

**General Theory of Federalism:  
What the Ostroms Can Teach Us about How State Attorneys General  
Can Continue to Contribute to Polycentric Governance**

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I'm honored to have been invited to speak to this gathering. I must say I'm a bit out of my element, since I'm a political scientist, with no zero legal training!

I'm here to speak to you about something I do know pretty well, and that's a perspective on questions of federalism and constitutionalism developed by my colleagues Vincent and Elinor Ostrom, at the Ostrom Workshop.

You and your colleagues across the nation have become an important new force in national politics. After being invited, I did some background reading on the position of State Attorneys General, and have come to a deep appreciation of the unique contributions being made by you all on important matters of policy.

As a political scientist I had heard of the tobacco settlement, and especially with state participation in court cases against various aspects of the 2010 health reform package known colloquially as ObamaCare. But in my preparation for these remarks I began to see that the increasingly routine pattern of cooperation among state attorneys general in using federal courts to push for practical solutions to complex policy problems that, for whatever reason, had not been adequately resolved at the national level, that this was in some ways a natural extension of federalism as experienced in the U.S., but in other ways amounted to a more profound transformation of the political landscape.

I'd like to take this opportunity to explain what I mean by that assertion.

As you all know so well, from the very beginning of the American republic, state and national level governments have been engaged in an interesting (and changing) mixture of confrontation and collaboration in virtually all areas of public policy. At first glance, by working together to pursue court cases it may look like you are simply executing an end-run around partisan gridlock at the national level, forcing action and often achieving important results. This, in itself, is an important accomplishment, even if some recent cases, including the successful challenge against the Medicaid expansion aspect of ACA, threatens to reinforce, at the state level, the intense partisanship that has so deeply enmeshed our national political institutions in a deep quagmire of gridlock.

In any event, your actions have added a significant new tool to the repertoire of practical options for the search for policy change. And the way in which this has been done, with deep cooperation among different states, helps direct our attention away from the standard framing of federalism as a zero-sum game between competing levels of government. To me federalism is not just about governments. Instead, it points towards something much more fundamental, dynamic, and intrinsically innovative, something deeply ingrained in the DNA of the American political system of multiple checks and balances.

#### A. Overview

1. I want to speak to you about a specific tradition of research into federalism, one that can, I think, shed new light on the ways through which cooperation among state attorneys general on policy-driven legal suits have become an important new force in national politics, and what challenges might lie ahead.
  - i. This research tradition is associated with two of my dearest colleagues -- Elinor and Vincent Ostrom – who taught political science at IU Bloomington from 1965 until their death in 2012.
  - ii. You might know Elinor Ostrom as the first woman to be awarded a Nobel Prize in Economics, in 2009, for her path-breaking research on “economic governance, especially the commons,”
  - iii. Vincent was her husband and long-time collaborator, who back in the early 1960s developed the concept of “polycentric governance” upon which Lin’s later empirical research was based.
  - iv. Back in 1973 the Ostroms established the Workshop in Political Theory and Policy Analysis at IUB, and their contributions, along with many

collaborators, colleagues, and students, have built what we have come to call the Bloomington School of political economy, or of institutional analysis

- v. In this talk I'd like to give you some background on their research, and on their concepts of commons and polycentric governance, and then connect these concepts to the practice of multi-state litigation by coalitions of state attorneys general, then conclude with some observations about possible future challenges.

## B. Lin Ostrom and the Commons

1. The Nobel committee highlighted the influence of Lin's 1990 book *Governing the Commons* as her primary contribution to scholarship. In that book she reviewed a large number of cases, from all parts of the world, in which local communities of farmers, fishers, or foresters developed ways to collectively manage resources critical to their own survival. They did so by sharing their knowledge about these resources, coming to agreements concerning what rules should govern their use of these resources, how many fish they could extract at what times of year or with what forms of technology, or how each should contribute to the construction and maintenance of irrigation systems or other shared infrastructures, and then also devise and implement rules on how they would monitor each other's behavior, sanction rule violators, and resolve the inevitable disputes that would arise.
2. This sounds like a lot to ask, but her book, and the research of many others, demonstrated just how many communities have been able to do exactly that.
3. This was considered an important contribution to scholarship, basically because existing theories of economics and political science implied that solving all these collective action problems without external guidance was impossible. In 1968 Garrett Hardin published a famous article, Tragedy of the Commons, in which he concluded that rational individuals (in his evocative image, herders owning sheep grazing on a common pasture), would face incentives to over-exploit any shared resources, and thus that all commons should be expected to become degraded over time. He said the only option to keep the commons going would be to (1) transform it into private property and (2) assign its management to some central authority. Mancur Olson and other theoreticians similarly concluded that collective action was very, very difficult to accomplish.

