DISSENTING BY DECIDING

By Heather K. Gerken

INTRODUCTION

Everyone, it seems, believes in dissent. Our political mythology promotes a romantic vision: the solitary voice of reason, Holmes's prescient dissents, the lone juror in *Twelve Angry Men*.[1] When talking about the role dissenters play in democratic governance, scholars offer a more workmanlike view. The conventional understanding of dissent as a practice recognizes that dissent is more than culturally resonant; it is a political strategy. Like any minority faction, dissenters can often get the majority to soften its views or at least obtain a concession or two. Scholars thus grasp that dissenters can wield power through participation or presence rather than persuasion.

On this conventional understanding of dissent, dissenters have two choices with regard to governance: *act moderately* or *speak radically*. To the extent that would-be dissenters want to govern—to engage in a public act, to wield the authority of the state[2]—they must try to influence the decisionmaking process. They will thus bargain with their votes and with the threat of public dissent to gain concessions from the majority. Would-be dissenters who deploy this strategy get to take part in an act of governance, but it is governance of a moderate sort. And even if the dissenter gets an opportunity to wield the authority of the state, dissent takes the form of an argument, one designed to persuade other members of the decisionmaking body to take a different stance. Dissenters speak truth *to* power—to those with a majority of the votes.

Alternatively, would-be dissenters on the conventional view can speak radically—that is, they can freely state the position they believe that the majority ought to take in a dissenting opinion or minority report. In doing so, dissenters sacrifice the chance to be part of the governing majority and thus to wield the authority of the state. When they speak, it is with a critical rather than authoritative voice; they speak on behalf of themselves, not the polity. Dissent, again, takes the form of an argument, speaking truth *to* power.

What is missing from the usual account of dissent is a third possibility: that would-be dissenters could *act radically*. We have trouble envisioning dissent taking the form of state action. Our conventional intuition is that dissenters will try to change decisionmakers' minds, they may even moderate the decision rendered, but they will not—and ought not—determine the outcome of the decision unless they can persuade the majority to alter its views.

The assumption underlying this conventional view of dissent is that dissent means speaking truth *to* power, not *with* it. That is, we assume that

dissenters will be in the minority on any decisionmaking body. After all, we might think, if would-be dissenters had enough votes to control the outcome of the decisionmaking process, they wouldn't be "dissenters" anymore. "Dissenting by deciding" seems like a contradiction in terms.[3]

The main reason we overlook the possibility of dissenting by deciding is that we tend to conceive of democratic bodies as unitary—there is *one* legislature rendering *the* law, *one* populace voting on *the* initiative. It is thus quite difficult to discern what power an electoral minority ought to have in making *the* decision. Our intuitions about the legitimacy of majority rule lead us to resist proposals to allow would-be dissenters to "take turns"[4] in exercising majority power or to create a minority veto. We thus assume that the best—perhaps the only—model for distributing power fairly is to let electoral minorities influence a governmental decision or, failing that, to make their disagreement known publicly.

Where decisionmaking power is disaggregated—as with juries, school committees, local governments, even states in a federal system—there are more options for thinking about how to allocate decisionmaking authority among members of the minority and majority. Disaggregated institutions create the opportunity for global minorities to constitute local majorities. They thus allow dissenters to decide, to *act* on behalf of the state.

Dissenting by deciding thus occurs when would-be dissenters—individuals who hold a minority view within the polity as a whole—enjoy a local majority on a decisionmaking body and can thus dictate the outcome. One example of dissenting by deciding occurred in San Francisco, California, shortly before the time of this writing. The city spent several weeks marrying gay and lesbian couples until a court put a halt to its activities. San Francisco officials surely understood that, with respect to the state and national population, theirs was the minority view. They surely understood their action to be a challenge of sorts to the prevailing view,[5] and that assessment was shared by others.[6] The principle embodied in San Francisco's decision was no different from the argument found in editorials, judicial dissents, and ongoing debates about the status of gays and lesbians in this country. What was different was the *form* the dissent took.

Dissenting by deciding also takes place when a school board chooses to mandate the teaching of creationism or a jury filled with those who think our sentencing regime is too harsh vote to nullify. The members of each of these decisionmaking bodies subscribe to the same set of commitments held by individuals whom we would unthinkingly term "dissenters." But they express disagreement not through a blog, a protest, or an editorial, but by offering a real-life instantiation of their views. While calling these examples "dissent" may seem counterintuitive, each involves an act of contestation, an attempt to express disagreement with the majority's view. What makes these acts unique is the unusual institutional form dissent takes in each instance.

This book is devoted to the notion that dissenting by deciding can and should be understood as an alternative strategy for institutionalizing channels for dissent within the democratic process. Because dissent has not been conceptualized in these terms, scholars have not given adequate thought to which form of dissent is preferable, and when. The book therefore considers what makes decisional dissent different from our usual understanding of dissent. It explores the ways in which dissenting by deciding furthers the traditional goals of dissent differently than conventional dissent. Its ultimate goal is to think more creatively and comprehensively about how best to institutionalize channels for resolving the problem of democratic difference.

The legal literature on dissent and the First Amendment is, of course, extensive. The book offers a different angle on these well-developed theories. First, it attempts to break down conventional categories for understanding dissent by examining it from a structural rather than a rights-based perspective. In an effort to understand the landscape in which oppositional politics take place, the book focuses on the governance structures dissenters inhabit, particularly those decentralized structures that can enable electoral minorities to constitute temporary majorities. It closely examines the different outlets for oppositional politics with an eye to understanding how political disagreement is shaped and refracted through those channels.

Second, consistent with this institutional perspective, the book introduces questions of power into a scholarly discourse that has long been preoccupied with constitutive and expressive values. It considers how to harness the power of majoritarianism in service of the goals of oppositional politics. The notion of decisional dissent thus allows us to overlay the insights of the literature on decentralization (federalism, local government law) upon traditional First Amendment scholarship. It thereby offers a new lens for examining tensions that thread through the two literatures – integration versus enclave, individuals versus groups, voice versus exit – and introduces a discussion of groups into a literature that has largely focused on individual rights.

The book offers a number of counterintuitive conclusions about the role decisional dissent can play in a democracy. At first glance, dissenting by deciding may seem more radical than conventional dissent because electoral minorities are able to use the apparatus of governance to express disagreement. If we look more closely, decisional dissent may make dissent less radical because it is incremental—it takes place within a space chosen by the majority—and it directs the energies of dissenters toward governance as well as resistance. Decisional dissent may empower dissenters, but it seems as likely to tame dissent by undermining its rebellious or iconoclastic possibilities. In the long run, the notion of dissenting by deciding seems likely to help us think of dissent as an everyday act of citizenship rather than an act of disaffiliation.

The book also dwells on the most intriguing aspect of dissenting by deciding – namely, its transformative possibilities. As explored in greater detail in Chapters 3 and 5, decisional dissent seems unusually well suited to generating

political energy at the lower end of the political hierarchy. If one thinks that radical reform is most likely to emerge bottom-up rather than top-down—from average citizens rather than dissenting elites—dissenting by deciding offers an intriguing avenue for further exploration. It holds out the possibility of radical incrementalism, the potential power associated with an everyday act of citizenship, and the possibility that dissent may be understood more as a practice than a status, governance rather than politics.

* * * *

Chapter 1 is the conceptual heart of the paper. It briefly introduces the concept of decisional dissent and deals with several, preliminary counterarguments. It then sketches the ways in which dissenting by deciding further the three aims we traditionally associated with dissent – contributing to the marketplace of ideas, engaging electoral minorities in the project of self-governance, and facilitating self-expression[7] -- differently than conventional dissent. The chapter is cast at a high level of generality and largely focuses on the affirmative case for decisional dissent.

Chapter 2, entitled "Partial Exit" deals with the main objection to the book's thesis: can a governance decision really be termed dissent? It explores the dilemma of what one might call the "law-loving dissenter" and uses a range of examples from the dissent tradition (civil disobedience, utopian communities, jury nullification) to identify where decisional dissent fits – or stands apart from – the tradition of dissent. In doing so, the chapter identifies the many features shared by decisional dissent and the private forms of contestation that we unthinkingly term "dissent."

Having shown that "dissenting by deciding" can properly be classified as dissent, the remainder of the book is devoted to exploring the ways in which dissenting by deciding represents a better or worse avenue for channeling dissent. Chapters 3 - 6 thus offer a more nuanced assessment of the costs and benefits associated with dissenting by deciding. Each presents a case study that highlights some of the unusual features of decisional dissent and provides a richer, more contextualized forum for assessing its merits.

Chapter 3, entitled "A Tale of Two Cities," explores two instances where cities engaged in an act of decisional dissent -- San Francisco's issuance of marriage licenses to gays and lesbians in 2004, and the City of Richmond's decision to create a minority set-aside program in 1983. It focuses on the ways in which dissent can affect the democratic conversation and notes the narrowness of our constitutional discourse regarding the empowerment of electoral minorities and the paucity of conceptual tools for protecting channels for decisional dissent.

Chapter 4, entitled "Isolation and Enclaves," reflects on the connections between power and expression as they relate to dissent, using the Hasidim school district struck down in *Kiryas Joel* and deaf communities as examples. In doing so, it plays two academic literatures against one another: (1) the dominant strand of First Amendment scholarship that, with its romantic conception of dissent, is individualist, even isolationist, in tenor; and (2) the decentralization literature,

which deals more directly with the trade-offs between enclaves and empowerment, isolation and integration.

Chapter 5, "The Taming of Dissent" examines the movement to teach creationism in the school. It considers the costs and benefits associated with radical incrementalism – pouring oppositional politics into small spaces left open by the majority. And it canvasses the reasons that a governing majority might prefer to direct dissent into the channels of governance.

Chapter 6, "Dissent and Dialogue," considers the problem of backlash, using the 2004 election (which took place in the wake of two gay marriage decisions) and the Southern resistance to *Brown v. Board of Education* as examples. It offers a more dynamic conception of the interaction between dissenters and the majority and attempts to pin down the role that decisional dissent – and the conflict it forces -- can play in helping local majorities take part in the shaping of a national identity. The concluding chapter closes by reflecting on what are likely to be the most productive institutional sites for fostering decisional dissent.

CHAPTER I: A COMPARATIVE ACCOUNT

This chapter examines the distinct ways in which dissenting by deciding and conventional dissent ought to differ, at least as a theoretical matter, in furthering the fundamental aims of dissent. Section A identifies the differences in the forms that these two variant of dissent take, and Section B shows how those distinct forms result in functionally different kinds of dissent.

A. Form versus function.

As noted above, traditional conceptions of dissent seem to leave no room for the notion of dissenting by deciding. Indeed, even the *form* dissenting by deciding takes is all but unrecognizable, at least when viewed through the lens of traditional First Amendment analysis. For purposes of this chapter, I set aside the question whether what I term decisional dissent is "really" a form of dissent, taking up the interpretive project necessary to establish that claim in Chapter 2. This chapter simply rests on the assumption that, as a purely functional matter, whether or not dissenting by deciding is properly understood as dissent, it furthers many of the same democratic aims that are served by conventional dissent. On this functional account, if "dissenting by deciding," offers a workable institutional strategy for dealing with the problem of democratic difference, the concept is useful no matter how it is denominated.[8]

There are at least three ways in which dissenting by deciding differs from our conventional conception of dissent. First, it takes the form of a decision, not an argument. Second, dissenters speak truth *with* power rather than to it; they speak not against the state, but on its behalf. Third, when engaged in an act of governance, dissenters act collectively rather than in relative isolation. Each of these differences means that decisional dissent furthers the aims of dissent in different ways.

One key difference between decisional dissent and conventional dissent is the former is embodied in a decision, not just an argument. As noted above, conventional dissenters have two choices: act moderately or speak radically.[9] In either case, dissenters make arguments. Dissenters who act moderately try to persuade the majority on the decisionmaking body to soften its views. Dissenters who speak radically also make an argument, one directed both to the majority of the decisionmaking body and to those outside of it.[10]

Acting radically, in contrast, allows dissenters to express their disagreement through a decision. They are able to offer a real-world example of what their principles would look like in practice. San Francisco's decision to marry gays and lesbians, for instance, gave the nation a concrete practice, not just an abstract issue, to debate. As the New York Times explained, "[t]he television images from San Francisco brought gay marriage into America's living rooms in

a way no court decision could."[11] We learned the story of Del Martin and Phyllis Lyon, partners for over fifty years and long-time lesbian activists, who received the city's first marriage license. We saw beaming couples, surrounded by family and friends, who looked no different from the usual wedding party save that there was an extra wedding dress or tuxedo in the mix. In the words of one supporter, San Francisco's decision "put a face on discrimination."[12]

A second key difference between conventional dissent and decisional dissent is that dissenters speak truth *with* power, thus fusing an act of contestation with an act of affiliation. Decisional dissent allows dissenters to challenge the majority's views at the same moment they act on behalf of the state. Ardent environmentalists on a zoning board, for instance, are not merely attacking the majority's preferred regulatory strategy; they are actively engaged in on-the-ground policymaking. Advocates of creationism are not merely challenging the dominance of evolution in the educational system; they are shouldering the duties of citizenship and implementing the educational strategy they think best serves the community.

