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GOING ROGUE: WHAT HAPPENS WHEN STATES AND THE FEDERAL
GOVERNMENT DON'T AGREE?

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GOING ROGUE: WHAT HAPPENS WHEN STATES AND THE FEDERAL
GOVERNMENT DON'T AGREE?

(7:45 a.m.)

MR. GERSON: Okay. Why don't we get started? I'm Elliot Gerson, Executive Vice President of the Aspen Institute, and I'm thrilled to see all of you here today. I hope we'll have a very interesting conversation about topics of great interest, contemporary relevance and I think increasing attention actually. I didn't come up with the title, "Going Rogue: When States and the Federal Government Disagree." I think some of our panelists will probably argue that there's really nothing rogue about it, that it's appropriate and actually can enhance Democratic functioning and integrity. But obviously they are topics of great relevance when you think of some of the issues that we've just seen over the last few years, whether it's immigration policy with the Obama Administration and some states wanting to enforce laws perhaps more stringently. The case of Arizona against the United States is an example of that.

And let me -- I should probably say at the very outset, you're probably wondering why I only have two panelists and not three. Governor Ducey of Arizona was here in Aspen, but he had to return to Arizona because of forest fires. And as you can tell just here North of Arizona, we haven't had any rain in a couple of weeks. We'll probably have our fireworks canceled next week. It's incredibly dry, it's unusually hot and the forest fires in Arizona are very serious. So he sends his regrets. We also have our regrets, one reason being that we try very hard in discussions like this even when they don't necessarily have a partisan dimension to have a balance of Republicans and Democrats. And I will introduce in a minute Josh Shapiro who is a Democrat and the Attorney General of Pennsylvania. So regrets that we don't have Governor Ducey with us here today.

But there are immigration issues, transgender, bathroom issues, we're going to see lots of conflicts between state and federal government over marijuana and Governor Hickenlooper who's here this week has already

been in some heated conversations with the attorney general of the United States over those issues. And there's of course a long history of conflict between states and federal government. So we'll talk a little bit about the practical aspects of that conflict and also the kinds of issues you have when you have a change in administrations we've just had with really very different ideas about policy that will change the posture of the states and the federal government.

But of course, the basic debate about federalism or states' rights as opposed to the powers of the federal government are as old as the Republic, and whether it's the debates between Alexander Hamilton, champion of federal authority and aggressive use of power against the power of the states or on the other side Jefferson and Madison the issues go back to our founding. And something else we'll probably talk about is how those issues have evolved over time and the concept of states' rights for example, sort of a rallying cry around federalism. And for many of us in this audience, I think states' rights have a connotation going back to really at going back to the Civil War and the aftermath and had a very conservative connotation.

Of course states' rights was the argument until very recently, and still today many, many southerners would say that's what the Civil War was all about, whereas increasingly people are acknowledging that actually it was more about slavery than some abstract principle of states' rights and the Jim Crow laws. But recently, and Heather Gerken, the dean elect of Yale Law School has written a great deal about how federalism in fact could be a progressive force.

And finally federalism is -- it sort of -- the principle of states and federal government is enshrined in our constitutional fabric. And, for example, Justice Brandeis famously called the states laboratories of democracy and was sort of a Jeffersonian in the sense that he thought our whole government would be improved by virtue of the fact that states could do many things that the federal government was not -- not delegated powers through the Constitution under the Tenth Amendment to the

Constitution. So there are lots of things we'd like to talk about.

Heather Gerken, as I mentioned, is a civilian for another two or three days, the J. Skelly Wright Professor of Law at Yale Law School. She becomes dean on July 1st. And because it's a Saturday she has the weekend off so she may not actually be dean until Monday, a very distinguished constitutional scholar. She's taught at Yale for quite a number of years, taught at Harvard as well, was an appellate lawyer and is a founder of a sort of an, what she calls and we'll describe a national school of federalism which advances the cause of federalism actually as a progressive force in American democracy. And if you haven't seen it, I happen to notice just this morning an article about her views in *The Atlantic*, our partner in the Ideas Festival, online that you might want to look at.

Josh Shapiro is the Attorney General of Pennsylvania. He was elected just last year. Famously obviously Pennsylvania's electoral votes went to Donald Trump. Yet Josh Shapiro won the election for Attorney General. He may actually talk about that in some way here in a minute. Before that, he had many very significant roles in state government. Headed a commission on criminal justice, was a county commissioner, a very successful state representative as well. And of particular relevance here at the Aspen Institute, he was one of the early Rodel Fellows.

I see Mickey Edwards in the audience who runs that wonderful program. This is a program that identifies 10 outstanding young elected officials in the country, not at the federal level, but at the state level, 10 Democrats, 10 Republicans. Mickey has an extraordinary eye. Virtually all of them end up getting elected to statewide office or Congress. And we bring them together in a series of seminars and it's one of our many ways here at the Institute to try to enhance bipartisan attitudes and collaborative spirit in the electoral -- in the elected branches of government, state, local and federal, something that we all regret we don't see more of.

So with that much too long introduction, let me just jump in and let me start with you, if I could, Heather. So it's not our father's federalism anymore. I mean, when many of us think of federalism we think of states' rights in a very conservative context of states protecting their own prerogatives and their views against the federal government, that which is in most of the least 20th century to impose its own views perhaps more liberal and progressive views on the states, but you don't -- that's not federalism to you anymore?

