

DISSENTING BY DECIDING

Heather K. Gerken*

INTRODUCTION.....	102
I. THE FORM DISSENT TAKES.....	108
A. <i>The Identity of the Dissenter</i>	108
B. <i>What Makes Dissenting by Deciding Different?</i>	109
II. THE RELATIONSHIP BETWEEN FORM AND FUNCTION: DISSENTING BY DECIDING AND THE GOALS OF DISSENT.....	115
A. <i>The Role of Dissent in Improving Democratic Decisionmaking: Visibility and the Marketplace of Ideas</i>	115
1. <i>Making dissent visible: arguments versus decisions</i>	116
2. <i>Comparing institutional alternatives: Sunstein and the dynamics of democratic decisionmaking</i>	125
B. <i>Dissent and the Value of Self-Governance: Speaking Truth to Power or With It</i>	130
1. <i>Forging civic ties</i>	131
2. <i>Comparing institutional alternatives: federalism</i>	137
C. <i>Identity and Expression: The Relationship Between Collective Dissent and Public Action</i>	147
1. <i>The “politics of recognition”: Isolation and enclaves</i>	149
2. <i>Dissenting by deciding: Fusing the collective act with the public one</i>	151
3. <i>Tradeoffs and risks</i>	152

* Assistant Professor of Law, Harvard Law School. For helpful comments and conversations, I would like to thank Bruce Ackerman, Bill Buzbee, Sharon Dolovich, Dick Fallon, Jack Goldsmith, Ryan Goodman, Lani Guinier, Janet Halley, Don Herzog, Michael Kang, Daryl Levinson, Dan Lowenstein, Dan Meltzer, Martha Minow, Robert Post, Fred Schauer, David Schleicher, David Simon, Dennis Thompson, Robert Tsai, Kenji Yoshino, and Ernie Young. I am especially indebted to Bill Stuntz for his help in thinking through and framing this project. Thanks also to the participants at the Constitutionalism and Legislatures Symposium at the University of Alberta’s Centre for Constitutional Studies, the Emory Law School Faculty Workshop, the Harvard Law School Winter Term Workshop, the UCLA Legal Theory Workshop, the Yale Legal Theory Workshop, Michael Kang’s “Politics and Democratic Governance” class at Emory Law School, and the participants in the “Second-Order Diversity” seminar at Harvard Law School. Annette Demers, Chris Egleson, Sarah Gerry, Rebecca Ingber, Zach Robert, Monica Sekhon, and Michael Thakur provided excellent research assistance. Special thanks go to Kate Ferguson, Anton Metlitsky, Matthew Price, and Dan Weiner, who provided an extraordinary amount of help in researching and working through many parts of this Article.

III. WHEN SHOULD WE FAVOR DISSENTING BY DECIDING OVER CONVENTIONAL DISSENT?: GENERATING A PRODUCTIVE CONVERSATION BETWEEN PERIPHERY AND CENTER.....	153
A. <i>The Center's Opening Conversational Gambit</i>	154
B. <i>The Length of the Conversation</i>	154
C. <i>The Dissenters' Target Audience</i>	155
D. <i>The Institutional Site for the Dissenters' Response</i>	156
E. <i>The Composition of the Decisionmaking Body</i>	158
F. <i>The Identity of the Dissenter: Average Citizens v. Dissenting Elites</i>	159
CONCLUSION.....	160

INTRODUCTION

Everyone, it seems, believes in dissent.¹ Our political mythology promotes a romantic vision: the solitary voice of reason, Holmes' prescient dissents, the lone juror in *Twelve Angry Men*.² 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 state³—they must try to influence the decisionmaking process.

1. Robert Tsai argues there is a “cultural consensus” about the value of dissent and that the language of the First Amendment is “a patois spoken by most Americans.” Robert L. Tsai, *Speech and Strife*, 67 L. & CONTEMP. PROBS. 83, 85-86 (2004).

2. 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*].

3. Throughout the paper, 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 literatures. 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 it is used in certain legal 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—

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 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.⁴

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"⁵ 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

that is, capable of having an effect—but *governmental* power.

4. Throughout this paper, 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 33-37, 96-102 (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 paper, although the issue is one well worth exploring.

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

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* 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 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 population, theirs was the minority view. They surely understood their action to be a challenge of sorts to the prevailing view,⁶ and that assessment was shared by others.⁷ The principle embodied in San Francisco's decision was no different than 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* dissent took.

Dissenting by deciding also takes place when a school board chooses to mandate the teaching of creationism⁸ 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 weblog, 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.

Dissenting by deciding, then, should be understood as an alternative

6. Mayor Newsom, for instance, has invoked Martin Luther King's famous argument in favor of civil disobedience in justifying San Francisco's decision. <http://www.gavinnewsom.com/index.php?id+47> (last visited Mar. 1, 2005) (reprinting transcript of an interview with Gavin Newsom where he invoked King's “Letter from a Birmingham Jail”).