4. It's important to emphasize that Lin never said the kind of community-based resource management she described was easy, only that it was possible. Her major innovation was to look at hundreds of cases and come up with a set of eight "design principles" that were found in successfully sustainable cases, and that were missing in failed cases. If these conditions were found, or constructed, in a given setting, then this form of common property could be sustained, sometimes for remarkably long stretches of time. In effect, she had discovered, or rather realized the conditions that lay behind, a third form of effective governance other than markets or governments.
  
5. I was particularly pleased when Lin was awarded a Nobel prize in economics, because so many of my political science colleagues never understood why Lin bothered to study peasants in remote villages in Nepal, to take one example.
  - i. Maintaining natural resources didn't seem to have much relevance to big political questions of war and peace, elections and partisanship, regime change, or, frankly, legal challenges associated with the balance of state and national authority.
  - ii. But for the farmers involved, questions of who had the right to use how much water and for how long were deeply political questions. They managed to cooperate not because they were all members of one big happy community, but precisely because what they cooperated over was so important to all of them that they had plenty of incentives to do it right. And they were allowed the room to figure it out for themselves.
  
6. Some of you may be asking, how does any of this relate to the subject of this meeting? Its relevance derives from the realization that something similar might well be occurring in contexts unrelated to natural resource management. It turns out that Lin, and now many others, have also studied a form of community-based governance that is surprising common, and often significant, in more familiar areas of public policy, and specifically in what can be conceptualized as cultural or constructed commons.
  - i. A commons can be not just naturally occurring resources, like a pasture or a fishery, but also constructed ones, like an irrigation system or a protected park, or a technical infrastructure like a road system or power grid, or a legal system and other aspects of the public realm

1. For this research it's just to define a commons not just as the pasture (or other kind of resource) itself, but rather the full configuration of resources, people, and rules/institutions through which those people can make, and make use of, these resources.
  2. This perspective helps us realize that complex policy arenas include many such configurations of people, resources, and institutions, that there is much more to public policy than just markets and governments.
7. A commons may be available to some restricted subset of individuals, or to the entire group. Speaking broadly, even a legal system can be seen as a commons, with some procedures and institutions available to only eligible citizens or other actors, but these legal systems may also be tapped by outsiders working in collaboration with local actors, as SAGs become part of policy advocacy coalitions.
  8. Some legal scholars have been especially interested in considering implications for intellectual property rights, and have been exploring the conditions under which peer-based collaboration (such as occurs in the operation of Wikipedia, which I must confess that even we professors occasionally use as a source) can serve as an alternative to patent protection as a means to incentivize the construction, improvement, and preservation of new forms of knowledge and products.
  9. Specifically, in the book Governing the Knowledge Commons, the co-editors, Brett Frischmann, Michael Madison, and Katherine Strandburg, define three perspectives or policy regimes for "promoting innovation and creativity" as follows:
    - i. "innovation systems organized around markets, supported by intellectual property rights directed to exclusivity and ownership, and"
    - ii. "innovation systems organized around governments, which intervene in markets (or avoid markets) in various ways to sponsor and subsidize innovation."
    - iii. "A third approach, commons-based sharing of knowledge and information resources to produce innovation and creativity" [page x]
  10. Yochai Benkler, in that volume and in his other work, distinguishes between two different kinds of commons, one that is much like Lin's work on community-based ownership, or common property, and the other being open access commons, with a public realm that has been constructed and/or is protected by private, public, or community actions, and which anyone in that community has the right to access and use.

- i. Benkler and other scholars working in this area argue that the concept of an open commons constitutes a deep challenge to property rights, as they are commonly understood, but also that property and commons are deeply intertwined in modern economies.
  - ii. From this perspective, even markets are embedded within broader systems of social order that facilitate their efficient operation. It's not just a question of governmental policy supplying the public goods (like a stable currency or protection of property rights) that cannot be easily supplied by market exchange alone, but also the broader environment from which resource inputs are extracted and the shared social values and expectations that sustain the operation of competitive markets.
11. In my own research, I'm been looking into how a commons perspective can put question of health care reform in a different light, to look beyond partisan rhetoric to more fully appreciate the myriad forms of collective action that have constructed our current system of health care
- i. But rather than getting lost in the morass of either of these deeply contentious topics, I'd like to now move to Vincent Ostrom.