MS. GERKEN: No. This is -- it's definitely not your father's federalism and I think it is helpful to start there whenever you're talking to people, because to many people the reason why lots of people aren't particular enamored of federalism is they have the image of the civil rights movement and they have the image where states' rights were invoked as a means of depriving individuals of their rights, and that's an ugly moment in history. But our federalism, our today's federalism is really nothing like that. And so I thought I'd just say a couple words about why that's so.

So the old image of federalism was rested on the idea that the federal government somehow couldn't intervene in state affairs, that it couldn't regulate in some areas, and that's just not true anymore. So for those of you who are lawyers in here, you know the Rehnquist and the Roberts Court have tried to do as much as possible to protect the states and shield them from federal interference, but for every single decision that they have rendered there is an easy workaround.

So the old image which was the federal government wants to do something good on civil rights and the states are blocking it, that's not the case anymore. Right now actually the fight for civil rights, ground zero for the fight for civil rights in the States. And I'll just say the most spectacular example we've seen recently is the same sex-marriage movement. So the same sex-marriage movement relied on state and local power to leverage their movement, is really hard to start a national conversation. So what states and locals allow you to do is to start it at the state and local level and

just think for a minute just to give you a sense of the power for equality-enforcing purposes that states have. I don't know if you all remember that moment when San Francisco and Massachusetts started issuing licenses to same-sex couples. That was an incredible moment. Why? Because for years up until then people had been talking about the issue, they've been rallying about the issue, they've been lobbying on the issue, but that was the day that everything changed, because for the first time we were able to see a real-life instantiation of that idea, so beamed to every television set in the country was these happy couples, except they wore two tuxedos or two wedding dresses. That moment changed the same-sex marriage debate in a fundamental way. And the same-sex marriage movement built on the power that they had in states -- at the state local level in order to build a national movement.

So the way to think about federalism these days is not the idea that it's an enclave sheltered from national norms. States and localities are where we build national norms and both sides are engaged in a fight. So I always say federalism isn't -- it's not your father's federalism but federalism is for everyone. And particularly for progressives who have long been reluctant to think about state and local power in a serious way, I just want to say to you it's a mistake, the conservative movement has been quite smart about using state and local power and progressives, I think actually have cottoned onto it but for some reason I'll say there's a segment of the population, journalists, academics, who still are skeptical, and that is a mistake.

MR. GERSON: And maybe some of those will be less skeptical after January 20th this year in terms of the relative balance of progressiveness of state and local government.

MS. GERKEN: It is true. All my progressive friends have suddenly discovered my work is extremely relevant to their world. They are fair-weather federalism people, and my goal in the long run is to make that commitment enduring.

MR. GERSON: Yours is any weather, yours though

is any-weather federalism.

MS. GERKEN: I'm, yes, I have been a federalism person well before all of this happened.

MR. GERSON: So Josh, why don't you tell us how you see the role of the attorney general of the state in the federal system and how it relates to some of the things we talked about? And I think I recollect in your own biography you played a role in same-sex marriage in Pennsylvania too?

MR. SHAPIRO: We did and thank you very much. It's an honor to be on the panel with you and to have the opportunity to speak with you today. I'm a big believer in the States. All of my work in public service has been in the States. When I was asked to run for the United States Senate, the United States Congress I said I want to stay in the States because I think as Brandeis said that is the great laboratory of democracy and that is where the action is. And I think the professor is spot on, that is where the movements begin and where ultimately they can trickle out to effectuate national policy.

I think ultimately attorneys general especially today, post January 20th, and I say this with all respect to other elected officials, are probably the most important elected officials in our democracy today. I say that because ultimately when our kids, I've got four young kids, Heather has young kids, when our kids go to school and they study about checks and balances, of course they study about horizontal checks and balances, right? They study about the role that Congress has and the President has and the judiciary has.

What they don't study, and this is where I think the action is, is they don't study about the vertical set of checks and balances. The way the states can be both a shield against federal encroachments unwarranted and unwanted, but then also be a sword to advance rights.

And to Elliot's point about and Heather's point about marriage equality, when I was a county

commissioners, like our county executive, our mayor of a large county just outside Philadelphia we were the first County in Pennsylvania to issue marriage licenses to same-sex couples. Once the federal government had said what it said about marriage equality, but our state had not yet caught up and we used the resources of our state we used our clerks of court to be able to advance marriage equality.

I'm a believer in the States, and I can give you some examples, I'm sure as our discussion goes through, the way myself and other state attorneys general have stood up and embraced federalism in a way that frankly should be viewed as nonpartisan, but rather essential to our democracy, which is why if you are a progressive, as I am a progressive attorney general, you can believe in the role that states have in our democracy, in our process, in our vertical set of checks and balances and advance progressive causes and progressive values. And I would submit that now more than ever the role of state attorneys general is critical in that process.

MR. GERSON: Heather, when you write about federalism in these issues you also -- you write a lot about power and you write about how federalism can in fact enhance the advancement of minorities and dissenters, which seems perhaps a little counterintuitive again the history of federalism. Can you just explain a little bit about how you think federalism advances the rights, well, the rights or the success of minorities and dissenters in our system where as we're used to thinking that it's rights in the constitution and litigation that gets to some of those results?

MS. GERKEN: Absolutely. So again, it comes from I think in large part the civil rights movement. We have a picture in our head that if you care about racial equality, if you care about dissent you should care about constitutional rights, just absolutely true. They really matter for this purpose. But even -- I'll just tell you, in constitutional law if you care about race and you care about equality or you care about dissent you study the First Amendment or the Fourteenth Amendment. What you don't talk about is the separation of powers and

federalism, how we divide power, that's called structure. By the way, we structure our constitution. And usually the people who take care about federalism most will offer sort of an apologetic sidebar about states' rights and the role that they play in the civil rights movement, but they have nothing affirmative to say about why something like federalism might be useful for racial minorities and dissenters.