A final, key difference between conventional dissent and dissenting by deciding is that, in most of its forms, the latter allows dissenters to act on behalf of the state *collectively*, rather than in relative isolation. Under a conventional model, collective action for dissenters is necessarily private action. Conventional dissent entails electoral minorities' engaging in an act of governance under roughly the same power dynamics that they experience elsewhere. Libertarians who constitute a fraction of the state's population are also a minority on a jury. Greens who enjoy a small proportion of statewide votes may hold just one seat on a zoning commission. In those instances where racial identity and dissenting views meaningfully overlap, African Americans or Latinos are isolated from other group members whenever they serve on a jury or school board. If members of dissenting groups wish to engage with a critical mass of group members, they cannot do so when acting on behalf of the state.

Dissenting by deciding, in contrast, fuses a public act with a collective one. Decisions are made by zoning boards dominated by Greens or juries controlled by libertarians. African Americans and Latinos have ten seats on a jury or school board rather than two. Decisional dissent thus creates an unusual political space for electoral minorities, one where they can abandon their usual role as junior partners to the decision and can govern in the presence of a critical mass of members of the group.

B. What Makes Dissenting by Deciding Function Differently?

Once we have a sense of the differences in the forms taken by conventional and decisional dissent, we can think more systematically about which institutional strategy best serves our purposes in a given context. This section thus explores the connections between the three qualities that distinguish decisional from conventional dissent, canvassed above, with three of the primary

purposes served by dissent: it can contribute to the *marketplace of ideas*, it engages electoral minorities in the project of *self-governance*, and it facilitates *self-expression*.

1. *The Role of Dissent in Improving Democratic Decisionmaking: Visibility and the Marketplace of Ideas*

Consider the different ways in which conventional dissent and decisional dissent serve one of the main goals of dissent: improving the quality of democratic decisionmaking. Political theorists have long grasped the importance of dissent to sound decisionmaking. Here I pull one analytic thread from this conceptual quilt: the conventional Millian idea that dissent allows a society to test its views and positions, to assure itself of the accuracy of some views and to correct others. As Mill writes of the "peculiar evil of silencing the expression of [a dissenting] opinion," we should treasure dissenting opinions because "[i]f the opinion is right, [we] are deprived of the opportunity of exchanging error for truth; if wrong, [we] lose, what is almost as great a benefit, the clearer perception and livelier impression of truth produced by its collision with error."[13] In legal circles, of course, this argument generally travels under the rubric of the "marketplace of ideas."[14]

In order for dissent to function in the manner Mill envisioned, it must be visible. If would-be dissenters keep their views to themselves, their ideas will never reach the marketplace of ideas. The crucial question here is whether conventional dissent and dissenting by deciding produce different *kinds* of visibility for dissenting views.

Acting moderately versus acting radically. It is not difficult to grasp the difference between dissenting by deciding (acting radically), on the one hand, and one variant of conventional dissent (acting moderately), on the other. Because dissenting by deciding takes the form of an outlier decision, not an argument, it is inherently visible to the polity.[15] When conventional dissenters use their votes to gain concessions from the majority, in contrast, dissent is confined *within* the decisionmaking body. It takes the form of an argument to the majority of decisionmakers. It is quite visible to members of the majority, those whom the dissenters are lobbying or trying to convince. But at the aggregate level, while we might see the *effects* of conventional dissent—a slightly less mainstream decision, a concession or two for the minority group—the substance of the dissenters' views is likely to remain opaque.

Consider, for instance, the difference between a verdict rendered by a jury with one juror who is suspicious of prosecutorial misconduct and a decision to nullify by a jury filled with such jurors. Or imagine the likelihood that the policies of a school committee that includes a member of a left-leaning minority will make the left's views visible compared to the likelihood that a committee dominated by left-leaning members will do so. To the extent that conventional dissenters choose to join the decision rather than distance themselves from it,

policies may shift moderately, but dissent will be submerged at the polity-wide level.

Acting radically versus speaking radically. The more interesting question is whether *acting* radically is different from *speaking* radically. Is dissenting by deciding different from publicizing a dissenting view, the other choice available to a conventional dissenter? After all, there are many avenues for making disagreement public that do not involve rendering a decision. Much of First Amendment doctrine, indeed, is preoccupied with preserving such avenues. Nonetheless, dissenting by deciding provides a type of visibility that may be hard to reproduce by publishing a dissenting opinion, let alone writing an editorial or answering a survey. Here again, there is a difference between dissent that takes the form of a decision and dissent that is expressed through an argument.

Agenda setting. Dissenting by deciding has a direct political consequence: the decision of the dissenters is *binding* upon other members of the polity.[16] That fact may ensure it receives attention that conventional dissent might not. To be sure, speaking radically—publicizing disagreement—can have political consequences; it may, for instance, shame the majority into changing its position. Because conventional dissent lacks a binding legal effect, however, under many circumstances it will simply be ignored.

Dissenting by deciding is harder to ignore because it takes the form of a decision rendered; getting rid of it generally means that the majority has to *do* something (usually formally overrule the decision). Decisional dissent can thus force members of the majority to act, reevaluate, and engage with the decision and with those who made it. It thereby allows electoral minorities to engage in the type of agenda setting that is otherwise difficult for those outside the political mainstream.[17]

One might argue that dissenting decisions can be ignored as well, at least when they resolve a sufficiently trivial issue. Decisions rendered by the town of Bolton, Massachusetts, or the Cambridge City Council are hardly the stuff of national debate. But the claim here is only that an outlier decision about even a trivial issue is less likely to be ignored than a published dissent to the majority's preferred resolution of that trivial question.

Certain groups, of course, are more than capable of making dissenting views visible without the aid of formal decisionmaking authority. The Democratic Caucus can easily make its position on an issue visible even when it does not control Congress. The NAACP or Common Cause can make their members' views clear to the world even if their supporters cannot muster enough votes to control any relevant governing institution. These groups are what I term "dissenting elites"; they lack the ability to control a majority of votes at the upper echelons of power, but they can still demand the majority's attention. Indeed, we might guess that electoral minorities are best able to make conventional dissent visible at the upper echelons of power—like state or national legislatures—where enough attention is paid to the debate to justify organizing a minority caucus.[18]

Most would-be dissenters lack such power, however. Many individuals whose views are not represented by dissenting elites lack access to a sufficiently powerful institution to make their views public in this fashion. And even those citizens who share the views of dissenting elites nonetheless cannot *themselves* dissent effectively. When they voice the same arguments offered by the dissenting elites, no one pays attention. Indeed, even if every dissenting school committee member or juror went to the trouble of penning her views, it is quite unlikely that anyone would take notice. The power associated with making a decision—acting with the authority of the state—provides a megaphone for amplifying the dissenting views of lower-level decisionmakers.

Dissenting by deciding, then, is an equalizer of sorts. It provides an avenue for average citizens to make disagreement visible. Because many of the opportunities for decisional dissent stem from the everyday participatory opportunities that allow a mass democracy to function, the coins of *this* realm are not money and access, but time and numbers. And even when average citizens are not on completely equal footing with dissenting elites—as with important positions in a local government, which demand something more of candidates than a mere willingness to participate—at the very least decisional dissent moves the debate closer to those at the lower end of the political hierarchy.[19]

One might object that the power to decide is meaningless for dissenters as long as the centralized authority can overrule it. Setting aside the possibility of agenda setting, who cares, for instance, if a locality adopts an ordinance protecting gay rights if the statewide majority can simply vote a different policy into place?[20] Even when the majority overrules the dissenters, however, there is reason to think that the conversational dynamic between minority and majority plays out differently than it would in an arena featuring only conventional dissent.

Specifically, dissenting by deciding may subtly shift the burden of persuasion in political discourse. When minorities dissent by deciding, we might expect to see something like an endowment effect or status quo bias.[21] There may be a stickiness to the initial decision that makes it more difficult for the majority to adopt its preferred policy than it would be were the majority operating with a clean slate. When the majority has already enacted a statewide rule, conventional dissenters bear the burden of persuasion if they want to change the status quo. When the minority gets a chance to put its principles into practice first, it may be more difficult for the majority to adopt its preferred rule.[22] Further, the implementation of a decision may generate a new set of interests groups ready to lobby on behalf of the decision, thus changing the political dynamic that produced the majority's original decision.

The argument here is not that dissenting by deciding is more likely to lead the majority to change its views. As explored in greater detail in Chapter 6, issues can get on the agenda too quickly, and decisional dissent can prompt backlash. The argument is simply that decisional dissent has the potential to change the democratic conversation in a different way than conventional dissent.

Remapping the politics of the possible. Even setting aside the possibility that a decision rather than an argument will lend more visibility to a dissenting view, there may be a difference in what, precisely, we end up seeing when dissent is couched in these competing forms. Dissent that takes the form of an argument takes on a distinctive, albeit familiar cast. When a minority caucus is formed or a dissenting view is published, conventional dissenters can only announce their views in the abstract. All they can do is describe what members of their group would do *if* they had the power to decide.

Dissenting by deciding offers a real-life instantiation of an idea. It thus allows electoral minorities to remap the politics of the possible. When dissent takes the form of decision, electoral minorities have a chance to put their ideas into practice, to move from abstract principles to actual policy.[23] Decisional dissent gives us a concrete practice to examine, a real-world example to debate, and it provides a concrete answer to the parade-of-horribles question that represents one of inertia's most powerful tools. We not only get to see whether the idea works, but how the new policy fits or clashes with existing institutional practices. As the mayor of San Francisco noted of the city's decision to marry gays and lesbians, it "put a human face on [the issue]. Let's not talk about it in theory. Give me a story. Give me lives."[24] *Speaking* radically thus looks different from *acting* radically.[25]

Consider, for instance, a set of examples drawn from Michael Klarman's recent work on the *Brown* era.[26] Klarman's account offers examples of dissenting by deciding in its ugliest form (the resistance of white Southerners to a national court's command to desegregate) and conventional dissent in its most heroic (the civil rights protests against the policies of Southern-state majorities). At first glance, one might think that Klarman tells the story of decisional dissent gone wrong. Klarman argues that the civil rights protests were the "primar[]y" reason that "the pace of school desegregation accelerated,"[27] and no one needs to be reminded of the tragedies that arose from the actions of white Southerners who used the tools of governance to resist *Brown*'s mandate.

As one peels back the layers, however, a more complex story emerges, one that illuminates the role dissenting by deciding can play in making disagreement visible. To begin, dissenting by deciding played a positive role in desegregation efforts, as it offered a real-life instantiation of what successful integration could look like. Klarman, for instance, finds that the success of local desegregation efforts in the border states—interracial educational committees and projects, an integrated teacher's union, the desegregation of several local theaters and lunch counters—"smoothed the way for peaceful school desegregation."[28] In his words, "[t]he readiness of city and state officials to comply with *Brown* is therefore less surprising, given how far segregation barriers had already been breached."[29]

Klarman's most controversial claim concerns the dark side of dissenting by deciding: that *Brown* radicalized Southern whites, leading them to acts of

violence, which in turn transformed Northern opinion about the need for strong, national civil-rights legislation.[30] Here again, decisional dissent played a role, albeit a tragic one, in this dynamic. After all, had Southern whites merely confined themselves to conventional dissent, the nation might not have recognized the urgent need for civil rights legislation. The fact that Southerners engaged not only in violence, but *state-sponsored* violence, offered concrete examples of what their outlier views looked like in practice. As Klarman observes, "It was televised scenes of *officially sanctioned* brutality against black demonstrators that transformed northern opinion on race."[31]

Klarman's account of the *Brown* era thus underlines Mill's basic insight. When dissent is made visible, it sharpens our thinking about an issue. By offering a real-life instantiation of an idea, dissenting by deciding plainly furthers that end. It can sometimes show us that our views are mistaken, as Klarman suggests occurred when Southern-state majorities saw the results of incremental efforts to desegregate in the border states. And decisional dissent, like conventional dissent, can also produce "the clearer perception and livelier impression of truth produced by its collision with error."[32] To say this was the case with the nation's reaction to the brutal resistance tactics deployed by white Southerners would trivialize what occurred during those turbulent times. But if Klarman is correct that state-sponsored violence helped prompt an unduly complacent national majority to respond to Southern intransigence, his account does shed light on the role that dissenting by deciding can play in making outlier views visible to the majority.