### C. Vincent Ostrom and Polycentric Governance

1. Polycentricity is a broader understanding of governance that Vincent developed in a classic APSR article in 1961, with co-authors Tiebout and Robert Warren. They were inspired by looking at the way metropolitan areas in the U.S. tend to be governed, not by a single overarching political center of power, but rather a much more fragmented system of different sized communities and public agencies.
  - i. They defined polycentric order as a system of multiple centers of authority, with overlapping jurisdictions, interacting in diverse ways to address shared concerns, all acting within an overarching context of laws, rules, norms, and shared understandings, and generating a system of order that may seem to emerge spontaneously but that is really driven by the efforts of a large number of public entrepreneurs.
  - ii. This vision was often critiqued as being an effort to reduce politics to economics, to see it as nothing more than another form of market. Indeed, Vincent was part of the initial public choice movement, but his later work went in quite a different direction than what we now know as public choice, in which the emphasis lies of a deep suspicion of the selfish interests of all government officials. Unfortunately, Vincent's perspective has not been as

well-known or influential as mainstream public choice scholarship. At the Ostrom Workshop, we're working on changing that!

- iii. Each decision center in a polycentric system is like a commons, in both of the senses noted earlier.
  1. First, they have some group of people making decisions, for themselves and/or for others, concerning access and use of certain kinds of resources, subject to applicable laws, rules and normative considerations.
  2. Second, the diverse array of institutional arrangements that emerge constitute resources that can be drawn upon, by anyone living within that system, to address new problems, or as the raw material upon which still new institutional forms can be constructed to serve new purposes.
- iv. Vincent contrasted this view of polycentric governance to a metropolitan reform tradition that sought to consolidate the many political jurisdictions found in U.S. metropolitan areas, and tried to understand the conditions for which maintaining the complexity of current patterns might make more sense.
2. In the 1970s, the early days of the Ostrom Workshop, Lin began her first major research collaboration, with students from IU, investigating police services here in the Indianapolis area, which had recently been consolidated, mostly, into a unified city-county government structure, or Unigov. Fortunately, for their purposes of comparative research, a few local communities opted out of this new Unigov structure. These researchers compared these local police forces to the Indianapolis police force in nearby and demographically similar neighborhoods.
  - i. Their conclusions were complex, but they basically found that it was most efficient to combine small, medium, and large scale units into a system that allowed for flexible combinations of actors involved in different aspects of policy services. Patrols, for example, seemed to work better if run by local or community level jurisdictions, whereas broader metropolitan area wide agencies were needed to most effectively coordinate emergency response, and organizations at the state or national level were most effective for purposes of training and other broader concerns.
  - ii. The general point is that different sizes and types of jurisdictions were needed because different public goods and services have different requirements.
  - iii. In short, they found empirical support for polycentricity in police services.

3. Lin's later research on resource commons also found that local community management worked best if it was located within supportive and enabling jurisdictions at higher levels, which granted a significant amount of autonomy for local communities to deal with important aspects of their own governance. Or, in some cases, even if the area was so remote from the capital that the national government didn't much care what these local villagers did with their water or their fish.
  - i. One of Lin's design principles dealt specifically with this nesting, and another with the need for flexibility to form new associations as new problems arose.
  - ii. Ironically, the Nobel prize committee failed to even mention this earlier research, but Lin corrected their mistake by entitling her Nobel Memorial Lecture as "Polycentric Governance of Complex Economic Systems,"
  
4. Back to Vincent, who early in his career was himself a well-known scholar of federalism. But he had a very distinctive way of interpreting federalism, and of placing it within a much broader context. To Vincent, the U.S. system of constitutional governance was polycentric, not merely federal, in the traditional sense of relations among local, state, and national levels of governments.
  - i. Traditional view of federalism as two or three layers of government agencies is way too simplified, instead there were lots of other kinds of organizations that needed to be included into any institutional analysis,
    1. Including school districts, and special tax districts within states,
    2. inter-state compacts for river or water management, or regional transportation authorities that cross state boundaries, etc.
    3. and especially important in the US case, a long tradition of important contributions from private actors, including for-profit firms, professional associations, and nonprofit orgs (including FBOs) that were actively engaged in the delivery of public services.
  - ii. Vincent was a pioneer in understanding governance as a process of cross-sector collaboration. However, because his work was often dismissed as too market-based, his insights were neglected when the public administration and policy literatures, and practitioners, discovered cross-sector collaboration as a major form of governance in the 1980s, with devolution, decentralization, and contracting out aspects of public policy to private organizations. But Vincent had been there first, and his work helps us realize



that this had been the case for the U.S. from the very birth of the republic. Federalism was always about more than just governments.