So let me tell you why I think it's useful. And just think for a minute about our image of decision making bodies. We usually sort of imagine them being diverse, the idea that they should look like America. So what's the problem with having every single body diverse and looking like America, that means if you're in the minority you get out-voted every single time on every single decision-making body that you've ever been on.

Now think about federalism and localism. Federalism and localism do something that we don't do in other parts of our political system that we give people who are political minorities, be they racial minorities or dissenters, a chance to stand in the shoes of the majority to put their own vision into place, to have a chance to enjoy the same sort of sense of efficacy that everyone else who's in the majority routinely enjoys. So again the same-sex marriage movement is a really good example.

Why did it start in states and cities, because that's where groups had enough power. They were definitely a minority at the national level, but in states and localities they could leverage the power that they have to move forward on equality issues. That's an enormously powerful and important thing because they were able to do something, right, not just to talk about something. They were able actually to take control of their own destinies rather than depend on some other group to help them. So that's the magic of it.

It doesn't work without a baseline of right. So anyone who tells you you don't need rights is wrong about that, you need both rights, but you also need structure. So one thing -- way to think about federalism and constitutional rights is they're like interlocking gears,

they both play off one another, they're both useful to one another, they both help constitute one another, they both help move things forward. Same-sex marriage movement, that would never have worked if you didn't have voting rights and people were able to cast their ballot. It would never have worked without the First Amendment.

On the other hand, federalism and localism really gave that movement a boost, because it let people stop just talking about ideas and do something about it to really set the agenda in a way that you can't do just by speech. So that's why I think it's true.

MR. GERSON: Well, maybe the fact that rights you're saying are still important, affect what I'm about to ask you, but doesn't what you say suggest that we have to then accept perhaps radically different situations locality, locality, city to city. Some might be very progressive on issues like marriage rights or transgender bathrooms or legalization of marijuana or whatever, whereas others would not where the minorities are not in control in a particular city or state. So it might be that this would lead to progressivism in some places but two cities away or across the state border women's access to safe abortion services or contraception even might not be available.

MS. GERKEN: So I'll just, if we're -- no matter which side you are on federalism is not a guarantee that you're going to win, federalism is a guarantee that you're in the fight. And so I'm an, as I said, a nationalist who believes in federalism, although I feel in the wake of recent discussions about nationalism I want to specify, I mean new deal nationalists not the form of nationalism that is weird, its head raised recently in American politics. So does that mean? I believe in national laws and national norms and national rights. So for these things that you're talking about, if there are issues in which you care about and you think that there ought to be a national policy and a national floor you have to build it. And so the question isn't whether those exist. You don't have to say, oh, everyone gets to do whatever they want, no. The whole point of federalism is to fight about national norms and to put them into place. The way you

build national norms though, and this is the contradiction, is you build them through states and localities.

MR. GERSON: Correct.

MS. GERKEN: So the civil rights movement is actually a pretty good example of that. Civil rights movement was happening at the state and local level and different parts of the country, it eventually built itself into a national movement, but initially it started small. They weren't claiming when they were engaged in building out small and states and localities that because they were allowed to have a more progressive an egalitarian city here that you can have a terrible racist city there. No, they were saying we want, our aim is to build national norms, but we recognize that's going to we have to do it piece by piece. So that's how to think about it.

The one thing I'll just say, there's no guarantee that either side wins. So if you don't suit up and get in the game you're going to lose not just the fight at the state and local level but the fight at the national level. So if you really care as I do about national equality norms, about national protection for rights then the way to build that out is to start working at the state and local level.

MR. GERSON: Yeah, I want to come back to that in a minute. You keep talking about engagement and in the society today where so few people vote and so few millennials relatively vote, the kind of engagement that your view of federalism can provoke at the local level might actually invigorate our civic culture. But Josh, let me ask a different kind of question. As I noted earlier you won yet Donald Trump carried your state, which means, I'm not sure the math is quite right here, that some of the people who voted for you voted for Donald Trump.

MR. SHAPIRO: Right.

MR. GERSON: And obviously your elector state voted for Donald Trump. Does that in any way affect your

judgment or posture when as attorney general when you think about whether you should be challenging, for example, policies coming from the Trump Administration?

MR. SHAPIRO: It was a fascinating election process in Pennsylvania, and for those of you upset with Pennsylvania I apologize, but I have to say, I mean we could have an entire discussion just on that and the way in which the campaigns operated. Look my goal was to get to every community, each of the 67 counties. That was not a goal shared by some of our national Democratic candidates, and I think ultimately the math proves it. Donald Trump and I finished first second, I was first he was second, sorry I have to point that out, but there was, I mean there was probably about a quarter of a million people who voted for Donald Trump and voted for me.

And it's really interesting, I mean I spend a lot of time thinking about that and what these voters want from me, what they want from him or what they didn't see in his opponent or what they didn't see in my opponent. A week into my term, actually it was probably 10 days into my term and 3 or 4 days into the President's term, he issued the first travel ban and we saw chaos in our airports. And we saw real fear in our communities. Probably 40 or 50 percent of the people in my state were really fearful, because they feared the worst that the President was going to tear away our institutions, right, that the checks and balances in our democracy as we knew it wouldn't exist anymore. This wasn't about ideology or philosophy, this was about the very root of our democracy.