Trade-offs and risk. The point is not that a decision is a superior vehicle for conveying a dissenting view; it is simply a different one. Dissenting by deciding will sometimes be a poor strategy for expressing dissent. In some instances, although the decision of the dissenters may be visible, the identity and commitments of the dissenters may not be. Jury verdicts, for instance, can be quite opaque.[33]

Dissenting by deciding may also muddy—even change—the views of would-be dissenters. Most obviously, casting dissent in the form of a decision may prevent minorities from presenting their views in an analytically clean and comprehensive fashion. For instance, the choice for would-be dissenters may be binary—the acceptance or rejection of a given policy or verdict. Dissenters may not be able to articulate their views in full because the decision in question presents too limited a set of facts or policies to do so. Alternatively, the choice for would-be dissenters may involve too many options to make dissent visible. For instance, if we look at the record of a black governor, how do we separate out the dissenting portions of her policy choices from the package of compromises and concessions that any governing official must make to do her job?

Further, as explored in greater detail in Chapter 6, pouring dissent into the mold of a decision may change the contours of the idea. Theories often change when put into practice. Implementing an idea may require compromise and adaptation. It may reveal the need for even more systemic change or may prove ineffective in practice. Dissenting by deciding may be quite useful in this regard;

dissenters may learn something different about their views, strengthen them through adaptation, or discover a more creative set of solutions to their concerns.[34] But this strategy may also dilute or complicate the dissenters' message in a way that undermines the effectiveness of their arguments.

The fact that dissent takes the form of a decision may also prove to be a handicap in generating the right kind of visibility for the dissenters' arguments. Decisional dissent allow dissenters to speak not only on behalf of themselves, but on behalf of nongroup members. One might think that refracting dissent through a governing body might be useful because it shifts the debate from the politics of identity to the politics of ideas.[35] In San Francisco, for instance, a heterosexual Mayor presiding over a city whose population included a large proportion of heterosexuals chose to issue the licenses. It was impossible for opponents of gay marriage credibly to accuse gays and lesbians of hijacking city governance for their own purposes. On the other hand, there are risks associated with severing the link between identity and ideas. For instance, one might think it is a problem that the current stand-ins for the gay marriage debate are a heterosexual mayor from the West Coast and a heterosexual judge on the East Coast. Such stand-ins allow would-be opponents of the dissenters' position to avoid railing against the dissenters or even their ideas; instead, they simply complain about institutional actors' exceeding their authority.[36]

B. *Dissent and the Value of Self-Governance: Speaking Truth to Power or With It*

A second reason we value dissent is that it encourages the participation of minorities in the project of self-governance.[37] The link between the First Amendment and the values associated with self-governance has been the subject of much academic discussion. The seminal work is that of Alexander Meiklejohn, who argued that "[h]uman discourse, as the First Amendment sees it, is not a mere academic and harmless discussion. . . . It offers defense to men who plan and advocate and incite toward corporate action for the common good."[38]

In thinking about the ways in which free speech furthers the project of self-governance, a number of scholars have emphasized the importance of dissent for engaging electoral minorities—the usual losers in the political process—in the project of self-rule. Dissent matters for these purposes because a government's legitimacy in the eyes of the minority depends in part on its creation of channels for dissent. Stephen Carter, for example, has argued that "the decision on how to treat disobedience is . . . part of the community's act of definition,"[39] adding that:

> For the fairness and decency of any state should be assessed not alone through study of whether its majorities . . . find it good, but through a study of whether its minorities . . . find it good. Another way to look at the matter is this: the justice of a state is not measured by its authority's tolerance for dissent, but also by its dissenters' tolerance for authority.[40]

Similarly, Steven Shiffrin has argued that protecting the rights of dissenters to protest helps bind them to the political community,[41] and Lee Bollinger describes the shared intuition that the "society adds something important to its identity, that it is significantly strengthened, by . . . acts of extraordinary tolerance" toward dissenters.[42]

If we value dissent because it encourages electoral minorities to take part in the project of governance, the question is whether conventional dissent and dissenting by deciding further that end in different ways. Is there a reason to think that speaking truth *with* power might affect electoral minorities differently than speaking truth *to* power?

Forging civic ties. If we value dissent in part because it helps cement ties between electoral minorities and the polity, it is easy to grasp the arguments in favor of conventional dissent. If the state creates opportunities for contestation—a chance for dissenters to have their say—electoral minorities will feel they have gotten a fair shake.[43] Further, giving dissenters a chance to participate in the decision and to air their disagreements publicly can both be understood as an acknowledgment by the majority of the dignity of the dissenter.

Participation versus power. Dissenting by deciding goes one step further in forging ties between a dissenter and the polity. It offers electoral minorities not only the dignity to participate, but the dignity to decide. If scholars are correct that protecting dissent in its conventional form helps bind dissenters to the community, then granting dissenters a chance to decide—to speak truth *with* power—may give would-be dissenters an even stronger reason to be invested in the system, a significant justification for calling it their own. Decisional dissent allows electoral minorities to shed the role of powerless critic. Rather than merely cast a vote, electoral minorities wield the same power and authority as members of the majority. If, as George Kateb writes, representative democracy depends on synecdoche, dissenters, too, get a chance to "take turns standing in for the whole."[44]

The relationship between personal and civic identity. Conventional dissent and dissenting by deciding also seem to suggest a different relationship between a dissenter's views and her civic status. The conventional model of dissent, as noted above, leaves a would-be dissenter two choices: act moderately or speak radically. If a dissenter wishes to engage directly in self-rule—to act under the authority of the state—she must speak moderately. If she wishes to speak her mind, giving full expression to her views, she necessarily distances herself from the project of self-governance. She speaks for herself, not for the state.[45] Conventional dissent may thus be more likely to create a disconnect between an individual's identity as a dissenter and her status as a member of the polity. Disagreement with the majority's view is, at least as a formal matter, equated with disagreement with the polity.

Decisional dissent, in contrast, blends dissent with an act of governance. When an individual can dissent by deciding, she is able to reaffirm her status as a full member of the polity at the same moment she expresses her disagreement with the majority's view. She speaks against the majority while acting on its behalf. Dissent thus involves both an act of affiliation and an act of contestation. It moves dissent closer to Edward Corbett's view that disagreement ought to be expressed through "the rhetoric of the open hand" rather than that of "the closed fist."[46]

One might argue, correctly, that conventional dissent can also be understood as an act of affiliation. A conventional dissenter can, of course, declare her affiliation with the polity—her loyalty to the political community—at the same moment she expresses her disagreement. The relevant difference between conventional and decisional dissent, however, is that in the latter case the state in some senses returns the sentiment. When someone dissents by deciding, her act of affiliation is officially recognized as such—"blessed," if you will, by the state. The dissenter does not merely declare her affiliation to the state; she acts under its authority despite staking out an outlier position. Membership in the polity is distinguished from membership in the majority—not merely as a matter of rhetoric, as is possible with conventional dissent, but as an institutional practice.

Dissenting by deciding thus involves oppositional politics at two levels. It involves not only a challenge to the majority's preferred policy, but to the majority's assumption that it is entitled to the decide question. Decisional dissent thus helps redefine what constitutes "normal" terms of policy—what kinds of practices actually exist in the world – and in terms of politics by creating an unusual political space where members of the majority are deprived of the comfort and power associated with their majority status and members of the minority enjoy the dignity to decide.

Absorbing the habits of citizenship. Dissenting by deciding may also inculcate the habits of self-governance in would-be dissenters differently than conventional dissent. Conventional dissent, to be sure, teaches the value of compromise to those dissenters who choose to act moderately and the value of opposition to those who speak radically. The participatory habits conventional dissenters are likely to acquire are thus those of the influencer or gadfly.

If the conventional dissent model offers a rough choice between self-rule and self-expression, dissenting by deciding fuses the two. The goal of the dissenter is not just to win a concession or shame the majority, but to get something—*her* something—done. Dissenting by deciding thus represents an unusual blend of the liberty of the ancients (a participatory conception of citizenship) and the liberty of the moderns (self-expression, an individual-centered conception of liberty that requires protection from government interference).[47]

On this view, Harry Kalven's suggestion that the "citizen-critic" is "our most important public official"[48] ceases to be a metaphor. For instance, Greens who dominate a zoning board are not merely touting a contrary view about the current state of the environment; they are working to integrate those views into the political system. A school committee figuring out how to teach creationism is not just offering a critique of secular education; its members are embracing that educational system as their own and doing their best to improve it.

It is worth noting that electoral minorities take on not just the power associated with membership in the majority, but the responsibility. Dissenters no longer enjoy the luxury of the critic: inaction. They must figure out how to put their ideas into practice, negotiate a compromise, and, most importantly, live with the consequences of their critique. A jury filled with those who think our sentencing regime is unduly punitive must set a guilty defendant free in a case where the victim is more than a cipher. A zoning commission filled with environmentalists will be forced to vote against worthy projects in order to protect the environment. A school committee that believes creationism should be taught in the school must choose a textbook, figure out precisely how to integrate those arguments with the school's science curriculum, and decide how to accommodate the views of those who think creationism does not belong in the school.

Trade-offs and risks. Here again, dissenting by deciding is merely a different strategy for promoting dissent, not necessarily a better one. To begin, there is an obvious trade-off embedded in the choice between decisional and conventional dissent. We must decide how broad or how deep we want minority influence to run in our institutions. Within a given institutional setting, we must choose between allowing electoral minorities to participate in *all* decisions or letting them control *some* of them. After all, if we want to ensure that electoral minorities have the power to decide, we must concentrate them in some subset of decisionmaking bodies, thus sacrificing a chance for them to influence the decisions made by each of those bodies.

Dissenting by deciding also carries its own set of possibilities and risks. For instance, on the one hand, we might value the chance to strengthen the ties between the dissenter's private identity and her civic one. In the long run, if disagreement is consistently embraced as a public act rather than shunted off to the private realm, it may help us think of dissent as an everyday act of citizenship rather than as an act of disaffiliation.

On the other hand, dissenting by deciding may blur the public-private distinction that many think is crucial for maintaining political pluralism. Political pluralists argue that individuals are members of multiple social groups that serve, in effect, as sources of sovereignty that are independent of—and in competition with—the state.[49] In the words of Dalia Tsuk, "By envisioning sovereignty as distributive or multiple, pluralists sought to guarantee the flourishing of diverse and valuable forms of identities, ways of life, experiences, and viewpoints."[50] Political pluralists have been especially attentive to protecting private groups and associations from public interference and thus preserving their ability to serve as

competing sources of norms. Kathleen Sullivan offers a typical argument to this effect in discussing the constitutional status of religious groups:

> One might think such autonomy for religious and other private associations desirable precisely because of the normative pluralism and epistemic diversity it fosters. To the extent that religion serves as an autonomous source of values for its members, it stands apart from and potentially against the state . . . . On this view, public and private values ought not be congruent, and conscription of private associations, including religious associations, into common norms and public values defeats their very purpose.[51]

Dissenting by deciding seems to pose a quite different threat to political pluralism than the one most pluralists imagine emanating from the state. Whereas political pluralists tend to worry that the state will impose its own public values on private groups,[52] dissenting by deciding could lead to the absorption of private values into the public realm by offering state-based institutional sites for the development of competing norms. Dissenting by deciding poses the risk of cooptation—the gradual erosion of the public-private boundary through the state's embrace of, rather than assault upon, dissenting views. As explored in greater detail in Chapter 4, the notion of decisional dissent presses on the question whether the language of separate sovereigns, which permeates the literature on political pluralism, is a convenient shorthand or an essential prerequisite for pluralism.

Even if dissenting by deciding does not unduly erode public-private boundaries, there is a risk that dissenting by deciding may, in the long run, tame dissent. To be sure, one might initially think that the fact that dissent takes the form of a decision might make it more threatening—*acting* radically may be more disturbing to the majority than *speaking* radically. Dissenting by deciding may harden the majority's views against dissenters if it creates the appearance that dissenters are hijacking the state's apparatus to express disagreement.

