

America's Other Election

Gary Gerstle

DISSENT · FALL 2016

It is time we reckoned with the cost of the country's Trump obsession—not simply in distorting politics at the national level but in taking our gaze away from what is going on in the states. There, another election is being held in November and then another in 2018, and the stakes are high. Democrats and Republicans are vying to turn as many states as possible to their partisan advantage. Barring a collapse of the Trump campaign, Republicans stand to win many more of these contests than Democrats.

States have again become what U.S. Supreme Court Justice Louis Brandeis once called them almost a hundred years ago—laboratories of democracy. Battles on significant issues are being fought out within their borders: whether or not to legalize marijuana; whether or not to raise the minimum wage; what restrictions can be placed on a woman's right to an abortion; whether to preserve or curtail the collective bargaining rights of public-sector employees; whether or not transgender people will be allowed to use the bathroom of their chosen gender; whether small business owners must serve gay customers; how to reconfigure the electorate in terms of districting and protection (or lack thereof) of minority voting rights; whether or not states and cities should tax sugar and other substances harmful to health.

That these battles are being waged with such intensity reflects the historic importance of the states in the American federal system. The federal government and the Supreme Court, in particular, reined in states' rights in the 1960s, as part of their campaign to insure that minorities and women had full access to the liberties guaranteed by the Constitution. But the states did not die. Constitutionally, they retain broad powers to legislate for the good and welfare of their little commonwealths.

Moreover, states have recently resurged in power and ambition. The causes are threefold: first, a Republican-induced paralysis of the federal government; second, the desire of the Roberts Court to reduce the federal government's ability to police the states; and third, the confounding political effects of *Citizens United*, which has impelled America's frustrated

plutocrats to shift a good deal of their spending from the federal to the state arena.

The paralysis of the federal government may well be the defining political feature of our time. Obama does not have a single significant legislative achievement to show for his last six years in office. Dozens of Republican “irreconcilables” in the House of Representatives are the key obstructionists. They represent districts that have been gerrymandered to favor Tea Party voters who insist on puritanical adherence to conservative Republican principles. These representatives want to shrink the size of the federal government to the point where, in Grover Norquist’s memorable phrase, they could “drown it in a bathtub.”

They are not powerful enough to get their agendas adopted, but they are strong enough to stop most of what they do not like. And they do not mind paralyzing the federal government or shutting it down, for such stances, they believe, will demonstrate either the inefficacy of the central state or its irrelevance. Pushing the federal government to the sidelines impels those concerned about problem-solving and progress in the United States to look elsewhere for a way forward. It is natural, in a federal system, to look toward the states.

The Supreme Court’s 2012 ruling on the Affordable Care Act (ACA) has also encouraged this turn toward the states. While the decision to uphold the act did legitimate an important expansion in federal government power (making John Roberts a target of conservative fury), it simultaneously diminished the ability of the central government to conscript states into its policy initiatives. The ACA, in its original form, required the states to provide their poorest citizens with insurance by expanding their Medicaid programs. But the Supreme Court ruled that the federal government could not impose this expansion on the states, even if the feds agreed to pick up most of the tab. The states, Roberts declared, are “independent sovereigns in our federal system,” and their sovereignty must be protected. Failure to do so would turn “the two-government system established by the Framers” into “a system that vests power in one central government, and individual liberty would suffer.”

The immediate effect of this ruling was to permit states to opt out of the Medicaid-administered part of the ACA, with the consequence that poor people living in those states are denied access to health insurance that the legislation had authorized for them. Many Republican-controlled states have chosen this option. But the more significant effect was to give state legislators permission to once again imagine their polities as “independent sovereigns” over which the federal government had only limited control. This permission is a much more significant development than it was understood to have been at the time of the 2012 ruling. It is encouraging states to take the initiative on social and economic policy in ways they have not in a long time; as these initiatives harden into habit and precedent,

future federal governments and courts may find it difficult to discipline the states in the interests of Washington-generated policy. Roberts may yet be restored to an honored place in the conservative pantheon.