And I saw what happened. I believed his action to be completely unconstitutional, totally illegal and completely un-American. And by the way at the end of the day the administration agreed, because they withdrew that executive order. And I had a decision to make, and I ended up deciding to be one of the lead States in opposing the President's first travel ban and we won. And someone asked me that very question, Elliot, how can you do this, you're in a state that Donald Trump won, how can you take him on in his first real action? And my response was Donald Trump is doing this in a state that I won, and I don't mean that to be flipping, I mean that because I know

that at the end of the day I got elected because people want me to solve problems and protect the rule of law. And at the end of the day I think that first executive order, which is probably the best example so far violated the rule of law and left Pennsylvania unprotected.

The 260 Penn State students who were from one of those seven nations affected by the first travel ban, the 350 medical professionals who trained in one of those seven nations who were scared, who were concerned and they needed a champion to protect their interests and their rights and we needed someone to protect the interest of the Commonwealth of Pennsylvania.

So I will say at the end of the day I really don't factor in the politics of being, and I guess what people would now consider a purple state or red state or what have you, you don't spend a whole lot of time putting labels on it. I spent a whole lot of time thinking about the rule of law and how to protect the interests of the people of Pennsylvania. I try to do it with dialogue that is civil, that is not hyper-partisan. I try not to become what Mickey Edwards calls, one of those political clubs that exist in Congress today of just Republicans and Democrats fighting with each other all the time because they're on opposite sides of the aisle, and focus specifically on the rule of law in the interest of my state.

And at the end of day I think if I do that voters are discerning, they get it, they're willing to make choices. I don't agree all the time with the choices they make, but they're willing to make choices based on their assessment of the candidates and to me my job is to protect the rule of law and their interest, and that is my litmus test each and every time. I've sued the President multiple times. I've written letters. I've taken legal actions. Sometimes I do them just with Democratic attorneys general sometimes I do it with Democratic and Republican attorneys general. At the end of the day for me it's what's best for the people of Pennsylvania.

MR. GERSON: Let's talk about a real example of an issue that's certainly going to develop and that's

sanctuary cities. Sanctuary cities you might say was a wonderful example of the kind of federalism you espouse, that is deciding to do something like that, are they going to be able to survive if the Trump administration does what it indicates it intends to or may have already started? I don't know, Josh, if there is a Sanctuary City in Pennsylvania.

MR. SHAPIRO: Soon enough.

MR. GERSON: So I'd like both of your views on how this unfolds.

MS. GERKEN: Sure. And I should just begin by saying that my clinic, it's an unusual phrase for a law dean to use but at Yale Law School, the most theoretical school in the country, I run a clinic with the City of San Francisco and so I just state we, my students and that clinic worked on the first in the Nation Sanctuary City challenge and helped win the nationwide injunction against a Sanctuary City order. So I'm immensely proud of that but I just want to make very clear for a moment I'm not speaking for the City or for my clinic, I'm just speaking as an academic. With regard to Sanctuary City order if Donald Trump continues to wage the Sanctuary City war the way he's waging it he's going to lose, because the law is clearly against him. But I'll just say in the long run if he -- there are ways for the national government to bring the cities to heel if they want to. The national government has weapons.

MR. GERSON: You don't have to give them the advice today.

MS. GERKEN: Yes, no, I won't.

(Laughter)

MS. GERKEN: Well, if they -- if you would just read a few Supreme Court opinions that would help some I think, but the key thing to remember about the sanctuary cities is that if you really want to know what the real form of state power is these days it's not what the Supreme Court is saying is a state right or a protection

in the law, the real power that cities and states have these days is that the federal government depends on them enormously to put federal policy into place. So one of the things we often forget is the federal government is pretty small relative to its ambitions. States and localities have a much bigger and more developed administrative apparatus in almost every part of the world that people care about. And so as a result when the federal government wants to enact policy it has to depend on the states to carry out that policy. The sanctuary city example is a perfect one.

Donald Trump cannot carry out his immigration policies without the help of states and localities. The federal government does not have enough boots on the ground, it simply cannot do it if states and localities are not partnering with it, which creates this really interesting moment. Donald Trump does not actually have to talk to any Democrat in Washington to get his policies passed, but he does have to talk to Josh, right, he does have to talk to the governor of California and the mayor of New York if he wants to get his policies passed on the ground in immigration. And we can talk more or we can play this game in lots of different areas, but that's the real power of states and localities, the fact that the federal government depends on them. And if they withdraw their administrative resources the federal government doesn't have enough boots on the ground to do what it wants to do.

MR. GERSON: Josh, maybe you can comment on sanctuary cities but also in the context of the fact that Americans are just getting fed up with partisanship in general and during the Obama Administration Republican attorneys general regularly sued the federal government, and now we can see that it's going to be Democratic attorneys general regularly suing a Republican federal administration. How does that not just lead people to believe that this is all a political game and just lead to even greater alienation and frustration and people saying let's just have these things resolved in the ballot box and instead of the courts?

MR. SHAPIRO: Sure. Let me touch on sanctuary

city first and then talk about the partisan divide. The professor couldn't be more correct on this issue. And I'll just share with you, I spoke with a group -- Philadelphia is a major Sanctuary City and I spoke with a group of progressives in the city of Philadelphia the other day and I quoted two people and I think they think I'm nuts, I quoted Justice Scalia and I quoted Chief Justice Roberts and they looked at me like I was nuts and I said, look, remember back in the '90s when Bill Clinton, President Clinton wanted local police to be able to go out and enforce federal laws on guns, right? We had this issue of the epidemic of gun violence in our communities, we're still have them in some places in the Commonwealth of Pennsylvania as well.