In the long run, however, decisional dissent may tame dissent by channeling contestation into a form that is more palatable to the majority. Conventional dissent, as noted above, involves an argument *against* the polity's decision. Its dominant valence is oppositional. Dissenting by deciding, in contrast, encourages dissenters to work through the system. Rather than jeering from the sidelines, dissenters suit up and get in the game. Further, their disagreement seems to take a positive form—an affirmative effort to put their views into the service of the state—rather than a negative attack on the policies of the majority. And it provides ready institutional channels for dissenters to blow off steam,[53] perhaps leading them to vent their frustrations by making small decisions rather than organize to change the larger ones.

Further, in some instances, it may be easier to speak truth *without* power. Expressing dissent through accepted channels of governance risks taming dissent, cabining it within bounds that are acceptable to the majority. Precisely because dissenters are engaged in governance, they cannot present their ideas in an

undiluted form, but must engage in the same sort of compromise and negotiation that members of the majority do when they seek to implement their own preferences. If dissent always took this form, it might pressure dissenters to accommodate the majority's views rather than challenge them. The oppositional piece of oppositional politics may fall away. Further, the presence of dissenters in positions of power might "bless" the process, lending the government an undeserved legitimacy in the eyes of the minority and majority.

C. *Identity and Expression: The Relationship Between Collective Dissent and Public Action*

A final reason that we value dissent is because it allows individuals to define and express their identities. A major strand of First Amendment theory thus focuses on speech as an opportunity for self-actualization. Scholars who write in this vein laud the First Amendment's role in maintaining individual autonomy and promoting self-expression.[54] Here, consistent with the book's focus on questions of power and governance, I move away from the purely individualist model of self-expression that dominates First Amendment scholarship and consider more group-oriented conceptions of identity[55]—specifically, questions of racial or ethnic difference. After all, the problem of dissent seems to be most nettlesome when the views of the polity divide along *group* lines and those in dissent share the same racial or ethnic background.[56] Dealing with dissent is difficult in this context because we are dealing not just with disagreement, but disagreement that corresponds to disparities in power. One's status as a member of a subordinated group overlaps with one's status as a dissenter.

To the extent that participation in governance allows an individual to *constitute* her identity—to define her political self and her relationship to the community[57]—we might think that an identity category, like race, that is salient to an individual's personal identity might similarly be salient to her civic identity. If, as some political theorists claim, one's group identity influences the way that one participates in the political process, we might think the reverse is true as well – that an individual's participatory experiences help shape her group identity. The notion of dissent, then, may be relevant to the formation of personal and civic identity at the *group* level, just as many believe it is at the individual level.

Although those who emphasize the expressive dimensions of dissent do not often consider the issue of group identity, the conventional view of dissent maps on quite neatly to one of the primary strategies proposed for dealing with the issue of group difference in democratic decisionmaking: the "politics of recognition."[58] Just as proponents of conventional dissent seek to ensure the presence of a dissenter on every decisionmaking body, proponents of the politics of recognition seek to guarantee racial and ethnic minorities a presence—or voice—in every part of the political process.[59] Dissenting by deciding, in contrast, would sacrifice the chance for racial minorities to have a voice on every decisionmaking body. It would instead concentrate racial minorities on a subset of decisionmaking bodies so that they would have a chance to control the outcome of those decisions.[60]

If one thinks concretely about institutionalizing these two visions of dissent in a context where the identity of the dissenter roughly aligns with membership in a subordinated group, conventional dissent (the natural institutional strategy for implementing the politics of recognition) does not merely require racial minorities to choose between acting moderately and speaking radically. It also requires them to choose between acting *in isolation* or speaking *together*. Dissenting by deciding, in contrast, often allows racial minorities to *act together*. As a result, these two strategies for institutionalizing dissent may create quite different fora for the expression of group identity.

The politics of recognition: isolation and enclaves. One crucial difference between the fora for self-expression created by the politics-of-recognition strategy and the decisional-dissent model has to do with numbers and, thus, with power. The goal of the politics of recognition is to ensure that at least one "representative" of each minority group has a chance to articulate the group's perspective on every decisionmaking body. It thus requires us to spread racial minorities across all decisionmaking bodies rather than to concentrate them in a few. The result of this empowerment strategy is a set of decisionmaking bodies in which racial minorities are *always* numerical minorities.

What that means in practice is that racial minorities who wield the authority of the state do so in relative isolation from other members of the group. Under the system favored by adherents to the politics of recognition, one would expect ten or twenty percent of the decisionmakers to be members of the relevant minority group—one or two African Americans on a jury, one Latina on a school committee, etc. To the extent that these individuals understood their group identity to influence their perspective on the issue before them, they would have a chance to articulate those views. But the expression of identity would be a relatively solitary act: the statement of one or two group members on a given decisionmaking body. Under such circumstances, racial minorities might feel pressure to speak "on behalf" of the group or to conform their statements to internal or external conceptions of the group's identity.[61] At a minimum, the absence of a critical mass of group members would mean that there would be relatively little chance that internal dissent—disagreement among group members regarding the existence or nature of the group's identity—would emerge during this process.

Moreover, the politics of recognition may ultimately reproduce in decisionmaking bodies the same level of powerlessness that group members experience polity-wide. Precisely because their numbers on any given decisionmaking body are few under the politics-of-recognition strategy, racial minorities will wield roughly the same amount of power on the decisionmaking body as members of the group wield within the polity as a whole. Group members exploring the relationship between their personal and civic identities might discern little difference between the experience of being in the minority on a jury or school committee and their experiences as a minority outside of that context. If part of the reason we wish to reserve civic space for racial minorities to dissent is

that we are concerned about the group's lack of power, the politics-of-recognition strategy may both undermine and reify existing political dynamics.

At the very least, it is quite unlikely that racial minorities will be able to give full vent to their perspectives. Their numbers destine them to play the role of "influencer" in the decisionmaking process and thus preclude them from exercising full control over the message being conveyed by the governance decision.

Perhaps because acting in isolation does not provide an entirely satisfactory solution to the problem of group difference, some advocates of the politics of recognition have argued that we ought to maintain alternative fora for racial groups to gather—safe spaces for group members to shape and give expression to their identity. Safe spaces ensure that the expression of group identity is not a solitary act; it guarantees that racial minorities have a place to hash out their views along with other members of their group. In such circumstances, group members may not experience the same type of pressure to articulate "the" group's perspective. To the contrary, the sheer number of minority group members present is likely to create space for disagreement among members about the nature—or even the existence—of a group perspective. And the private enclave guarantees group members a level of control that they are unlikely to encounter when participating directly in the process of governance.

Notice, however, that the safe space strategy is the rough cognate of speaking radically. Dissent takes the form of private speech, not a public decision. To the extent that group members wish to speak *as a collective* about the group's identity, they can only do so on behalf of themselves, not on behalf of the state. Under the politics-of-recognition strategy for dealing with group difference, group members can speak radically and they can speak collectively, but the collective expression of group identity is limited to private speech, not public action.

Fusing the collective act with the public one. Dissenting by deciding, in contrast, can fuse the public act with the collective one. Because, at least its most common forms, it concentrates racial minorities on a subset of decisionmaking bodies, they need not choose between acting in isolation or speaking collectively. Under a system that fosters dissenting by deciding, group members can *act collectively*—they can engage with a critical mass of group members in expressing the group's identity on behalf of the state. What this means in practice is that the process of defining the connection between civic and personal identity usually involves many voices, not one. It thus provides an institutional solution for those seeking to move away from an individualist understanding of dissent.[62]

Perhaps more importantly, group members speak together at the same moment that they speak on behalf of the state.[63] Opportunities for group members to hash out the connection between group and civic identity together exist under the politics of recognition and other conventional accounts of dissent. But it is only decisional dissent that allows group members to engage collectively in that process at the same moment they are performing a civic act, and we might suspect

that the relationship between group and civic identity might look different when it is forged in the crucible of a governance decision.

Put differently, what is intriguing about the notion of dissenting by deciding is that subordinated group members get a chance to speak truth *with* power in a dual sense—exercising control over the message (by virtue of their numbers) at the same time they wield state authority (by virtue of the form that dissent takes). Dissenting by deciding thus picks up on the strands of First Amendment doctrine that protect not only "abstract discussion" but *collective* efforts to get something done.[64] It also resonates with Lani Guinier and Gerald Torres's conception of "political race": "Unlike identity politics, political race is not about being but instead is about doing. Political race configures race and politics as an action or set of actions rather than a thing."[65]

Further, dissenting by deciding means that racial minorities engage in this simultaneously cooperative and expressive act in the presence not only of internal dissent, but external dissent as well. Internal dissent is what springs from the presence of a critical mass of group members on the decisionmaking body. But precisely because decisional dissent does not occur in a purely private enclave, members of the majority group also take part in the decisionmaking process. Minority group members thus reach a decision in the presence of members of the majority group, who may support—or oppose—the decision.

Dissenting by deciding thus offers neither the risk of a permanent minority status in the civic realm nor the safety of a private enclave. As with a private enclave, racial minorities exercise *control* over the decision. That control, however, stems not from the exclusion of members of the majority from the discussion, but from the power of concentrated numbers—the same type of power enjoyed by members of the majority in most instances. Members of the minority group are thus engaged in a profoundly democratic act—forging agreement in the presence of internal dissent *and* external disagreement. In effect, racial minorities stand in the shoes of the majority under the usual political dynamic; they enjoy the power to decide, but that decision must be made in the presence of internal and external dissent. No longer confined to the role of influencer or gadfly, racial minorities wield power in the presence of influencers and gadflies. And the type of collective dissent that was once forged in a private enclave moves to a decidedly public space.

Trade-offs and risks. While dissenting by deciding is best understood as a complement to the politics of recognition—it is possible to pursue both strategies simultaneously across institutional contexts—we face a trade-off between the two if we focus on a single institution, where it will not be possible to pursue both design strategies simultaneously. On the one hand, dissenting by deciding sacrifices a chance for minority group members to affect all the decisions rendered within a particular institutional structure. On the other hand, it offers racial minorities the chance to abandon the role of permanent *political* minority and control some subset of decisions.

Even setting aside this trade-off, here again dissenting by deciding simply represents a different—not better—strategy for dealing with the problem of group difference. While the politics of recognition emphasizes the dignity of voice, dissenting by deciding emphasizes the dignity to decide, and how one values each may depend on the extent to which one agrees with Cover's strong claim that "those who would offer a law different from that of the state will not be satisfied with a rule that permits them to speak without living their law."[66]

Further, while the politics of recognition may lead to the creation of private enclaves for racial group members to hash out questions of civic and group identity undisturbed, the notion of decisional dissent not only places those debates in a civic space, but embraces their *outcome* as a decision of the state.

Dissenting by deciding may make dissent harder by forcing debates about civic and group identity to take place in the presence of majority group members who may support—or challenge—the decision. Further, while a private enclave deprives one of the chance to speak truth *with* power, it also allows one to craft one's message without the distraction of outside dissenters. On the flip side, the decisional-dissent model may help eliminate any inference that minority group members require protection from the rough-and-tumble world of politics.

Nor does the presence of a critical mass necessarily make dissent easier. While the company of others may be a source of empowerment, it is, of course, easier for one person to speak on behalf of the group than for a number of group members to agree on what to say.

A final cost to decisional dissent is that, as noted above, it is sometimes easier to speak truth *without* power. A government decisionmaking process can be a forum non conveniens for expressing group identity. It may be difficult for members of a group to speak for themselves and for the polity at the same time. A decision rendered under state law may simply be an unwieldy vehicle for expressing group members' views. That conjecture seems most likely to be true for those group members who define their identities in opposition to the state, who believe that membership in the group depends on an outsider's status. In such instances, the notion of expressing one's identity through an action of the state would be a contradiction in terms.

Chapter II: Partial Exit

As noted above, the obvious question raised by the conceptual framework this book proposes is whether "dissenting by deciding" is properly understood as a form of dissent. As a functional matter, of course, it does not matter what one calls decisional dissent provided that it offers a useful institutional strategy for dealing with the problem of democratic difference. Even if the functional account can stand on its own, however, there are reasons to probe further and assess whether an interpretive account can be offered to supplement the functional one. After all, if we think of American constitutionalism as containing two competing strands – federalism and nationalism – any analysis of the small, disaggregated institutions ought to limn both parts of that tradition.[67] Examining these institutions simply as sites for empowering minorities – as I do elsewhere[68] -- lets us widen the lens of federalism, which has largely overlooked the unique role that many small, overlapping sites for local majority control can and do play in promoting the values associated with decentralization. The notion of decisional dissent, however, shifts the focus to the nationalist strand of our constitutional tradition because it explores the ways in which local majorities can take part in a dialogue about national identity. It is thus closely intertwined with the notion of dissent, with its focus on voice and symbolic power.