The final factor driving the turn toward the states is the 2010 *Citizens United* decision, which removed restrictions on contributions from wealthy individuals to political action committees. The money flooding into politics has increased as anticipated, but it has not enlarged elite control of politics, at least not at the presidential level. In 2012 Mitt Romney had to tack hard right for months to defeat the likes of Rick Santorum and Newt Gingrich, each kept in the race by the backing of a mega-wealthy donor. By the time Romney had cleared the field of these rivals, it was too late for him to regain his footing in the political center where the general election needed to be fought. This year, several candidates relied on the outsize donations of particular moguls, Marco Rubio, Ted Cruz, and Scott Walker among them.

Thwarted at the presidential level, the moneyed men began to wonder whether they might achieve better yields in the states. Mechanisms for doing so had been in place for decades. Conservative activist Paul Weirich launched the American Legislative Exchange Council (ALEC) in 1973 to develop and disseminate legislation that could be used by conservatives in state legislatures throughout the country. In 1992 Thomas Roe, a conservative construction multimillionaire, founded the State Policy Network (SPN) to support and link state-level think tanks across the nation.

In this century, moneyed elites have significantly increased their investments in these federated organizations, encouraging them to ramp up the production of conservative policy and statutes, to design campaigns to implement them in conservative states, and then to distribute news of successful ventures to their affiliates across the country. As Jane Mayer has shown in *Dark Money*, this campaign has been vast, efficient, and consequential. The Koch brothers are at its center, pouring their own money into it and strong-arming their wealthy conservative confreres into doing the same.

The Kochs' overarching goal is to create one-party states, where the GOP controls the governorship and both houses of the state legislature, enabling it to decisively influence government policy on a wide range of matters. The electoral and policy results in Wisconsin and North Carolina have demonstrated what these state investments can generate. In Wisconsin, Republican governor Scott Walker led a successful campaign to break the power of public-sector unions, slash taxes, and defund institutions, such as the University of Wisconsin, regarded by the right as bastions of liberalism. In North Carolina, an ascendant conservative coalition cut taxes, limited women's access to abortions, denied transgendered individuals the right to use the bathroom of their chosen gender, eviscerated state environmental law, cut unemployment benefits, turned away ACA Medicaid subsidies, and shrank support for the state's public university system.



In Wisconsin, full Republican control over the governorship and both houses of the state legislature has allowed governor Scott Walker to break the power of public-sector unions, slash taxes, and defund higher education. Photo by Jonathan Hartsaw.

Republicans currently control the governorship and state legislatures in twenty-three states, up from nine in 2010; Democrats, by contrast, enjoy “trifecta” monopolies in only seven. The ambition of the GOP in each of their trifecta polities is to reproduce the results it has already achieved in Wisconsin and North Carolina. Linked by ALEC and SPN, and lavishly supported by the Koch conservative network, the GOP organizations are well positioned to establish and sustain these state-level political monopolies. Meanwhile, a separate, nation-spanning, conservative organization, Americans United for Life, is spearheading a state-by-state campaign to curtail, even eliminate, the right to an abortion. In 2015 seventeen states passed fifty-seven laws to curtail abortion rights; in 2016, fourteen states passed thirty additional laws. A recent Supreme Court ruling has slowed the advance of this anti-abortion initiative. Yet, its progress so far has already demonstrated what monopolies on state power can achieve in the realm of social policy.

For conservatives, the turn toward the states has been relatively easy; they have always been suspicious of Washington-based power, and long nurtured a fondness for “states’ rights.” For liberals, a turn toward the states is a more wrenching proposition. States in the liberal imagination are the historical enemies of civil rights, reproductive choice, and religious freedom. The federal government, by contrast, is revered among liberals for its role in freeing major groups of citizens—racial minorities, women, and

Catholics and Jews—from the clutches of discriminatory state laws. Nevertheless, liberals themselves have been pivoting to the states in the hope that they, too, would find opportunities there currently denied to them in a paralyzed Washington.

The campaign to legalize gay marriage has demonstrated how well such a strategy can work. Its architects sought to develop support for gay marriage in the legislatures and courts of various states rather than to take their case directly to Congress or to the Supreme Court. These campaigns resulted in the legalization of same-sex marriage in thirty-seven states and the District of Columbia between 2004 and 2015, making it a *fait accompli* in the nation before the Supreme Court blessed it constitutionally in *Obergefell v. Hodges* in 2015.