And remember Justice Scalia famously wrote the (inaudible) decision, which I know you've cited before that the federal government can't compel a local authority to go out and carry out these federal dictates. Similarly, Chief Justice Roberts when writing an opinion on the Affordable Care Act said that the federal government couldn't use this threat of taking away the money from a state or a locality or what have you in order to compel them to expand Medicaid. I think at the end of the day, the tool that progressives are going to use to push back on Trump sanctuary cities' policy or some of his other policies that we've yet to see are going to be these decisions written famously by conservatives who are sort of strict readers of the Constitution.

I shared some of those thoughts with folks as now Justice Gorsuch was going through the process that if you read these strictly, a lot of what the Trump administration is trying to do goes well beyond the bounds of a strict reading or a conservative reading of the Constitution and ultimately could be the power used by progressives to push back on some of these encroachments that the Trump administration is pushing.

As it relates to the sort of partisanship of attorneys general, I have to say that having been a legislator where it is incredibly partisan, having worked in numerous places in government including as an aide in Congress and read pretty much everything Mickey Edwards

has written over the years about bipartisanship, the reality is I think the Attorneys General are one last place where there is still a real effort to work together.

Just the other day more than 30 of us got together and opposed an FCC rule that actually would strip away our authority on protecting consumers when it comes to regulating broadband speeds, for example. We announced just the other day that Pennsylvania is one of the leaders in a massive multi-state investigation into the opioid manufacturing industry. And by the way we could spend hours talking about the heroin and opioid crisis which is ravaging states, it's just extraordinary.

But there is still an effort to work together in a bipartisan way. What I hope though is that those same Republicans over the last 8 years during the Obama administration who preached about the state standing up for their interests and their rights whether it was on environmental issues or criminal justice issues will join us and not just wear a partisan hat in this era of Trump.

Hard for me to comment on what happened during the Obama Administration relative to attorneys general, because I wasn't an attorney general then, but I can tell you that for me the litmus test is not how many Democrats are on this, how many Republicans are on this but how does it impact the people of Pennsylvania? How does it affect the rule of law? And how can I advance the interest of my state? And at the end of the day that causes me to not sign on to every Democratic initiative, sign on to some Republican initiatives and ultimately I think continue to be a bipartisan voice in this era where people, Elliot, as you said, just want things to get done.

And I think if we allow ourselves -- just last point, if we allow ourselves to be governed just by what happens at the ballot box every year then we'll just continue to lurch side to side based on where the real anger was, right? '06 Democrats rise to power in the Congress because there's anger there, '08 it continues with Obama. In '10 it snaps back with the Tea Party. You see it, you know go back and forth. And so I think if we allow ourselves to continue to be governed by, as Mickey

Edwards says, these political clubs feeding on people's anger in a 140 characters at the time then ultimately we're not going to be a strong democracy. We're not going to be strong in the states, we're not strong at the federal level. Now is the time for real leadership.

MS. GERKEN: Can I just say a word --

MR. GERSON: Please.

MS. GERKEN: -- why I think attorneys general are one of our last best hopes. And I was just listening to Josh's speak for the last few minutes made me inordinately proud to be about to be the dean of a law school, because to my mind lawyers are actually the one profession that can give lessons to politics these days, because we are the only group that is trained from the first day we walk into law school to go to war with the other side without turning the other side into an enemy and that is a value that is just lost in politics. And I'll just tell you if there are any lawyers in the room you remember that horribly uncomfortable first semester when you're thrust into a class and every single day you are forced to argue for a judge's view that you don't believe to construct the very best argument on the other side and to poke every hole that you can find in your own argument. And when you do that, when you're self-reflectively doubtful of your own views and have a sense of what's best on the other person's views, that leads you to be much more respectful of the other side as a -- just as a professional norm. So you all need to stop with the lawyers jokes, I'll just tell you that.

(Laughter)

MS. GERKEN: Because the same training that makes you think of us as hired guns is the training that makes Josh the person that he is. Because we are in a giant fight about values, we do need to go to war about what we believe as a country, but that doesn't mean that we turn the other side into an enemy and don't recognize and what's honorable in the other side. So I just want to say the lawyers actually are the last part of politics that are able to do this with one another. We know how to

be righteous, but lawyers usually avoid being self-righteous and I think that's something that we're just missing in politics these days.

MR. GERSON: Let me say that listening to both of you make me feel proudly nostalgic, because I went to your law school, although I think you were in kindergarten at the time. And my favorite job maybe of all times, certainly the only comparison is the job I'm now privileged to have at the Aspen Institute when I was the deputy attorney general of Connecticut, and you're right about the role of the attorney general. And I should have said about Josh too, and I'm sure you get tremendous bipartisan support for this, he's been a real champion about dealing with the opioid epidemic, which many of your brother and sister attorneys general have the same problem, Republican or Democrat, maybe even more Republicans and also to protect consumers and small businesses from fraud.

But let me ask a different kind of question which I think relates to all of this. I'm thinking about Pennsylvania and it's a case that's -- issue that's going to come before the Supreme Court and there is going to be much discussion about, that's gerrymandering. And I could imagine, Heather, in your view that because of your view that minorities at local levels ordinarily in this diffused democracy they don't have majority power, they don't get engaged, that packing African-Americans into a strange shaped congressional district is actually good, because it assures that you have black power at that level. Pennsylvania is a classic case of gerrymandering from my perspective going absolutely wild. I think it was the 2011 census when the Republicans controlled the General Assembly drew your congressional districts. I think Republicans only got 49, 48 percent of the vote as I recall, yet 13 of the 18 --

MR. SHAPIRO: Right.