The definition of dissent. Does it make sense as an interpretive matter to conclude that dissent can take the form of a governance decision? Certainly nothing in the basic definition of dissent requires that it take a particular institutional form. The Oxford English Dictionary defines dissent simply as a "[d]ifference of opinion or sentiment; disagreement; dissension, quarrel." Even if we refer to a "dissenter" in a more specific sense – to describe someone who subscribes to an outlier view on an issue that she deems salient to her identity – the term can be used to describe a global minority who temporarily holds a local majority on some decisionmaking body.

The question is why we would think that dissenters of this sort lose their status as dissenters simply because they temporarily enjoy a local majority on a decisionmaking body. The objection might be that dissent cannot be expressed through a decision. Plainly the objection is not that dissent must take the form of speech, as there are numerous examples—most notably acts of civil disobedience—of dissent being expressed through action.

The concern instead must be that the notion of dissenters' wielding governmental power is a contradiction in terms. One of the reasons that it is difficult to accept the notion that acts of governance can be acts of contestation is that our constitutional vocabulary is not sufficiently capacious to describe decisional dissent. Our usual understanding of dissent involves the speech or actions of individuals against the state, and we address those questions using the rights-based framework of the First Amendment. When we focus on *governmental* decisionmaking, we typically think of such contests as playing out between separate sovereigns – e.g., a state acting against the federal government

rather than part of the polity acting against itself. We can then file such conflicts under the conceptual heading of federalism rather than dissent, thus allowing the idea of sovereignty to eliminate (or, as I would argue, conceal) this potential tension. The federalism literature, however, fails fully to capture the ideas explored here.

Even if we set aside the individualist, rights-centered focus of current First Amendment discourse, however, one might nonetheless insist that those engaged in political opposition must dissent from a decision, not make one. Such a claim, however, takes an unduly narrow view of power in the disaggregated institutions that are the subject of this book. Where an institution is disaggregated, the power of the polity—by which I mean the political community whose governing system includes that institution[69]—is parceled out to a number of smaller decisionmaking bodies. A disaggregated structure creates the possibility that electoral minorities can wield control over some subset of decisions without violating the principle of majority rule—an institutional design strategy that generates a range of intriguing democratic possibilities.

The fact that electoral minorities wield control over some decisions within a disaggregated structure does not alter their status as dissenters. The power of the dissenter in such instances is partial—confined temporally or spatially. For example, dissenters may control one jury or school committee. Even within that institution, the decisions dissenters render will be outliers, and the views of the majority will prevail in most of the decisions made therein. Nor will dissenters control the central decisionmaking body (usually a legislature) that sets polity-wide policies; they may thus succeed in enacting a policy locally only to have it subsequently overturned at the state or national level. The fact that dissenters use temporally or spatially restricted power to express their views should not be mistaken for a fundamental change in power dynamics in the state as a whole; a global minority remains a global minority. Dissenting by deciding does not constitute a reversal of fortune.

Perhaps, then, the objection is simply that that there is a difference between adopting an outlier policy and engaging in an act of opposition.[70] The danger is that the model pulls in too much; it includes outlier decisions that neither reflects a desire to oppose an existing norm nor create the appearance of opposition. The objection, then, is grounded in a conceptual problem that plagues scholars of dissent generally. After all, not all speech constitutes dissent, nor do all violations of the law represent civil disobedience.

The solution to that dilemma, however, is not to exclude all outlier decisions from one's definition of dissent, but instead to follow the lead of scholars of free speech and civil disobedience and rely on a set of common-sense proxies for identifying what speech or action constitutes dissent: whether the speaker/actor intends to dissent, and whether she is understood to be doing so.[71] And it appears that these rough-and-ready proxies would serve equally well here. Although our current vocabulary does not leave space for the notion of dissenting by deciding, those engaged in governance could certainly understand their

decisions to be an act of contestation, and the majority presumably could recognize them as such. Indeed, even without a popular conception of dissent capacious enough to encompass outlier decisions, we already see scattered but tantalizing examples where the language of oppositional politics seeps into acts of governance.[72] Thus, were the notion of decisional dissent to catch hold, it is possible to imagine acts of governance being understood as dissent.

The dissent tradition. One might nonetheless object that if one looks to the two main strands of the dissent tradition -- free speech and civil disobedience -- neither offers a perfect fit with decisional dissent. The free speech tradition, in which the state recognizes the right of dissenters to speak against it, involves *speaking with permission*, and civil disobedience involves *acting without permission*. Dissenting by deciding, in contrast, involves action, but action *with* permission – it takes place in the space left open by the centralized decisionmaker.

More importantly, the "permission" given in this context is to act on behalf of the state. One might therefore think that as long as the would-be dissenter is wielding state power in an area where the state has given her permission to do so – that is, as long as the dissenter's action is consistent with the law -- it cannot be dissent. Put differently, if the outlier decision is within the range of discretion the law grants her, the action is by definition not an act of contestation but simply an example of how federalism's laboratories of democracy model are supposed to function.[73]

This section makes two points. The first is that although decisional dissent is interstitial dissent – it takes place in gaps left by the majority and thus provides a comfortable home for what we might call the "law-loving dissenter"[74] – it leaves ample space for acts of contestation. The second point is that the law-loving dissenter inhabits a broad range of the dissent spectrum. Indeed, we can understand much of the dissent tradition as a form of partial exit – an act of contestation, but one that embodies a broader commitment to the polity as a whole. Thus, far from being a contradiction in terms, the notion of acting both for and against the polity is reasonably prevalent within the dissent tradition.

1. Interstitial dissent and the law-loving dissenter.

As noted above, when sovereign acts against sovereign (as with the federalism example), we might not conceptualize that action as an example of part of the polity acting against the whole. Here I therefore focus on the institutional contexts that most crisply illustrate this phenomenon -- decisionmaking bodies like juries or school committees, which are not separate sovereigns and thus squarely raise the question whether one can act on behalf of and against the polity at the same time.

Decisional dissent of this sort is interstitial; it takes place in the gaps of discretion left to low-level decisionmakers. Most disaggregated institutions where dissenting by deciding occurs are at the lower end of the political hierarchy. These decisionmaking bodies are usually charged with implementing

or applying a legislative or executive mandate—a jury applying the law enacted by the legislature, a school committee implementing the policy set by an education department.[75] The chance to register disagreement through a decision in such contexts emerges ad hoc, either by the grace of the majority or out of practical necessity.[76] Juries, for instance, can render a decision only within a range set by the legislature. Appellate panels are constrained by the precedent of a single superior court. School committees implement policy within a range set by a central policymaker.

Dissenting by deciding in these contexts does not, however, depend entirely on the willingness of the majority to cede some discretion to the lower-level decisionmakers. Disaggregated institutions are often a solution to the problem of mass governance. A legislature cannot render a decision in every criminal case or draft every legislative report. A single court cannot decide every case that enters the judicial system. Central decisionmakers, of necessity, must cede some discretion to lower-level decisionmakers to interpret and implement the majority's decrees. And in the gap between the rule and the interpretation lies room for would-be dissenters to express their own preferences and views—a de facto space for dissenting by deciding.

The power that would-be dissenters can exercise in implementing or interpreting the majority's views is further augmented when, as is often the case, the majority cannot control the membership of the disaggregated institution. Interstitial dissent is likely to be insignificant in a truly centralized system, where a central decisionmaker appoints underlings to carry out its preferences. But dissenting by deciding often occurs in a system where the decisionmaking body is drawn from a different part of the polity than the central authority. Juries, for instance, are randomly assigned and drawn from districts that may bear no resemblance to the polity as a whole. Appellate panels, simply by virtue of the episodic nature of judicial appointments and the vagaries of the random draw, may not mirror the composition of the superior court. School committees or regional governments are elected from a territorially defined area.

These institutional arrangements thus tend to involve the separation of powers with a twist.[77] Under a traditional separation of powers scheme, the executive elected by the whole polity checks a legislature elected by the whole polity, or a court appointed by an executive elected by the whole checks a legislature elected by the whole. In both instances, even if these institutions "represent" the people in a different way,[78] we nonetheless see a representative of the whole checking another representative of the whole. Under a disaggregated system, we find *part* of the polity checking the whole. A jury representing a subpart of the polity checks legislative overreaching.[79] Members of a legislative committee can prevent legislation from going forward even if a majority of their colleagues supports it. A school committee may subvert a policy decision handed down by a legislature in the way it implements that mandate. Decisional dissent thus takes a kaleidoscopic form. There is no formally delineated territory for dissenters to occupy; dissent simply emerges from a handful of decisions haphazardly scattered throughout a number of institutions.

Because the centralized authority cannot appoint the members of many disaggregated decisionmaking bodies, to enforce its mandate it must rely at least in part on the informal give-and-take we call politics. The majority must expend political capital if it wants its mandates to be carried out precisely. How much space is left for interstitial dissent in a given context will depend on the intensity of the majority's preferences—how far it is willing to go to police the decisions of lower-level decisionmakers. But there will always be some play in the joints, some decisionmaking discretion left to lower-level decisionmakers.

As a practical matter, then, the "lawfulness" of decisional dissent falls roughly along the same continuum as we see in the federalism model. In some instances, the central authority explicitly grants the lower-level decisionmaker the power to disagree. The power of the jury to nullify is thus roughly comparable what I have elsewhere termed *de jure* or "hard" federalism, which designates formally protected realms where states may act without federal interference. In other instances, decisional dissent takes place in a gap left by the majority – an implicit grant of authority to depart from the central authority's preferences. This type of decisional dissent roughly corresponds to "soft" or "de facto" federalism, where the federal government and states exercise concurrent jurisdiction. Here, either the state may act in the absence of federal preemption or the state and federal government regulate together under a cooperative federalism model.[80] In such instances, as with soft federalism, the space left for decisional dissent depends on an informal give-and-take between the lower-level decisionmaker and the central authority.[81] (I leave aside for the moment decisions that fall outside of the interstices – e.g., decisions that exceed the range of the decisionmaker's discretion and squarely conflict with the law of the central authority -- as they raise a different set of conceptual questions).

Because contestation takes places in the interstices left open by the majority, decisional dissent is a tool that fits easily within the hands of the law-loving dissenter. The dissenter can both challenge the majority and yet act on its behalf; she can contest the law at the same moment that she complies with it.

The fact that a law-loving dissenter can engage in decisional dissent should not disqualify dissenting by deciding from our definition of dissent The free speech tradition provides the most obvious example of a moment when we pour radical politics into a space delineated by the majority. Judicial dissents also represent examples where an act of contestation falls within the discretion we accord decisionmakers.

One might argue that in both cases we have only authorized the speakers to speak privately, on their own behalf, and that dissenting by deciding is different because the act of contestation is also an action *on behalf of* the polity. As long as the decisionmaker is acting within the range of authority given to her (that is, unless one is claiming that one no longer wields the authority of the state if one acts to challenge that authority), that seems like an odd claim. While the institutional structure may not mandate dissent – a jury is not required to nullify, a

school board need not challenge the statewide consensus – neither does it mandate conformity. The fact that we have chosen ex ante to provide a forum where acts of contestation might take place does not render the action any less of a challenge to the majority. So, for instance, we do not think that because a jury is allowed to nullify that the decision to do so is somehow not a form of dissent.[82]

Or consider an example drawn from the practice of civil disobedience, which we unthinkingly understand to be a form of dissent. At first glance, one might think that dissenting by deciding and civil disobedience are distinct: civil disobedients violate a duly enacted law, not a potentially enactable majority preference. As Alexander Bickel has observed, however, this simplistic account misses the ways in which formal law can sometimes authorize civil disobedience. He argues, for example, that the Freedom Rides and lunch counter sit-ins of the 1960s were "an exercise in law formation through exploitation of the natural tension between two co-existing systems of law, state and federal."[83] Pointing out that in each instance these actions were consistent with national law (enacted or soon-to-be passed), but not local law, he observes that while "in a unitary state this might have been seen as an act of conscience, an appeal to higher law, but certainly an act of disobedience . . . in our own federal system, the appeal to higher law is not a call for revolutionary change . . . [but] a practical appeal in almost a technical, legal sense to existing higher law-making institutions."[84] If Bickel is right, then the notion that formal authorization precludes us from terming an action dissent is in considerable tension with our socio-cultural understanding of dissent.[85]

2. Dissenting as a form of partial exit.

If we move away from a formal or positivist account of law toward the notion of "higher law," the notion of acting for and against the polity looks even more commonplace within the dissent tradition. Indeed, drawing from Michael Walzer's work on civil disobedience, one could presumably map dissent practices along a continuum of what one might term "partial exit."[86]

[This section will map out that continuum. It will place the free speech tradition at one end of the spectrum, moving to civil disobedience, and perhaps including certain forms of secession at the other end of the partial exit spectrum, with revolution and terrorism falling outside of it.].