Other progressive initiatives in the states, most notably campaigns to legalize marijuana and raise the minimum wage, are now underway. Four states have legalized marijuana thus far, with one of those states (Oregon) being a Democratic one-party state, and two more (Colorado and Washington) being within one state senatorial seat each of achieving that status. Many states are in the process of raising minimum-wage laws, with the most impressive campaigns occurring in California and New York, both of which have committed to implementing a \$15-an-hour minimum wage—more than double the current federal minimum wage—by the early 2020s. California is a Democratic one-party state, and New York is within one Senate seat of becoming so. Each of these campaigns has the potential to sweep through many more states, should the Democrats improve their state showings. The political effects of such a sweep would be major. Battles to legalize marijuana are stimulating a radical rethinking of America's failed drug and incarceration policies. The campaign for a higher minimum wage may re-energize a listless American labor movement.

Building a progressive political movement via the states will not be easy. Conservative success rests on systems of national coordination more advanced and comprehensive than what progressives currently possess, and on a much deeper commitment on the part of donors to funding state initiatives. Conservatives also turn out their people in higher numbers than Democrats do in off-year elections, which gives them an advantage in the legislative redistrictings that occur in those elections' aftermath. Their success in the 2010 elections allowed them to multiply the number of safe Republican districts in numerous states and thus to lock in their state-level political advantage for the long term. The Democrats should do better in the redistricting that will follow the 2020 election, when blue voters will turn out in greater numbers to gain the White House for their nominee.

The Republicans' achievement in the states is partially rooted in political conviction, namely that governing power should be drained away from Washington and returned to the states. But it is also rooted in culture. Republicans like to associate themselves with the heartland while

progressives prefer the cosmopolitanism of the coasts and of the great interior cities such as Chicago. Washington fires the imagination of progressives not just because of its historical role in securing collective-bargaining rights, civil rights, and reproductive freedom, but also because of its location in the country's premier metropolitan corridor, which now runs from northern Virginia through Philadelphia and New York to Boston. Progressives want to live and labor in this bigger world; the opportunity to reside and work in a state capital—in Springfield, Illinois, in Little Rock, Arkansas, or even in Albany, New York, does not appeal in the same way. Nor does the day-to-day political work that must be done in numerous small towns in order to secure progressive-friendly state legislatures. It is unlikely we will ever discover Thomas Frank knocking on doors in Topeka, even if his native state of Kansas should recover the radical luster whose passing he famously mourned.

A new progressivism has taken root in second-tier heartland cities such as Nashville, which elected a left-leaning Democrat, Megan Barry, in 2015. This is an encouraging development, reflecting the degree to which southern cities are themselves changing as their economic dynamism draws Americans from across the country and immigrants from abroad, and as certain aspects of progressivism, such as gay rights, are convulsing southern culture in unexpected ways. But Nashville's progressivism has thus far made little headway in Tennessee, where both houses of the state legislature and the governorship are firmly in the hands of arch-conservative Republicans, and are likely to remain so for a long time. The rippling outwards of progressive politics from urban districts has proceeded further in Virginia, where legislators in the capital of Richmond must now reckon with the demographic and electoral weight of the state's urban northeast. Moreover, the 2016 Bernie Sanders presidential campaign has demonstrated that issues of economic inequality can cut across the cosmopolitan-heartland divide in promising and unexpected ways. Whether the bridge-building that Sanders facilitated can continue now that his charismatic personality is no longer at the center of the movement he launched, and whether his campaign against concentrated wealth and power can be repurposed to make it relevant to state-level political battles, are key challenges that progressives will face over the next few years.

Rolling back Republican domination in the states will not be easy. But it is a battle that must be joined.

Gary Gerstle is the author, most recently, of Liberty and Coercion: The Paradox of American Government from the Founding to the Present (Princeton University Press, 2015), from which a small part of this essay is drawn. He teaches at the University of Cambridge.