MR. GERSON: -- members of Congress are Republican, and that's continued in every election since in Pennsylvania. And I think I read not recently that when you look at something called the efficiency index of

voting Pennsylvania has the worst in the country because of gerrymandering. So what should we think about gerrymandering? Is this fine and appropriate fitting into federalism in some way allowing minorities in some cases to have more control although in other cases they're diffused? And will -- what do you think the Supreme Court should do about it? And you're an election law expert too.

MS. GERKEN: Yeah. I was actually writing an amicus brief for the partisan gerrymandering case going to the Supreme Court.

MR. GERSON: Okay.

MS. GERKEN: -- over here. So what I'll say about that is the reason I became interested in federalism was because I cut my teeth as a young lawyer on voting rights cases. So how does the Voting Rights Act work? The Voting Rights Act recognizes that if you have statewide elections every time in a world where voting is horribly racially polarized, African-Americans will lose every election every time. So it's actually that's the insight that led me to federalism, because election law is the one place that recognizes that majority minority institutions are actually forms of empowerment, that if you don't get your guy in then you're unlikely to have much influence over the decision that's getting made. So that's actually what led me to federalism in the first place. That's a different thing from saying that you want racial enclaves.

So sometimes we have just -- we don't have a particularly good vocabulary for talking about majority minority institutions, we have two words there's diversity right, which we all like, which is that, the idea that everyone is represented according the population and then there's Jim Crow enclaves which are homogenous racial enclaves. The Voting Rights Act shows that there's something between those two things, which is a minority having a majority inside a district but not having it be a racial enclave. So majority mono institutions are just as diverse as white majority institutions, it's just a different group that is in power at the top.

So I believe in is a form of empowerment to give everyone the power that they ought to have by population, that's very different at the end of the day from a minority holding majority power over everyone by virtue of manipulating the political system. Again, I'm a nationalist, so if national government decide something, that's the rule. And the same at the state level, I believe in state majorities controlling at the state level, I also believe in dissenters and local groups controlling where they can control at the city level. And that's the key difference in -- gerrymandering is getting more extreme and is becoming so precise these days that you can hold power pretty much forever because of the precision of it. And it's a terrible democratic practice and it prevents us from changing our minds and changing our policies, because even when you have a wave election some of these districts are so gerrymandered that they're not going to change. So I think these things are perfectly consistent with one another.

You should think like the Voting Rights Act does, you're not going to give the group more power than it would be entitled to under its population, but you should make sure that it's got some power. Gerrymandering is the opposite, right, gerrymandering gives you more power than you're entitled to based on the votes you've got.

MR. GERSON: In the State the gerrymander is better than any other.

MS. GERKEN: It is one of those vicious gerrymanders in the country.

MR. SHAPIRO: I wish I could dive in on this question a little bit more. The state was just sued, last week I think it was.

MR. GERSON: Oh, you certainly can't comment perhaps.

MR. SHAPIRO: As the attorney for the state I've to be a little careful on what I say, but let me offer

some broad comments on this. We've talked a lot about different reforms I know in all the states, certainly in Pennsylvania, right, do we need campaign finance reform and what other kinds of reforms we need. Without a doubt the mother of all reforms is redistricting reform. You are stealing power away from people who otherwise should have it and giving it to others for really self-perpetuating -- or the perpetuation of their partisan goals or their partisan efforts. Pennsylvania has got a million more Democrats, 900,000 more Democrats than Republicans.

We elected a Democratic governor, Democrat AG, Democratic U.S. senators and at the end of the day 13 of the congress people are Republican and 5 are Democrat. Now, there's a lot of reasons for that, obviously those that have the computer programs that draw the maps the way they do, but there's also like a self-interest involved as well, which I think we have to be honest about that Democrats and Republicans when they get the opportunity to have a seat at the table in the room they want to protect themselves.

Now, my argument would be you can protect yourself and get reelected if there is 60% of one of your, you know, of your party in the district. You don't need 94 percent of your party in the district. And by doing that you make it harder for your neighbors to be of the same party. And at the end of the day the real corrosive effect of our democracy, on our democracy is that no one goes to the middle anymore, because the fear you have electorally is you're going to get nipped on the left or on the right in a primary, you're not really worried about the general election anymore.

I'm sure there are -- I hope to never go to Congress, I'm sure there are people here in this room who, you know, study that and give money to people running for Congress and care about that process, and that's great, I'm glad you do that. And I think you probably know better than I do at the end of day 435 seats, what are they, like 20 or 30 really competitive races at the end of the day? Well, it shouldn't be that way. There should be 3 or 400 competitive races at the end of the day. And

with an honest redistricting process where you're actually drawing compact contiguous districts that are focused on municipal boundaries, not just on some partisan objective you could actually get to that. And then when you have competitive races at the end of the day people know that they're going to be judged by their results, what they do, how they work together with people who might have different views than them, and that is going to advance our democracy, advance their electoral causes and make the States and the Congress a heck of a lot stronger.

So this is the reform. This is the key thing that I think efforts need to be behind in, you know, we'll be saying a lot more about this issue in Pennsylvania specifically as it relates to the suit, but this is a major deal and something that we've all got to focus on.

MR. GERSON: Well, I think most of us agree with you. I think I suspect probably 90 percent of the Americans agree the question is whether 5 members of the Supreme Court agree I actually worry --

MR. SHAPIRO: It depends on how good their brief is, right?