- iii. For Vincent, polycentric governance is multi-level, cross-sectoral, omnifunctional, and involves a diverse array of public jurisdictions, community organizations, professional associations, and private corporations
  - iv. Basically, the foundation for this kind of complex system of polycentric governance is the ability of groups of citizens to associate together to undertake a wide variety of tasks with public import, including forming corporations or voluntary associations, and yes, lobbying their representatives. But they didn't have to start, or end, there.
  - v. Much of our political discourse (and academic work in POLS) obsesses on elections and lobbying and campaign contributions, but most real policy outcomes emerge from other processes, undertaken by other kinds of actors, especially by citizens themselves.
5. The Ostroms have taught us to understand that **government is not some kind of disembodied force imposed on us from above, instead it IS us**, it consists of the tools that we and our fellow citizens have devised into to help us address practical policy problems and to realize our shared aspirations.
- i. Vincent Ostrom was deeply influenced by Tocqueville's understanding of the importance of building and continuing to improve a new art and science of association, and to teach that understanding to others, to shape the hearts and minds of future generations to make and keep them capable of self-governance.
  - ii. In her research on resource commons around the world, Lin Ostrom demonstrated that many communities are capable of governing themselves, even in areas where the national government is either absent or abusive.
6. Both Lin and Vincent Ostrom have encouraged us to embrace institutional diversity, and to avoid seeking simplistic solutions in any one ideological preference, but instead to deal with policy issues on their own merits, and especially to be open to learning from those directly engaged in solving these problems
- i. American political history as a long sequence of development of new institutions and innovative new uses for existing ones, formation and dissolution of coalitions and alliances, and evolving understandings of the meaning of different policy issues
  - ii. Basis for endless generation of additional complexity in our political system

D. Multi-State Litigation as Contribution to the Polycentric Political/Legal Commons

1. Now we come to the reason I'm here today, because multi-state litigation by SAGs constitutes a significant recent innovation in our collective repertoire of political instruments, and as such it can be seen as part and parcel of the long-standing American tradition of the complexification of public policy.
  - i. To evaluate its impact, I draw on a recent book by Paul Nolette, an assistant professor Marquette Univ., *Federalism on Trial: State Attorneys General and National Policymaking in Contemporary America*, Lawrence: U. Press of Kansas, 2015.
  - ii. Disclaimer: He's not coming from the Ostrom perspective, so he may not agree with my interpretations of his work!
  
2. Nolette describes recent rise of multi-state collaboration of SAGs in litigation,
  - i. Details role in health care and environment
  - ii. Means to bypass partisan gridlock and other barriers to policy change at national level – federalism as empowerment rather than constraint
    1. But not (or at least not always) in traditional terms of state vs. national level authority
    2. Instead one or a few lead states start the process, and invite other states to join, work together to select legal forums and adopt strategies,
    3. May require a long process of litigation, but sometimes a single settlement can lead to a cascading effect on related firms
  
3. Nolette organizes his analysis around three major ways in which SAGs influence national policymaking
  - i. Policy-creating, as in 1998 Master Settlement Agreement with tobacco industry, or drug pricing practices – series of settlements set new standards that serve as context for later controversies
  - ii. Policy-forcing, as in acid rain pollution cases, or carbon dioxide as greenhouse gas – take federal regulation as floor, but push to higher standards, and maybe bring the rest of the country along with them
  - iii. Policy-blocking, as in ACA Medicaid expansion

- iv. I'd add a fourth one, Policy-implementing, as in state Medicaid Fraud Control Units, which author uses as example of ways in which national agencies provide resources for SAG activism
4. Why has this specific kind of activity become more common?
- i. Basically, SAGs, as public entrepreneurs pursuing their responsibility to protect their state's legal and budgetary interests, found a need to address some significant policy problem that extended beyond their own state's borders, and decided to work together to do so, specifically by engaging in multi-state litigation against private firms or national government agencies, in hopes of creating new policy options, forcing others to be creative, blocking policies that seemed to conflict with their own state's interest, or simply to make it easier to implement laws that were already in place.
5. In this process they became part of new coalitions, involving a wide range of collaborators
- i. SAGs: realize common interests, maybe raise political profile by taking credit for attacking fraud, etc.; may support suit even if have ideological doubts, because otherwise their state might miss out on benefits
  - ii. Industry: suits tend to pick off market leaders first, firms have incentive to reach agreements quickly; reduce uncertainty and manage public relations, and face difficulties in collective resistance, since picked off one by one
  - iii. Private litigators of class action suits, and/or political advocates of conservative or liberal positions: SAGs can be useful allies, can add an "apolitical veneer" to what may seem an overtly political cause (but all such cases are political anyway!), and way to counter efforts to raise barriers against private litigation, since it's easier for SAGs to do so,
  - iv. National policymakers have helped build SAG authority and resources, even though their actions sometimes undermine federal authority, because SAGs can increase enforcement capability at lower cost than building new federal mechanisms, may even encouraged lawsuits against themselves to give political cover for changes they'd like to make but can't get congress to pass, or as a way to forestall implementation of national policies they interpret as being an unreasonable expansion of national authority.
  - v. In short, it has turned out to be a tool that can be effective in many different contexts, for many different reasons.