Where does decisional dissent fall along this spectrum? When dissenting by deciding takes place within the territory of hard federalism – one sovereign pitted against another – it seems to fit most closely with the practice of free speech. In both instances, the Constitution creates an ex ante structure licensing certain forms of contestation – private individual v. sovereign or sovereign v. sovereign. It is perhaps not surprising, then, that scholars of both practices find that they serve many of the same values. The existence of these well-accepted, ex ante structures also reduces the extent to which contestation is understood to involve a strong form of exit. But partial exit nonetheless occurs. Someone who speaks against the government can do so only as private citizen, and someone who issues a decision against the federal government may do so only as a member

of a "separate" sovereign. [What follows is an analysis of the extent to which the notion of sovereignty affects our understanding of state and federal citizenship].

When decisional dissent takes place within the interstices of a majority's mandate – as with the decisions of juries, school committees, zoning boards, even states acting within a "soft" federalism regime – decisional dissent falls closer to the civil disobedience portion of the partial exit spectrum. It may not be surprising that civil disobedience and decisional dissent are connected in this way. Each requires the majority to act – either by overruling a decision (decisional dissent) or prosecuting the dissenters (civil disobedience) – and thus, to borrow a phrase from Martin Luther King, helps "create . . . a crisis and foster such a tension that a community . . . is forced to confront the issue."[87] Like Bickel's account of civil disobedience, decisional dissent is "an exercise of power in the sense in which Burke defined it": an "attempt to coerce the legal order."[88]

Civil disobedience, of course, involves "the purposeful and public defiance of an established law or norm, undertaken with the intent of altering state policy."[89] What is most interesting for these purposes, however, is that civil disobedience is not purely oppositional, at least under most influential accounts. To the contrary, it is both an act of affiliation and of contestation. Martin Luther King described civil disobedience as "break[ing] an unjust law . . . *openly, lovingly*."[90] In the words of John Rawls, "It expresses disobedience to law within the limits of fidelity to law . . . . The law is broken, but fidelity to law is expressed by the public and nonviolent nature of the act, by the willingness to accept the legal consequences of one's conduct."[91] For this reason, Rawls termed civil disobedience "the form of dissent" that stands "at the boundary of fidelity to law."[92]

Similarly, consider Harry Kalven's evocative description of what actually occurred during two civil-rights protests:

> These are structured ceremonials of protest; they are not riots. The demonstrators were not . . . trying to bring government to a halt; rather, they were expressing the concern of the young Negro about his situation. What was symbolized was a deep grievance, a break with the society. They prayed, they pledged allegiance to the flag, they sang 'God Bless America,' and—in [one instance]—they even stopped for a red traffic light.[93]

Notice that the power of these acts civil disobedience, at least on Kalven's account, hinged on the dissenters' reaffirmation of their membership in the community. These acts of affiliation during the moment of dissent helped protesters, to borrow a phrase Kalven uses elsewhere, "trap democracy in its own decencies."[94]

One might think that decisional dissent – at least in its interstitial form -- involves the same sort of partial opposition invoked by the most influential accounts of civil disobedience. Those engaged in an act of civil disobedience defy

the majority's preferences, which have been enacted into law, while affirming their membership in the polity. Those engaged in decisional dissent defy the majority's preferences, which are not yet enacted into law so explicitly as to preclude the decision, while affirming their membership in the polity. If we think of civil disobedience as a piece of political theater designed to signal partial disagreement, disaggregated power structures offer an institutional vehicle for achieving the same end.

On this view, dissenting by deciding fits nicely with Michael Walzer's conception of civil disobedience. Walzer argues that civil disobedience stems from the problem of overlapping membership: "when obligations incurred in some small group come into conflict with obligations incurred in a larger, more inclusive group, generally the state."[95] Someone engaged in civil disobedience, Walzer believes, has only "partial claims" against the state;[96] his "loyalties are divided," as "he is not in any simple sense a citizen" or a rebel,[97] but partially both, precisely because "the processes through which men incur obligations are unavoidably pluralistic."[98] Civil disobedience merely stems from the existence of overlapping memberships, and civil disobedients are thus "partial members . . . partial emigrants, partial aliens partial rebels."[99] Others have written in this vein. Hanna Arendt, for instance, termed civil disobedients "nothing but the latest form of voluntary association."[100] Similarly, Stephen Carter has argued that communities of faith are "separate sovereigns," dissenting communities embedded within the polity and yet not fully part of it.[101]

Dissenting by deciding can be understood as an instantiation of the practice of pluralism, at least on Walzer's view. As with Walzer's account of civil disobedience, dissenting by deciding allows citizens to engage in partial rebellion and thus "builds loyalty not only toward the state but also against it."[102] Dissenting by deciding does not demand an external emigration to accompany what Walzer terms the "internal emigration" of a dissenter.[103] A dissenter can speak for the state, like any other citizen, even when she speaks her mind.

[The last section will deal with those examples of decisional dissent that seem to involve a stronger variant of exit – specifically, those which appeal not to higher law, but to what one might call lower law (the preferences of local majorities).[104] Some of these decisions may even violate the explicit mandates of the centralized authority. The appeal to higher law, if any, is simply an appeal to the global majority to change its mind or at least let the outlier decision stand, a plea of a second-order sort seeking permission to defy the polity's first-order preferences. It is thus almost the converse of the account of civil disobedience offered above. In placing such decisions within the "partial exit" continuum, this section will draw upon Walzer's argument that "the historical basis of liberalism is in large parts simply a series of recognitions" of "the claims of smaller groups" for exemptions from general rules[105] and Bickel's notion that consent to be governed depends on "continual responsiveness" by the government that registers "intensity rather than numbers" and involves "a conversation, not a monologue."[106]]

Endnotes

1. Among modern First Amendment scholars, Steven Shiffrin most clearly mines this romantic tradition. *See* STEVEN H. SHIFFRIN, DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA (1999) [hereinafter SHIFFRIN, DISSENT]; STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE (1990) [hereinafter SHIFFRIN, ROMANCE].

2. Throughout this Article, I use variants of these terms—"public act," "acting with the authority of the state," "acting on behalf of the state," "speaking truth with power"—to convey the notion that would-be dissenters wield state power by rendering a decision on behalf of the government or some part of it. Although these terms come closest to conveying what is at stake here, they tread upon certain terms of art deployed in other literature. For instance, in describing the way dissenters issue a decision on behalf of the state, I do not mean to invoke the notion of "state action," a term of art used in identifying a constitutional harm. If I were describing state actors in the sense the term is used in such contexts, it would be underinclusive, as a judge writing a dissenting opinion or a legislator drafting a minority report would presumably be deemed a state actor for some purposes. Similarly, in some literatures, a "public" act refers not just to a governmental decision, but to anything done outside the privacy of one's home or in the presence of other members of one's community. Similarly, "speaking truth with power" here refers not to power in the most general of senses—that is, capable of having an effect—but *governmental* power.

3. Throughout this Article, the terms "decision" or "action" refer to a governance decision or an action of the state. Thus, in using these terms, I am not describing dissent that takes the form of a private action, like civil disobedience. *See infra* text accompanying notes ___ to ___ (analyzing the relationship between civil disobedience and dissenting by deciding). Further, as Bill Stuntz has pointed out to me, dissenting by deciding could also take the form of *inaction*—e.g., a prosecutor's decision not to prosecute certain kinds of cases. I set such examples aside for purposes of this Article, although the issue is one well worth exploring.

4. *See* LANI GUINIER, THE TYRANNY OF THE MAJORITY 5 (1994).

5. Mayor Gavin Newsom, for instance, has invoked Martin Luther King's famous argument in favor of civil disobedience in justifying San Francisco's decision. *See* Newsom for Mayor, Mayor Gavin Newsom, *at* http://www.gavinnewsom.com/index.php?id+47 (last visited Apr. 20, 2005) (reprinting a partial transcript of an interview with Newsom where he invoked King's *Letter from a Birmingham Jail*).

6. *See, e.g.*, Editorial, *The Road to Gay Marriage*, N.Y. TIMES, Mar. 7, 2004, at A12 (arguing that San Francisco's mayor was engaged in a "civil rights tradition" akin to refusing to obey Jim Crow laws); *see also infra* note 72.

7. These arguments are organized very loosely around three major theories undergirding First Amendment law, as that is the area where legal scholars have thought most systematically about dissent in its conventional form. *But see* SHIFFRIN, ROMANCE, *supra* note 1 (arguing that the notion of dissent has not been sufficiently central to our understanding of the First Amendment). I draw these categories from Emerson's catalog of reasons for valuing speech, *see* Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963), and the book that emerged from it, THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970). Although First Amendment scholarship helps frame the inquiry, I do not intend to push the analogy too far. For instance, I do not wish to suggest here that electoral minorities have a "right" to issue an outlier decision. Some scholars have gone further and posited a relationship between local decisionmaking and First Amendment rights (not just First Amendment values). *See, e.g.*, Matthew R. Porterfield, *State and Local Foreign Policy Initiatives and Free Speech: The First Amendment as an Instrument of Federalism*, 35 STAN. J. INT'L L. 1 (1999); Ernest A. Young, *Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror*, 69 BROOK. L. REV. 1277, 1295-1301 (2004).

8. Except to the extent that subjective or objective intent is necessary to further dissent's aims in practice.

9. They can, of course, do both at the same time—that is, speak radically in the hope of getting more concessions when they are ready to act.

10. Those who act moderately, of course, get to render a decision. But at the moment they render that decision, they are no longer expressing disagreement; they are compromising their views in order to join the decision. *See infra* note 45 (offering further

analysis of this distinction).

11. Editorial, *supra* note 6.

12. Carla Marinucci, *Newsom in Spotlight—Even if Gay Marriage Issue Isn't*, S.F. CHRON., July 28, 2004, at A10 (quoting Pam Cooke).

13. JOHN STUART MILL, ON LIBERTY 16 (Elizabeth Rapaport ed., Hackett Publ'g Co. 1978) (1859). Mill was preceded, of course, by John Milton. *See* JOHN MILTON, AREOPAGITICA: A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING 14-16, 18-19, 32-34 (London, W. Johnston 1644).

14. Lamont v. Postmaster General, 381 U.S. 301, 308 (1965); *see also* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (describing the importance of "the competition of the market"); *see generally* ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES (1967); Emerson, *supra* note 7; William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1 (1995); R. George Wright, *A Rationale from J.S. Mill for the Free Speech Clause*, 1985 SUP. CT. REV. 149. For the views of the skeptics, see, for example, FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 19-29 (1982); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978); Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1641 (1967); Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 787-88 (1987); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1; Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982); Harry H. Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105 (1979). For an effort to distinguish the search for truth from the marketplace of ideas, see generally SHIFFRIN, DISSENT, *supra* note 1; SHIFFRIN, ROMANCE, *supra* note 1.

15. As I explore *infra* note 33 and accompanying text, however, although the decision itself is public, the identity and commitments of the dissenters may not be.

16. The binding effect may be only temporary. Such decisions can be—and often are—overridden by the majority.

17. On agenda setting generally, see, for example, FRANK R. BAUMGARTEN & BRYAN D. JONES, AGENDAS AND INSTABILITY IN AMERICAN POLITICS (1993); ROGER W. COBB & CHARLES D. ELDER, PARTICIPATION IN AMERICAN POLITICS: THE DYNAMICS OF AGENDA-BUILDING (1972); JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES (2d ed. 1984); WILLIAM H. RIKER, LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE (1988).

18. In such contexts, conventional dissent may be the only option for dissenters. Absent adoption of proposals like those of Lani Guinier, *see* GUINIER, *supra* note 4, or a power-sharing agreement resembling a consociational democracy, it is very unlikely that electoral minorities will have a chance to make a decision when power is centralized, such as in a state or national legislature.

19. For instance, many officials who took part in the effort to marry gays and lesbians were county clerks, local commissioners, city council members, and mayors and deputy mayors of towns and small cities. Robertson, *supra* note 72.

20. *See* Romer v. Evans, 517 U.S. 620 (1996).

21. *See generally* RICHARD THALER, THE WINNER'S CURSE: PARADOXES AND ANOMALIES OF ECONOMIC LIFE 63-78 (1992). The term "endowment effect" "stands for the principal [sic] that people tend to value goods more when they own them than when they do not." Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227, 1228 (2003). "Status quo bias" is a broader term that refers to empirical evidence that "individuals tend to prefer the present state of the world to alternative states, all other things being equal." *Id.* at 1228-29.