MR. GERSON: I actually worry --

MS. GERKEN: Yeah. It's about 78% of Americans, I just cited this in my brief.

(Laughter)

MR. GERSON: But I actually worry that there may be five votes against that kind of sensible reform, we'll see. Up to now for questions please in the time we have left. This is all being taped so we have to wait for a microphone. Let's go to this gentleman and this gentleman. We have two microphones. And you first, please, sir. Just name and short question. Thank you.

MR. THOMPSON: Yeah, my name is Arturo Thompson from Arizona. If we --

MR. GERSON: And again, your governor is very

sorry he couldn't be here today.

MR. THOMPSON: Yeah. I'd like to see him. I did vote for him, but I've never seen him. Don't matter. My question is this, if we decided that so-called same-sex marriage, which to me is an oxymoron, but that's another story, is legal, what about polygamy, can we outlaw polygamy and still permit same-sex marriage? So I know it's a contradiction particularly when a number of religions support polygamy and you have the religious freedom idea?

MS. GERKEN: Well, that's a question outside the bounds of federalism, but I'll just say same-sex marriage is rooted in the Constitution, both inequality and liberty. We've always drawn limits on the rights that exist, that are sensible and acceptable. So it is possible to have a right and not decide that it applies willy-nilly to everything. And in this instance in particular the equality mandate behind same-sex marriage, this is about identity and discrimination. Our constitution protects against discrimination on that basis. That is a different question than polygamy.

MR. GERSON: Next question please.

MR. SKEWS: Hi, my name is Andrew Skews. Most Americans obviously have a lot of affection for the constitution. And the amendments we all learn in school, the First Amendment, the Second Amendment, the Fifth Amendment, but one which is noticeably absent which I have always wondered about and as somebody who didn't go to law school, the Tenth Amendment, which specifically dealt, I mean, you guys can talk about it more, but what specifically delegates power is not delegated by the Constitution to the states, but it seems given the nature of federalism these days it seems to be largely ignored. And once again, as somebody who didn't go to law school perhaps you could shed a light onto the Supreme Court's interpretation of that amendment as well as academic interpretation.

MR. SHAPIRO: Well, I think about it every day, and the reality is I think more and more as this

administration reaches it in unprecedented level into the states, frankly more unprecedented than Reagan, Bush one, Bush two on the Republican side. You know, more and more we're going to need to rely on the states to push back. A good example that is the states are always allowed to go above and beyond, right? So take California who said we want to have stricter emission standards for vehicles. We want to go above what the federal government says and they do it. And then that means that car dealerships have to up their, you know, excuse me, car makers have to up their process. Other states say, boy, we like what California is doing we're going to do that as well. And so you begin sort of a race to the top if you will, if you look at it the way --

MR. GERSON: Although there's also the situation where Texas decides that evolution it can't be taught alone in textbooks and then most of the children in the rest of the country we have to have the same textbooks.

MR. SHAPIRO: And in effect textbooks in Pennsylvania as well. I think that's a healthy thing. I think that's a good thing. And I think leaving the states with that power, with that ability to move the needle is good. What I get concerned about is when you have the EPA administrator, Scott Pruitt, at the federal level now come and say to California, no, no, you can't do that, you can't have higher standards. And so we in Pennsylvania stand up and we take legal action on that, because we want to preserve those rights, we want to preserve that ability, we want to preserve the inherent core of what's in the Tenth Amendment that you're leaving that, the rest of us and we want to be able to do some good with that.

Now, in this room we can define what good means in a lot of different ways, the textbook example in Texas versus the emission standards in California, I respect that. But that's what, again what Brandeis was talking about, as states being this wonderful laboratory of democracy, which is why I think it's so exciting right now to be part of state government and be part of the legal side of state government as an Attorney General.

MR. GERSON: In the third row and then we'll

come up to the front row. And then back there.

MS. BRYSON: Thanks. My name is Joanna Bryson. Thank you very much for the panel. My question is about I totally agree with you that the beauties of a federal system and the experimentation and everything, but I have trouble just understanding how the consolidation part happens so -- and what the consolidation part even means. So as this issue with gay marriage, a huge supporter myself, but I understand that there are colleagues who won't feel as strongly about it. I can understand the assortment, if we have -- really it's easy to move between states and we go to the states that have the things that we want, but I see as we strengthen federalism don't we weaken our capacity to actually if we find a good to spread it or are we just hoping that there'll be a contagion that people just agree at some level, is there no role for federal consolidation?

MS. GERKEN: So I think of decentralization as a tool to centralization. And I think that what the image you're describing is your father's federalism, right? You're assuming that everyone gets to choose their own policy at the end the day the national government doesn't step in. If you are like me, a nationalist who believes in federalism, you think it's perfectly fine for the national government to step in when it wants to. So just one way to describe it is right now we have a lot of variation in policies, why is that so? It is not, because the national government lacks the power if it wanted to to impose national norms. It is because those national norms are not strong enough to do it. So the way to think about it, this is just a start, you're actually being too much the lawyer, stop being a --

SPEAKER: (Inaudible).

MS. GERKEN: Yeah, so right. If you think about it like a lawyer you think that these groups are shielded and they have their own policies and you can't intervene, that's not how it works. The national government can regulate what it wants to regulate. And what the states and localities do is sometimes they make it harder or easier and sometimes they tee up the national movements

that change a norm. The Constitution did not change a word between 2002 when the same-sex marriage licenses started to get issued, I should not say it, it didn't change a word, but completely irrelevant word just to be a law dork for a second, but a different amendment. But nothing changed.

