon-for-replacing-st-louis/article\\_0806541b-ed48-5d06-9267-323531ad6cf1.html](http://www.stltoday.com/news/local/crime-and-courts/day-five-wrapup-mcculloch-blasts-nixon-for-replacing-st-louis/article_0806541b-ed48-5d06-9267-323531ad6cf1.html) (discussing Prosecutor McCulloch's statements critiquing Nixon's decision to displace the St. Louis County Police).

27. See Paul D. Shinkman, *In Ferguson, Was It Wise to Deploy the National Guard?*, U.S. NEWS (Nov. 25, 2014), <http://www.usnews.com/news/articles/2014/11/25/ferguson-tensions-potentially-heightened-by-missouri-national-guard> (calling into question the benefits of activating the National Guard); see also Christine Byers & David Hunn, *Ferguson Mayor Asks Where National Guard Was; Gov. Nixon Pledges More*, ST. LOUIS POST-DISPATCH (Nov. 26, 2014), [http://www.stltoday.com/news/local/crime-and-courts/ferguson-mayor-asks-where-national-guard-was-gov-nixon-pledges/article\\_343a2224-4d61-54fb-b5ac-a13ea99951f7.html](http://www.stltoday.com/news/local/crime-and-courts/ferguson-mayor-asks-where-national-guard-was-gov-nixon-pledges/article_343a2224-4d61-54fb-b5ac-a13ea99951f7.html) (discussing criticism levied against Governor Nixon after the National Guard failed to prevent the looting and burning of businesses and property in Ferguson).

28. See Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077 (2014) (providing a "framework of partisan federalism highlight[ing] the mutual entailment of nationalism and federalism in the early twenty-first century").

doing so in the service of a special Missouri interest at stake that warrants protection. Rather, they are asserting a national interest—an interest in aggressively fighting crime—that conflicts with another national interest—an interest in equal protection and in protecting civil rights.<sup>29</sup> Federalism just provides the canvas for that partisan warfare to take place.<sup>30</sup>

Now, let me to turn to what is perhaps the core argument put forward by Professor Gerken in her attempt to establish a *détente*. Contrary to what is often explicitly stated or assumed by proponents of nationalism, Professor Gerken presses the descriptive point that the devolution of power away from the federal government (or, the “center”) does not always equate to a diminution of federal power or an erosion of federal interests.<sup>31</sup> Instead, “devolution can further *nationalist* aims.”<sup>32</sup> Federalism can be a means to nationalist ends—thus, the nationalist school of federalism.

The justifications for this claim are numerous and are recounted eloquently in Professor Gerken’s Article.<sup>33</sup> For present purposes, I want to emphasize one: the “discursive benefits of structure.”<sup>34</sup> The core idea is that decentralized locations of power can provide additional points of contact at which citizens can engage with the government, and that those multiple points of contact can, in Cristina Rodriguez’s phrase, “simultaneously shape political consensus and channel ideological diversity.”<sup>35</sup>

Some of what we have seen in response to the events of Ferguson may be viewed through this lens. State and local structures have certainly served as sites of contestation and pluralist competition, and they have arguably facilitated interactions and conversation that may not have occurred through federal channels alone. That said, there is a dimension to the Ferguson experience that is deeply at odds with the descriptive account. As part of the “discursive benefits of structure,” Professor Gerken posits that federalism can benefit racial minorities and dissenters by providing them with localized opportunities to “turn the tables” and wield the power of the majority.<sup>36</sup> This is

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

30. Jessica Bulman-Pozen, *From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism*, 123 YALE L.J. 1920, 1923 (2014) (“National political conflict is drawn on the canvas of the states.”).

31. Gerken, *New Nationalism*, *supra* note 22, at 1890–1905.

32. Gerken, *supra* note 21, at 1001.

33. *Id.* at 1001–07.

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

35. Cristina M. Rodriguez, *Negotiating Conflict Through Federalism: Institutional and Popular Perspectives*, 123 YALE L.J. 2094, 2099 (2014).

36. Gerken, *New Nationalism*, *supra* note 22, at 1898; Heather K. Gerken, *The Loyal Opposition*, 123 YALE L.J. 1958, 1985 (2014).

an account that runs counter to the traditional narrative of the nationalists that casts federalism as a threat to minority rights.<sup>37</sup> It is an account that preferences insider status and the ability to exercise real power (even if subject to override) over tokenism that allows minorities to always be present but never to rule.<sup>38</sup> And it is an account that sets up structure as a companion to rights in the quest to further the federal project of protecting and empowering minorities.<sup>39</sup>

One might expect that St. Louis County would be Exhibit A for this vision of decentralization as empowerment. St. Louis County is characterized by a highly fractured set of governance sites.<sup>40</sup> And unlike in the federal context, where redistricting can distort the effects of shifts in residential patterns, the electoral boundaries for municipalities are (relatively) fixed. Thus, if residential patterns shift, electoral power should shift with it. The structure of St. Louis County government therefore seems well-suited to produce plentiful opportunities for minorities to be cast in the role of insider, to protect themselves through politics rather than through courts, and to build loyalty and promote civic identity.