6. Nolette acknowledges some potential problems
  - i. These suits may have a ratchet effect of increasing the range of regulation, and even add to its complexity.
  - ii. This may not be the best way to do it. Litigation can help fill a gap in regulatory coverage, but often does so without taking into account the big picture of the national industry or technical details, because SAGs and courts may lack the technical expertise that regulators themselves have.
  - iii. Big problem with democratic accountability – all deals made behind doors, with private actors, but this is a more general problem with complex systems of governance, especially polycentric ones.
  - iv. May contribute to Metzler’s “submerged state” – the concern that so many government programs have become so deeply enmeshed in our everyday life that the beneficiaries may not realize where those benefits come from, which in turn may contribute to a lack of support or respect for government.
    1. Classic example: signs that say “Keep the government’s hands off our Medicare!”
    2. So, may have effects that are disliked by opposite sides in partisan debates.
  
7. Nolette expresses particular concern with how this process may contribute to increasing partisanship of recent challenges to ACA, or other nationalized issues
  - i. I’d express this differently –nothing wrong with partisanship per se, since that’s a standard way of engaging in political discourse, and in litigation – as long as sides remain respectful of each other’s positions, which does seem to be rare in Congress these days.
  - ii. Lin and Vincent huge fans of contestation: deep engagement with other political actors, listening to others with respect and articulating one’s own position, remaining open to having your mind changed – a process I call “respectful contestation”
    1. Lin dedicated *Governing the Commons* to her husband Vincent: for a lifetime of love and contestation!
    2. Great vision of a marriage, and of a political community

- E. Future Prospects, and Challenges for this form of multi-state litigation as respectful contestation within a federal, or rather a polycentric, system of governance
1. My take-away point is that SAG action as exemplar of the kinds of innovative efforts to fill gaps in existing system, of the process that builds a polycentric system
    - i. Have been doing exactly what Vincent Ostrom saw as essential to the US system of constitutional order, of sustainable self-governance
    - ii. I hope you can continue to do so without reducing yourselves to just another arena for partisan gridlock, to maintain your unique perspectives on political discourse, and avoid becoming just another interest group.
    - iii. But there does appear to be one missing link, of direct relevance to this group
    - iv. Namely, how well known are these efforts to the public at large
      1. Not much at all, I'd venture to say
  2. One important implication of Ostrom's work is to emphasize the danger of what can happen when the public doesn't really understand their own system of governance
    - i. Citizens may fail to maintain their own capacity for self-governance, which is a concern first raised by Tocqueville
    - ii. With too much focus on elections and lobbying, not enough on practical problem-solving and the unusual arrangements that are often critical to their resolution.
    - iii. Even political scientists, and practitioners, can lose sight of the larger context of self-governance, while becoming too hung up on partisan fights of the day
    - iv. Polycentric system as basis for self-governance can work well only if the people are up to the challenge,
      1. Know about existing system, and current opportunities for influencing public policy, and not just by voting or lobbying
      2. And have training in devising new modes of governance
      3. There's a pretty deep frustration with national government these days, and SAGs might help show the way towards innovative responses

3. Multi-state litigation falls into the category of little-known and even less understood political mechanisms
  - i. Use myself as an example: I'm pretty knowledgeable about public policy, but I had to read up on this subject for this talk
  - ii. Is there some way to improve public familiarity with your work:
  - iii. Lots of schools have modules on civil rights struggle, which focus on the personal stories of heroism, even though the success of that struggle was itself deeply shaped by the results of legislation and litigation
  - iv. Why not give them similar modules for tobacco settlement, or public health issues, as examples of use of political and legal institutions to resolve real problems
  - v. And to help guarantee that public officials, and officials of major private organizations, act in socially responsible ways to contribute to the common good
  
- F. SAGs have been engaged in innovative use of litigation to shape public policy, and contribution to our existing repertoire of political tools to address critical public issues
  1. I would like to conclude by encouraging you all to get the word out about the good works you have been doing, and I hope will continue to do, in strengthening the federal foundation of American democracy.