What changed, our understanding of the question changed, and that changed how the justices viewed the Fourteenth and Fifteenth -- Fourteenth Amendment here. So you have to think about it this way. You can build a national norm, you can enforce a national norm. States and localities help make a national norm extraordinarily robust. But if you don't do the work at the state local level you're not going to get to that point. So I really do see -- I mean, I really do think that decentralization is just a tool, it's like the First Amendment, use it or don't, but it's not going to prevent you in the long run from centralizing. And I believe in a national norm and a national democracy so I'm in favor of centralization when it's the right issue.

MR. GERSON: Okay. You have a question here if we can wait for the microphone and then I think there was a question right back there. You can have the microphone ready.

MS. ROBINSON: Murphy Robinson, I'm from San Francisco. So we appreciate what you do. My question and we've talk about it -- I've looked at what I was interested for today. Living in California money in the end is important and the question is for states rights how much money we have to give to the federal government to do things we don't like. And I don't know if you have thoughts on how like different states respond to what we'd like, especially we giving a lot more money than we get I think? Thank you.

MR. SHAPIRO: Okay. I guess I would say that, you know, whether it's the state taxes you pay, the local tax you pay, the federal taxes you pay, we elect leaders to go make decisions on what our schools should be like, when the trash should get picked up, how much money should go to the military. And on that they set the tax policy,

they set the spending policy. And I think it becomes dangerous at any level if we begin to cherry-pick. I can recall the first race I ever run was for state representative on the Democrat Republican district, nobody gave me a shot to win, and I went around, knocked on 18,000 doors in my district and actually won the race. And the number one thing I heard from older Pennsylvanians in my district was, don't make me pay school taxes anymore because I don't have a kid in the schools, why are you making me do that?

At the end of day I was giving them an answer which I realized was intellectually honest, but politically stupid, I was going to lose the election because of it, which is, I said, look, I know you don't have kids in the school, but we all benefit from really good schools in the community. And if you don't like what the schools are doing or you don't like how much we're taxing you, vote for another school board member who's going to reduce your taxes or what have you. I think at the end of day there is this notion of this communal good and we all have to sort of buy into it. And if we don't like the direction they're going we use our voices.

I think you're seeing that with the President's first budget that he put out which is shocking on a whole lot of levels, but people have spoken up on both sides of the aisle. You've had Republicans and Democrats alike say well, thank you, Mr. President for the book you sent us, but now we're going to do the real work and actually focus on where we think the spending ought to really go. And I think that we just as a society have to recognize that our voices are important in the process, our votes are important the process, but so is this notion of the communal good.

MR. GERSON: Back here.

MS. BEAR: My name is Cheryl Bear. I had the unfortunate situation of going to law school many years ago, but I cannot remember what happens when there is a national law such as you may not use marijuana and then you have a state as Colorado enacting the legality of marijuana. Governor Hickenlooper just met with Jeff

Sessions and Jeff Sessions seems to have to it, live and let-live attitude, but could you speak more generally to what happens when there is a national law and then states that seize the opportunity to go beyond the national law?

MS. GERKEN: So this is a perfect example of the power that states wield. So when Washington and Colorado decided to pull their enforcement resources from marijuana enforcement they didn't change federal law. Federal law remained exactly the same, so why is it that suddenly everyone was smoking pot on the corner? The reason was because federal -- the states and localities enforce 99% of the marijuana arrests in the country. The federal government doesn't have enough people to do it and so it's quite interesting that both Jeff Sessions and his predecessor under the Obama Administration decided that this was not a fight worth having. So they could have if they wanted, right, try to enforce federal law, they just don't have the apparatus to do so.

And this is in some ways a lesson for all Presidents. You do have what we call the national supremacy trump card. As a technical matter, national law trumps state law. As a practical matter when you depend on states and localities to enforce those rules you can't actually do everything you want. So the national supremacy trump card, if I may borrow a phrase from one of my friends, is actually a jack not an ace. And so that's an -- and you can't, it could, the Trump administration is facing this. It wants to do a lot of things, environmental law, sanctuary cities, marijuana, these are all of these things that they want to do. They can't do all of them, right. They have to choose their battles and the states can make those battles very costly.

So maybe that Trump will win one war -- one battle or another, but it's very hard to win the war on all of your policies without getting state and local buy-in, which is why -- that's the magic of federalism is that it requires compromise. Trump may not have to compromise when he passes something in Washington, but if he wants to actually have that law reach people throughout the country he is going to have to compromise with the Democrats at some point.

MR. SHAPIRO: Just to add on --

MR. GERSON: Time for one last question as long as it allows a very short answer, if you could wait for the microphone.

MS. JACOBSON: Thank you. My name is Rochelle Jacobson, I'm from Houston Texas. Talking about sanctuary cities I think you're all aware that Houston is an extremely vibrant sanctuary city that's highly diverse. What happens when the local laws, the local government opposes not only the federal but the state, our situation?

MS. GERKEN: The states also have a state supremacy trump card and so they -- so we see the same pattern played out, transgender bathroom, sanctuary cities. Everyone's in a battle right now over these things. And so the states hold a lot of power in this battle with the locals.

MS. JACOBSON: Are they bigger than jack?

MR. GERSON: It's a queen or --

MS. GERKEN: Yeah. I would say actually I do think that it's bigger than jack, because states have more powers over their locals --

MR. SHAPIRO: They got more people --

MS. GERKEN: -- than the federal government has over the states.

MR. GERSON: Well, I'm afraid we have to bring this to a close. I'd like to thank our two wonderful --

(Applause)

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