And yet the experience in Ferguson does not bear that out. At the time of the Michael Brown shooting, roughly two-thirds of Ferguson's residents were African American.<sup>41</sup> But the mayor of Ferguson was white, five of six City Council members were white, the police force was overwhelmingly white, and six of seven members of the school board (which also includes parts of nearby Florissant) were white.<sup>42</sup>

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37. See, e.g., WILLIAM H. RIKER, *FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE* 155 (1964) ("If one disapproves of racism, one should disapprove of federalism."); see also Jesse H. Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 *YALE L.J.* 1552, 1618 (1977) (discussing the negative effects upon minority participation and power of federalism on a local scale).

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

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

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

41. German Lopez, *Why Ferguson's Government Is So White*, *VOX* (Aug. 14, 2014), <http://www.vox.com/2014/8/14/6003793/why-is-fergusons-local-government-so-white/in/5757650>.

42. See Ian Millhiser, *This Is the Most Important Reform Ferguson Can Enact to Give Its Black Residents a Voice*, *THINK PROGRESS* (Aug. 18, 2014), <http://thinkprogress.org/justice/2014/08/18/3472278/this-is-the-most-important-reform-ferguson-can-enact-to-prevent-another-stand-off/> (describing the racial composition of the municipal government in Ferguson); Tanzina Vega & John Eligon, *Deep Tensions Rise to Surface After Shooting*, *N.Y. TIMES*, Aug. 17, 2014, at A1

Much of the concern recently expressed by residents of Ferguson relates to their feeling that their government—their municipal government—is not responsive to their needs or respectful of their rights.<sup>43</sup> And the actions taken in response to the events there have largely been the actions of outsiders. Rather than being in the position of a minority who feels oppressed by the tyranny of the majority, what has been expressed by residents of Ferguson are the frustrations of a majority who feels oppressed by the tyranny of the minority.

Why has this occurred? Part of the story may be the relatively rapid changes in demographics in the area. In 1990, Ferguson was seventy-four percent white; in 2000, it was fifty-two percent black; and in 2010, that new black majority had risen to sixty-seven percent.<sup>44</sup> Because elections are occasional events, it may take time for electoral outcomes to catch up to the reality on the ground. More importantly, however, this is a story of turnout. Like many municipalities across the country, Ferguson holds municipal elections in odd-numbered years, and it holds them in April rather than November.<sup>45</sup> One result of this scheduling is to substantially reduce voter turnout.<sup>46</sup> Consider: in the 2012 general election, voter turnout in Ferguson was somewhere around fifty-four percent, but in the 2013 municipalities election a few months later, turnout was a relatively paltry 11.7%.<sup>47</sup> This alone might be cause for some concern. Even more concerning is the fact that this reduction is far from uniform. Although Missouri does not track the race of voters, fairly sophisticated modeling suggests that the turnout among black and white voters was almost identical in the general election—fifty-five percent for whites and

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(describing the racial composition of the school board). The municipal election held on April 7, 2015 changed some of that. Two black city council candidates were elected, bringing the total number on the council to three. John Elegon, *Ferguson Elects 2 Blacks to City Council, but Rejects Activist Candidates*, N.Y. TIMES (Apr. 7, 2015), <http://www.nytimes.com/2015/04/08/us/ferguson-adds-blacks-to-city-council-but-rejects-activist-candidates.html>.

43. Vega & Eligon, *supra* note 42, at A22.

44. Jeff Smith, *Black Town, White Power*, N.Y. TIMES, Aug. 18, 2014, at A19.

45. FERGUSON, MO., CODE § 7.1.1 (2014), available at [https://www.municode.com/library/mo/ferguson/codes/code\\_of\\_ordinances?nodeId=PTICH\\_ARTVIIELNO\\_S7.1CIEL](https://www.municode.com/library/mo/ferguson/codes/code_of_ordinances?nodeId=PTICH_ARTVIIELNO_S7.1CIEL); Brian Schaffner et al., *How Ferguson Exposes the Racial Bias in Local Election*, WASH. POST (Aug. 15, 2014), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/08/15/how-ferguson-exposes-the-racial-bias-in-local-elections/>.