22. For a survey of the legal scholarship that uses these insights from behavioral economics to predict that "once established, altering the legislative or regulatory status quo will be difficult" (as well as a cautionary note about the difficulties of drawing such inferences), see Korobkin, *supra* note 21, at 1242-55, 1266-70. Thanks to Bill Buzbee for suggesting this line of analysis.

23. This argument finds some support in the federalism literature, in which a number of scholars have argued that one of the strengths of a federal system is that it allows states to become what Justice Brandeis termed "laborator[ies]" of democracy. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[24] Time story

25. These observations, of course, are consistent with some of the justifications offered for standing doctrine by courts and commentators. *See, e.g.*, Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982); ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 115 (2d ed. 1986); Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of* Lyons, 59 N.Y.U. L. REV. 1, 13-14 (1984); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 222 (1988).

26. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004).

27. *Id.* at 360.

28. *Id.* at 345-46.

29. *Id.* at 346; *see also id.* at 346-48. *But see* Paul Finkelman, *Civil Rights in Historical Context: In Defense of* Brown, 118 HARV. L. REV. 973 (2005) (reviewing KLARMAN, *supra* note 26).

30. KLARMAN, *supra* note 26, ch. 7.

31. *Id.* at 441-42 (emphasis added).

32. MILL, *supra* note 13, at 16. Steven Shiffrin makes a similar point about racist speech. *See* SHIFFRIN, DISSENT, *supra* note 1, at 78.

33. *See* Gerken, *supra* note ___, at 1168-69 (discussing these issues in greater detail).

34. Consider, for instance, the remarkable path that the creationism debate has taken. Creationists have moved from demands that creationism be taught in the schools to a two-pronged attack on evolution. First, they have pushed an affirmative project – the intelligent design movement. For a discussion of the intelligent design movement, see David K. DeWolf et al., *Teaching the Origins Controversy: Science, or Religion, or Speech?*, 2000 UTAH L. REV. 39, 59-61; Ctr. for Sci. & Culture, Top Questions, *at* http://www.discovery.org/csc/topQuestions.php (last visited Jan. 31, 2005) (describing the basic tenets of intelligent design theory). Second, creationists have also appealed to traditional liberals with hard-to-resist claims that schools simply ought to teach students to think for themselves, thus requiring teachers to invite skepticism about the theory of evolution. *See, e.g.*, Stephen Meyer, Commentary, *Don't Ask, Don't Tell in Biology Instruction*, WASH. TIMES, July 4, 1996, at A13 (featuring claim by a leading opponent of the theory of evolution that "[t]he threat of indoctrination does not come from allowing students to ponder the philosophical issues raised by the origins question," but that "[i]nstead, it comes from force-feeding students a single ideological perspective").

35. *See* ANNE PHILLIPS, THE POLITICS OF PRESENCE 1 (1995).

36. I am indebted to Dan Weiner for helpful conversation on these points.

37. Alexander Meiklejohn has written the seminal work on the relationship between speech and self-governance. *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM (1948) [hereinafter MEIKLEJOHN, POLITICAL FREEDOM]. Contemporary scholars of many stripes have similarly explored the governance underpinnings of the First Amendment. *See, e.g.*, OWEN M. FISS, THE IRONY OF FREE SPEECH (1996); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993); Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 300-01 (1978); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 27 (1971); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1416 (1986) [hereinafter Fiss, *Free Speech*]; Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 788 (1987); Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 316 (1992). For critiques of Meiklejohn, see ROBERT C. POST, CONSTITUTIONAL DOMAINS 269-89 (1995); FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 41 (1982); Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109 (1993); Frederick Schauer, *The Role of the People in First Amendment Theory*, 74 CAL. L. REV. 761, 778-80 (1986); Zechariah Chafee, Jr., Book Review, 62 HARV. L. REV. 891 (1949).

It is worth noting, however, that the arguments below only loosely follow this line of scholarship. Meiklejohn and those inspired by his approach are generally concerned with the role free speech plays in educating citizens about the decisions they must make and creating appropriate conditions for democratic deliberation. They typically focus on the decisionmaker in her role as listener. *See, e.g.*, MEIKLEJOHN, POLITICAL FREEDOM, *supra*, at

24 ("What is essential is not that everyone shall speak, but that everything worth saying shall be said."). The analysis below is in some ways orthogonal to this set of concerns, as its focus is not on preparing the citizen to decide, but on the decision itself.

38. MEIKLEJOHN, POLITICAL FREEDOM, *supra* note 37, at 42 (quotation marks omitted); *see also* JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT 69 (2001) (criticizing the speech model of self-government because "the self that was to govern itself was the individual, not the people"); Fiss, *Free Speech*, *supra* note 37, at 1409-10. This Part similarly picks up on critiques of "expressivist" theories of voting, which privilege self-expression as the purpose of casting a ballot. Jeremy Waldron, for instance, argues that

> expressivist accounts of the importance of participation convey the misleading impression that the substance of politics—the decisions to be made and their implications for real people—matters less than the catharsis, the righteous sense of commitment, and the agonistic flair involved in publicly identifying a particular view as one's own.

JEREMY WALDRON, LAW AND DISAGREEMENT 240 (1999); *see also* JON ELSTER, SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY 99 (1983).

39. STEPHEN L. CARTER, THE DISSENT OF THE GOVERNED 86 (1998).

40. *Id.* at 97.

41. *See* SHIFFRIN, DISSENT, *supra* note 1, at 18; Emerson, *supra* note 7, at 885 (lauding free speech because it enhances the legitimacy of policy decisions, as "persons who have had full freedom to state their positions and to persuade others . . . will . . . be more ready to accept the common judgment").

42. LEE C. BOLLINGER, THE TOLERANT SOCIETY 9 (1986).

43. *See* Philip Pettit, *Republican Freedom and Contestatory Democratization*, *in* DEMOCRACY'S VALUE 163 (Ian Shapiro & Casiano Hacker-Cordón eds., 1999). Pettit, it should be noted, makes these arguments in a slightly different context, discussing the need to grant electoral minorities the opportunity to challenge the law in an acceptably neutral process—such as a proceeding before a judge, a jury, or an administrative agency—and thereby to vindicate what he terms a "contestatory" or "oppositional" model of democracy. *Id.* at 183-85. His conception of dissent focuses more on elites and less on a populist conception in which the people speak for themselves.

44. George Kateb, *The Moral Distinctiveness of Representative Democracy*, 91 ETHICS 357, 360 (1981). Kateb uses this phrase to describe the notion that in a representative democracy, a party or faction that does not represent all the people temporarily wields power on the entire polity's behalf. Kateb's description also applies to disaggregated institutions (like juries) where coalitions of citizens participate seriatim rather than elect someone to act on their behalf. Here, however, as I explore below, *infra* Part III.D, we sometimes understand the part to be standing in for the whole, and we sometimes understand these institutions to render decisions for only part of the whole. For further exploration of the idea of standing in for the whole and its connection to democratic politics, see LANI GUINIER & GERALD TORRES, THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY 168-222 (2002) (exploring the notion of synecdoche in the context of race and redistricting).

45. To be sure, while speaking radically distances dissenters from the decision of the majority, dissenters who choose instead to act moderately—to use their votes to gain concessions from the majority—allow dissenters to affiliate with the polity. But at the moment the dissenters act under the authority of the state, they act *moderately*. They are no longer expressing disagreement; they are compromising their position in order to join the decision. They give up on their opposition in exchange for the majority's concessions. In a sense, the dissent piece to their involvement drops out. Dissenting by deciding, in contrast, allows dissenters to act *radically*—to oppose the majority even as they issue a decision.

46. Edward P.J. Corbett, *The Rhetoric of the Open Hand and the Rhetoric of the Closed Fist*, *in* DISSENT: SYMBOLIC BEHAVIOR AND RHETORICAL STRATEGIES 71, 71 (Haig A. Bosmajian ed., 1972). Corbett uses the metaphor to contrast dissent through "reasoned, sustained, conciliatory discussion" with the "non-rationale [sic], non-sequential, often non-verbal, frequently provocative" protest that he believes characterized protests during the 1960s. *Id.* Charles Fried has pursued a similar set of ideas in describing judicial dissents as either "collaborative" or "oppositional." Charles Fried, *Five to Four: Reflections on the*

School Voucher Case, 116 HARV. L. REV. 163, 180 (2002). Of course, one might also think that decisional dissent is *more* like Corbett's closed fist; it takes the form of a decision, an act of power, rather than an argument.

47. *See* Benjamin Constant, *The Liberty of the Ancients Compared with That of the Moderns*, *in* CONSTANT: POLITICAL WRITINGS 307 (Biancamaria Fontana trans. & ed., 1988).

48. Harry Kalven, Jr., *The* New York Times *Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 205.

49. *See, e.g.*, MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 159 (1999); CAROL WEISBROD, EMBLEMS OF PLURALISM: CULTURAL DIFFERENCES AND THE STATE 112 (2002); William A. Galston, *Expressive Liberty and Constitutional Democracy: The Case of Freedom of Conscience*, 48 AM. J. JURIS. 149, 150 (2003); William A. Galston, *Expressive Liberty, Moral Pluralism, Political Pluralism: Three Sources of Liberal Theory*, 40 WM. & MARY L. REV. 869, 881 (1999); Kathleen M. Sullivan, *Constitutionalizing Women's Equality*, 90 CAL. L. REV. 735, 755 (2002); Kathleen M. Sullivan, *Sex, Money, and Groups: Free Speech and Association Decisions in the October 1999 Term*, 28 PEPP. L. REV. 723, 743 (2001); Kathleen M. Sullivan, *The New Religion and the Constitution*, 116 HARV. L. REV. 1397, 1401 (2003) [hereinafter Sullivan, *The New Religion*]; Dalia Tsuk, *Corporations Without Labor: The Politics of Progressive Corporate Law*, 151 U. PA. L. REV. 1861, 1876-77 (2003) [hereinafter Tsuk, *Corporations Without Labor*]; Dalia Tsuk, *The New Deal Origins of American Legal Pluralism*, 29 FLA. ST. U. L. REV. 189, 201 (2001); Mark Tushnet, *The Emerging Principle of Accommodation of Religion (Dubitante)*, 76 GEO. L.J. 1691, 1699-1700 (1988); Carol Weisbrod, *Practical Polyphony: Theories of the State and Feminist Jurisprudence*, 24 GA. L. REV. 985, 1002 (1990).

50. Tsuk, *Corporations Without Labor*, *supra* note 49, at 1876-77.

51. Sullivan, *The New Religion*, *supra* note 49, at 1401.

52. *See id.*

53. This argument plays into a fourth argument Emerson offers in favor of free expression. *See* Emerson, *supra* note 7, at 885 (arguing that free expression promotes social stability by allowing dissenters to blow off steam). Of course, one could easily imagine that dissenting by deciding would have the opposite effect—that is, it might further energize dissenters and lead them to push harder for their demands.

54. *See, e.g.*, C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (1989); MILL, *supra* note 13; DAVID A.J. RICHARDS, TOLERATION AND THE CONSTITUTION 165-77 (1986); SHIFFRIN, ROMANCE, *supra* note 1; Baker, *supra* note 14; Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225 (1992).

55. For an analysis and critique of this strain of First Amendment scholarship, see, for example, SHIFFRIN, ROMANCE, *supra* note 1, at 90-96; Nan Hunter, *Escaping the Expression-Equality Conundrum*, 61 OHIO ST. L.J. 167 (2000); and Nan Hunter, *Expressive Identity: Recuperating Dissent for Equality*, 35 HARV. C.R.-C.L. L. REV. 1 (2000). Although Shiffrin and Hunter both critique the individualist strain of First Amendment doctrine and scholarship, Hunter goes further than Shiffrin in trying to reconnect social identity with the notion of dissent.

56. Here I wish to bracket a broader debate about whether race is—or ought to be—a fluid identity category. Although a formal, stable conception of racial categories permeates most legal debates, *see* MARTHA MINOW, NOT ONLY FOR MYSELF: IDENTITY, POLITICS, AND THE LAW 59 (1997), many have argued that race is a semifluid category, one that can be shaped by individuals as they participate in the political process. *See, e.g.*, ANTHONY APPIAH & AMY GUTMANN, COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE 78, 80 (1996); Richard T. Ford, *Beyond "Difference," in* LEFT LEGALISM/LEFT CRITIQUE 38, 48 (Wendy Brown & Janet Halley eds., 2003); *see also* MINOW, *supra*, at 50-51; IRIS MARION YOUNG, INCLUSION AND DEMOCRACY 99 (2000) [hereinafter YOUNG, INCLUSION AND DEMOCRACY]; IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 46 (1990) [hereinafter YOUNG, POLITICS OF DIFFERENCE]. Nonetheless, it is worth noting that many of the arguments I make here fit well with scholarship that places special emphasis on the participatory dimensions of racial identity. *See, e.g.*, GUINIER & TORRES, *supra* note 44, at 11-14 (arguing that race should be understood as a *political* category); *see also* YOUNG, POLITICS OF DIFFERENCE, *supra*, at 156-91 (exploring how group members have participated in the reconstitution of their group identity).

