

Note to Participants in the Columbia Faculty Workshop:

Attached are excerpts from a quite preliminary draft of a book, tentatively titled *Dissenting by Deciding*. The book grows out of an article that was recently published in the *Stanford Law Review*, and it is one of two book projects I am currently drafting.

Initially, I had thought this project would be a chapter in the first book I am writing, entitled *Second-Order Diversity*. *Second-Order Diversity* focuses on the values associated with decentralization in the context of “sublocal” disaggregated decisionmaking bodies (juries, districts, school committees, and the like). It examines the costs and benefits associated with allowing global minorities to constitute local majorities on these decisionmaking bodies. The project thus makes the same conceptual move in studying small, disaggregated institutions that scholars have made in studying other types of decentralized institutions – shifting the inquiry up one level of generality by switching from an institution-by-institution analysis to a study of shared structures. It is an effort to widen the lens of the literature on decentralization, which has largely been focused on territorially based, sovereign institutions like states and local governments, by thinking about sublocal institutions as tools of minority empowerment.

I’ve now come to think that *Dissenting by Deciding* is a separate, albeit complementary, project. Conceptually, it represents the flip side of *Second-Order Diversity* in two respects. First, *Second-Order Diversity* explores the expressive and constitutive dimensions associated with decentralization, which has thus far tended to generate scholarship focused on questions of power. This book introduces questions of power into a field – dissent and the First Amendment – that has often been preoccupied with constitutive and expressive values.

Second, if we think of American constitutionalism as containing two competing strands – federalism and nationalism – the two books limn different parts of that tradition. *Second-Order Diversity* proposes the “destatification” of federalism, suggesting that in thinking about how local majorities should govern, we have overlooked the unique role that many small, overlapping sites for local majority control can and do play in promoting the values associated with decentralization – a “federalism-all-the-way-down” argument. *Dissenting by Deciding* returns to the nationalist strands of our constitutional tradition, exploring the ways in which local majorities can take part in a dialogue about national identity.

Although I would welcome comments on any aspect of the paper, I would especially appreciate your thoughts on two questions with which I’ve been wrestling. Both relate to the interpretive piece of the project – can the book make a convincing case that dissenting by deciding is properly understood as a form of dissent? The first is how to designate a category of decisional dissent that is narrower than “all outlier local decisions.” How would we distinguish between the type of disagreement one would expect in a Tieboutian world -- where localities reach mutually acceptable but different solutions to common problems -- and genuine efforts at contestation? If, for example, we think there is some sort of political theater that tells us when a legal infraction is civil

disobedience and when it is simply the action of a scofflaw, what rough equivalent would enable us to distinguish between the routine outputs of federalism and decisional dissent?

Second, what kinds of decisions should be included in the category of decisional dissent? If one thinks of the range of decisions a locality might render in order to oppose a state or national majority, they would range from decisions where the locality is licensed by the majority to disagree, those where the locality finds space to disagree in ways the majority might not anticipate, and those where the locality deliberately flaunts or violates an unambiguous state or federal law. The question is whether all three should be included in the category of decisional dissent and, if not, which should be excluded.

I look forward to the workshop and your comments.

-Heather Gerken