46. See ZOLTAN L. HAJNAL ET AL., PUB. POL'Y INST. OF CAL., MUNICIPAL ELECTIONS IN CALIFORNIA: TURNOUT, TIMING, AND COMPETITION vii–viii (2002), available at [http://www.ppic.org/content/pubs/report/R\\_302ZHR.pdf](http://www.ppic.org/content/pubs/report/R_302ZHR.pdf) (finding that timing of municipal elections dramatically affects turnout).

47. Zachary Roth, *Ferguson's Lack of Diversity Goes Way Beyond Its Cops*, MSNBC (Aug. 14, 2014), <http://www.msnbc.com/msnbc/ferguson-lack-diversity-goes-way-beyond-its-cops>; Schaffner et al., *supra* note 45 (voter turnout was fifty-four percent for whites and fifty-five percent for blacks).

fifty-four percent for blacks.<sup>48</sup> In the municipal election, on the other hand, turnout was both much lower and dramatically skewed—seventeen percent for whites and only six percent for blacks.<sup>49</sup> This three-to-one difference in turnout is enough to overcome the two-to-one difference in overall population, meaning that whites constituted the majority of voters in the municipal elections.<sup>50</sup> There are a number of potential explanations for this discrepancy in turnout. First, the rapid shift in demographics in Ferguson is reflected in the average age of the white and black population. The white population is older, and older citizens tend to vote more regularly.<sup>51</sup> Patricia Bynes, the Democratic committeewoman for Ferguson, and others have also pointed to the transience of the minority population in Ferguson as an explanation for why blacks may be less inclined to participate in local elections.<sup>52</sup> This explanation is roughly consonant with William Fischel’s “homevoter hypothesis,” which posits that homeowners are more likely to vote than renters in local elections because they are more invested in the community.<sup>53</sup> If homeownership is not evenly distributed across races—and it is not in Ferguson or many other places<sup>54</sup>—

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48. Schaffner et al., *supra* note 45.

49. *Id.*

50. *Id.*

51. Millhiser, *supra* note 42 (“Ferguson’s white population tends to be older than its black population, and older voters tend to turnout at higher rates than younger voters.”); see Paul Taylor & Mark H. Lopez, *Six Take-aways From the Census Bureau’s Voting Report*, PEW RES. CENTER (May 8, 2013), <http://www.pewresearch.org/fact-tank/2013/05/08/six-take-aways-from-the-census-bureaus-voting-report/> (showing higher voting rates by older voters).

52. Vega & Eligon, *supra* note 42, at A22.

53. WILLIAM A. FISCHEL, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* 4 (2001). For discussions of how rates of home ownership interacts with voting in Ferguson, see Rick Hills, *Does Ferguson Show That Fischel’s Homevoter Hypothesis Undermines Minority Power?*, PRAWFSBLAWG (Aug. 17, 2014, 8:00 AM), <http://prawnsblawg.blogspot.com/prawnsblawg/2014/08/does-ferguson-show-that-decentralization-has-failed-to-protect-minority-power.html>; and Roth, *supra* note 47 (discussing the black community’s low rates of homeownership and relative newcomer status in Ferguson).

54. According to information from the 2012 American Community Survey, the homeownership rate in Ferguson is forty-six percent for blacks and eighty-five percent for whites. Randal O’Toole, *What Ferguson Means for Urban Planning*, REAL CLEAR POL’Y (Aug. 21, 2014), [http://www.realclearpolicy.com/blog/2014/08/21/what\\_ferguson\\_means\\_for\\_urban\\_planning\\_1050.html](http://www.realclearpolicy.com/blog/2014/08/21/what_ferguson_means_for_urban_planning_1050.html). This disparity is replicated nationally. For example, the most recent data available shows an overall homeownership rate of 72.6% for non-hispanic whites, 45.6% for Hispanics, and 42.9% for blacks. U.S. CENSUS BUREAU, *RESIDENTIAL VACANCIES AND HOMEOWNERSHIP IN THE THIRD QUARTER 2014* tbl.7 (2014), available at <http://www.census.gov/housing/hvs/files/currenthvspress.pdf>. For a chart of this rate over time, see U.S. CENSUS BUREAU, *QUARTERLY HOMEOWNERSHIP RATES BY RACE AND ETHNICITY OF HOUSEHOLDER FOR THE UNITED STATES: 1994–2013*, available at <https://www.census.gov/housing/hvs/data/charts/fig08.pdf>.

then this hypothesis has implications for the demographics of who actually votes in local elections relative to the voting population.<sup>55</sup>

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

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

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

56. Hills, *supra* note 53.

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

58. Gerken, *The Loyal Opposition*, *supra* note 36, at 1976 (quoting SHEL SILVERSTEIN, *Almost Perfect, in A LIGHT IN THE ATTIC* (1981)).

59. Gerken, *supra* note 21, at 1000.