57. *See, e.g.*, BENJAMIN R. BARBER, STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE 119-20, 152 (1984); C.B. MACPHERSON, THE LIFE AND TIMES OF LIBERAL DEMOCRACY 99-100 (1977); YOUNG, POLITICS OF DIFFERENCE, *supra* note 56, at 92; Ellen D. Katz, *Race and the Right to Vote After* Rice v. Cayetano, 99 MICH. L. REV. 491, 512-14 (2000); Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 FLA. L. REV. 443, 478-79 (1989). For an analysis of the intellectual roots of this vision, see the discussion of Mill and Rousseau in CAROLE PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 22-33 (1970).

58. There are as many different versions of this theory as there are theorists, and their views of identity and the role it ought to play range dramatically, with some finding group identity to be a meaningful category, others focusing simply on the experience or social status shared by group members, others positing that shared experiences will lead to common interests or perspectives, and still others questioning the very usefulness of such categories. For a helpful introduction to this concept and the history of its development, see Charles Taylor, *The Politics of Recognition, in* MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 25 (Amy Gutmann ed., 1994). For additional reflections on the politics of recognition, both supportive and critical, see the responses in that volume; MINOW, *supra* note 56, ch. 2; PHILLIPS, *supra* ___; NANCY ROSENBLUM, MEMBERSHIP AND MORALS ch. 9 (1998); MELISSA S. WILLIAMS, VOICE, TRUST, AND MEMORY: MARGINALIZED GROUPS AND THE FAILINGS OF LIBERAL REPRESENTATION (1998); YOUNG, INCLUSION AND DEMOCRACY, *supra* note 56, at 121-53; YOUNG, POLITICS OF DIFFERENCE, *supra* note 56, at 44, 183-91; and Jane Mansbridge, *Should Blacks Represent Blacks and Women Represent Women? A Contingent "Yes,"* 61 J. POL. 628 (1999).

59. *See, e.g.*, YOUNG, POLITICS OF DIFFERENCE, *supra* note 56, at 183-91.

[60] For purposes of this part of the discussion, I set aside those instances where the dissenter who decides is a solitary actor (for instance, a prosecutor exercising her discretion).

61. *Cf.* Grutter v. Bollinger, 539 U.S. 306, 318-19 (2003) (describing the testimony of witnesses that the law school sought a "critical mass" of students to ensure that no member of the minority group felt pressured to be a spokesperson for that group); Andrew G. Deiss, *Negotiating Justice: The Criminal Trial Jury in a Pluralist America*, 3 U. CHI. L. SCH. ROUNDTABLE 323, 342 (1996) (arguing that a jury with eleven whites and one African American will pressure the latter into "view[ing] herself as a representative of her race").

62. *See* SHIFFRIN, ROMANCE, *supra* note 1, at 91-96.

63. Here again, the notion of dissenting by deciding picks up on a strain in Meiklejohn's conception of the First Amendment as a tool of self-government, not individual expression. *See, e.g.*, MEIKLEJOHN, POLITICAL FREEDOM, *supra* note 37, at 61-62 (critiquing Holmes, who made famous the marketplace metaphor of the First Amendment, for his "excessive individualism" and his failure to grasp "the theory of cooperation").

64. *See, e.g.*, NAACP v. Button, 371 U.S. 415, 429-30 (1963) (concluding that NAACP litigation, designed to "achiev[e] . . . equality of treatment by all government, federal, state and local, for the members of the Negro community in this country" through a "cooperative . . . group activity" was "a form of political expression"); *see also supra* notes 37-38 and accompanying text (discussing Meiklejohn).

65. GUINIER & TORRES, *supra* note 44, at 16.

[66] Robert Cover, *Foreword* – Nomos *and Narrative*, 97 Harv. L. Rev. 4, 49 (1982).

[67] I am indebted to Bruce Ackerman for offering this formulation and helping me conceptualize this project.

[68] Gerken, *supra* note ___.

69. Thus, when a jury renders a decision, the "polity" encompasses the citizens of the state or nation of which the jury system is a part. When a state renders a decision, the "polity" would refer to the national citizenry. The odd case is one like San Francisco, where a local government renders a decision that citizens nationwide find affects them, either directly or indirectly. Here, the polity could be the state of California, the nation, or both. One could, of course, imagine the infinite regress—we are all, after all, theoretically members of the "world polity." Whether or not there is a meaningful concept we could term the world polity, here I will stick to easily identified institutional arrangements and membership categories found *within* the United States.

70. I am indebted to Dick Fallon for raising this set of objections, and to Fred Schauer and Dick Fallon for helping me think through this problem.

[71] *See, e.g.*, Bickel, Morality of Consent, at 96.

72. *See, e.g.*, Joan Biskupic, *In Jury Rooms, A Form of Civil Protest Grows*, WASH. POST, Feb. 8, 1999, at A1 (documenting incidents of jury nullification and describing the jury box as a "venue for registering dissent, more powerful than one vote at the polls and more effective at producing tangible, satisfying results"); Tatsha Robertson, *Civil Disobedience Adds to Battle over Same-Sex Marriage*, BOSTON GLOBE, March 15, 2004, at A1 (stating that local officials' decision to marry gays and lesbians "provid[e] a rare instance in the nation's history of individuals using the power of their government to commit acts of disobedience and fuel the engine of social change"); Charles Toutant, *Ashbury Park's Chance Card*, N.J. L.J., Mar. 22, 2004, Westlaw Library, New Jersey Law Journal File (quoting a professor for the view that the decision by local officials to marry gays and lesbians was a "constructive act[] of civil disobedience"); *supra* note 5 (detailing the San Francisco mayor's invocation of the tradition of dissent in explaining his action); *supra* note 6 (describing San Francisco's gay marriage decision as civil disobedience).

[73] *Supra* note __ (collecting sources)

[74] I am indebted to Jiewuh Song for the suggested phrase.

75. This list would even include the "softer" variants of federalism, where states and the federal government exercise concurrent jurisdiction or engage in cooperative federalism. *See supra* note ___.

76. There is at least one exception to this observation: the protection afforded to the jury to engage in nullification.

77. Thanks to Bruce Ackerman for prodding me to think more about this question.

78. *See, e.g.*, BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 184-86 (1991).

79. In the aggregate, of course, all of the juries taken together represent the whole. And, as with Ackerman's characterization of the way the separation of powers scheme functions, *id.* at 184, they "represent" the people differently than other institutions, either because they involve direct participation by the people seriatim or because they deal with on-the-ground applications of the broad mandates enacted at the upper levels of government.

[80] For different formulations trying to capture these distinctions, *see* Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the* Globe, 111 YALE L. J. 619, 619-225 (2001) (contrasting "categorical federalism" and "multi-faceted federalism")' Ernest Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV 1, 16-17 (2005) (offering a somewhat different formulation for distinguishing between "hard" and "soft" federalism). For analyses of the cooperative federalism model, *see* Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 665, 671 (2001); *see also* Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813 (1998); Susan Rose-Ackerman, *Cooperative Federalism and Co-optation*, 92 YALE L.J. 1344 (1983). Finally, federal systems outside of the United States operate without deploying formal notions of sovereignty to protect state decisionmaking power. For a comparative analysis of the dynamics of federalism in the European Union, with a particular focus on Germany, *see* Daniel Halberstam, *Of Power and Responsibility: The Political Morality of Federal Systems*, 90 VIRG. L. REV. 731 (2004).

[81] *See, e.g.*, Hills, *supra*, at 856 (arguing that the anti-commandeering cases are best understood as creating a "property rule" that allows state governments to bargain effectively with the federal government about state implementation of federal law); Larry D. Kramer, *Putting the Politics Back Into the Political Safeguards of Federalism*, 100 COLUM. L. REV 215 (2000); Larry D. Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485 (1994); Mark Roe, *Delaware's Competition*, 117 HARV. L. REV. 588 (2003) (describing Delaware's adaptation of its corporate law regulations in response to the threat of federal preemption).

82. The decision by a jury to nullify has long been thought of as a form of contestation. *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 81-118 (1998); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 3, 28-29 (2004).

[83] Bickel, at 97.

[84] Bickel, at 96-97.

[85] Similarly, protestors have flooded courts and administrative agencies with huge numbers of cases in order to overwhelm them, thereby deploying a legal action to register opposition. Martha Minow, *Breaking the Law: Lawyers and Clients in Struggles for Social Change*, 52

U. PITT. L. REV. 723, 736 (1991). Similarly, Martha Minow argues that efforts by the battered women's movement to create shelters and support networks should be understood as an act of opposition, one that falls easily within the realm of legal conduct. *Id.* at 750-51.

[86] *See infra* TAN ___. For a different treatment of the notion of "partial exit" and the way the concept plays out in the federalism context, *see* Abner S. Green, *Kiryas Joel and Two Mistakes About Equality*, 96 Colum. L. Rev. 1 (1996)

[87] King, *supra* note 90, at 291; *see also* Rawls, *supra* note ___, § 55, at 366.

[88] Bickel, *supra* note ___, at 99.

89. ENCYCLOPEDIA OF DEMOCRATIC THOUGHT 60 (Paul Barry Clarke & Joe Foweraker eds., 2001) (defining civil disobedience); *see also* RAWLS, *supra* note ___, § 55, at 365 (defining civil disobedience within a "more or less just democratic state" as "a political act not only in the sense that it is addressed to the majority that holds political power, but also because it is an act guided and justified by political principles").

90. Martin Luther King, Jr., *Letters from a Birmingham Jail*, *in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 294, (James Melvin Washington ed., 1991).

91. RAWLS, *supra* note ___, § 55, at 366 (footnote omitted); *see also* King, *supra* note 90. Indeed, even conventional dissent is not always purely oppositional. Dissenters often affirm their loyalty to the polity while declaring their disagreement. *See, e.g.*, Robert N. Strassfeld, *Lose in Vietnam, Bring the Boys Home*, 82 N.C. L. REV. 1891 (2004) (documenting the strategy of Vietnam protesters to counter their opponents' equation of dissent and disloyalty). Steven Shiffrin even goes so far as to argue that dissent functions like "a cultural glue that binds [dissenters] to the political community." SHIFFRIN, DISSENT, *supra* note 1, at 18.

[92] Rawls, *supra* note ___, § 55, at 366.

93. Harry Kalven, Jr., *The Concept of the Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1, 6.

94. HARRY KALVEN, JR., THE NEGRO AND THE FIRST AMENDMENT 67 (1965). The lessons Kalven draws from civil rights protests have apparently not been lost on the mayor of San Francisco, whose staff "made sure that when the mayor came out swinging against Bush's backing for a constitutional amendment banning same-sex marriage, he was standing in front of an American flag." Phillip Matier & Andrew Ross, *Newsom Hasn't Been Ad-Libbing*, S.F. CHRON., Feb. 29, 2004, at A19.

95. MICHAEL WALZER, OBLIGATIONS: ESSAYS ON DISOBEDIENCE, WAR, AND CITIZENSHIP 10 (1970).

96. *Id.* at 14.

97. *Id.*

98. *Id.* at 15.

99. *Id.* at 11-12, 15.

[100] Arendt, Crisis of the Republic, 96; *see also id 75-76.*

[101] Carter, *Dissent of the Governed*

102. I*d.* at 220.

103. *Id.* at 14.

[104] Although Bickel alludes to the possibility that the law of the superior system can be called into question by illusion to the inferior system, *id.* at 96, he does not pursue or develop this idea.

[105] Walzer, *supra* note ___, at 12; *see also* Rawls, *supra* note ___, § 55, at 366 (arguing that civil disobedience "forces the majority to consider whether it wishes to have its actions construed in this way, or whether, in the view of the common sense of justice, it wishes to ackonwledge the legitimate claims of the minority").

[106] Bickel, *supra* note ___, at 100-103, 110-11; *see also* Post, Constitutional Domains 273-74 (describing the role free speech plays within running dialogue between the majority and minority); *cf.* Daniel Markovits, *Democratic Disobedience*, 114 Yale L.J. 1897, 1928, 1941 (2005).