7. 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 40.

8. This claim is admittedly a bit slippery. While I think it is fair to say that creationists are thought to hold the minority view and certainly do not find their policy preferences reflected in a majority of local institutions, let alone in national educational policy, some polls suggest that a majority of U.S. citizens would support the teaching of creationism alongside evolution in public schools. See Derek H. Davis, *Kansas versus Darwin: Examining the History and Future of the Creationism-Evolution Controversy in American Public Schools*, 9 KAN. J. L. & PUB. POL'Y 205, 207 (1999).

strategy for institutionalizing channels for dissent within the democratic process. But because dissent has not been conceptualized in these terms, scholars have not given adequate thought to which form of dissent is preferable, and when. This paper takes a first step in that direction by analyzing what makes decisional dissent different from our usual understanding of dissent. It organizes the analysis around three of the main reasons we value dissent: it can contribute to the *marketplace of ideas*, engages electoral minorities in the project of *self-governance*, and facilitates *self-expression*.⁹ The paper then considers the ways in which dissenting by deciding might further those goals differently than conventional dissent. In doing so, it starts to develop an analytic framework for thinking about whether and when we might value decisions that take this unusual form. Drawing upon a wide range of literatures—from First Amendment scholarship to cutting-edge research on group decisionmaking, from the literature on federalism to writings on the politics of recognition—the paper identifies what this framework reveals to be a recurring set of trade-offs in a wide variety of debates about institutional design. The payoff for thinking about dissent in the terms proposed here is a more comprehensive set of categories for thinking about how best to institutionalize it.

The argument runs roughly as follows: Conventional dissent and dissenting by deciding both further the main purposes that dissent serves, but in quite different ways. For example, some value dissent because they subscribe to the traditional Millian view that exposure to a wide range of views improves the quality of our decisions. To the extent we value a robust marketplace of ideas, however, dissent must be visible. And dissenting by deciding represents a different institutional strategy for making dissent visible than conventional dissent because it takes the form of a governmental *decision*, not an *argument*.

A second reason we value dissent is because it can engage electoral minorities in the project of self-governance. Some scholars have argued that creating avenues for expressing disagreement is crucial for establishing the

9. 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 2 (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: THOMAS I. EMERSON, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1973) [hereinafter Emerson, *General Theory*], 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).

government's legitimacy in the eyes of an electoral minority. Conventional dissent and dissenting by deciding further that end in different ways. Conventional dissent gives electoral minorities an opportunity to speak truth *to* power, either by acting moderately within a decisionmaking process or speaking radically outside of it. Dissenting by deciding goes one step further; it grants electoral minorities not merely the power to protest, but the power to decide—a chance to speak truth *with* power. Would-be dissenters need not moderate their stance in order to take part in the project of governance. Self-expression does not undermine opportunities for self-rule. Instead, fusing an act of contestation with an act of governance, dissenting by deciding allows a dissenter to reaffirm her allegiance to the polity at the same moment she expresses her disagreement with the majority's view.

Finally, to the extent that we value dissent because it provides individuals a chance to express and define their identity, dissenting by deciding offers an intriguing strategy for furthering that aim. Under a conventional view of dissent, when dissenters take part in the process of governing, they act in relative isolation from other members of their group. They have an opportunity to express themselves, but only in a context that reproduces the same power disparities group members routinely experience outside the governance context. If dissenters wish to dissent *collectively*—with a critical mass of group members exercising full control over the message they express—they must withdraw to a private enclave to do so.

Dissenting by deciding fuses the collective act with the public one, allowing electoral minorities to act collectively at the same moment they act on behalf of the polity. It 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. But that control 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. Identity is thus forged in the presence of internal and external dissent—with a critical mass of would-be dissenters (who may disagree about the nature or even the existence of the group's identity) as well as with members of the majority who may support or oppose the decision.

For each argument sketched above, there is a set of trade-offs and risks involved in the choice between conventional and decisional dissent. Dissent that takes the form of a decision is different from, but not necessarily better than, dissent that takes the form of an argument. Pouring dissent into the mold of a decision may lend it concreteness and weight in the marketplace of ideas, but it may also alter or obscure the content of the dissenters' views. Giving dissenters a chance to speak truth with power may seem like a more radical form of dissent because it allows dissenters to use the apparatus of governance to express their disagreement. But fusing an act of opposition with an act of affiliation may risk taming dissent in the long run. Finally, while dissenting by

deciding allows electoral minorities to act *collectively*, rather than in isolation, when taking part in the process of governance, that process may sometimes be a *forum non conveniens* for the expression of group identity.

For each set of arguments identified above, the Article compares decisional dissent to a more familiar institutional strategy for advancing the aims of dissent. The first Part focuses on the place decisional dissent might occupy in the marketplace of ideas and contrasts dissenting by deciding with Cass Sunstein's recent proposals for institutionalizing dissent. The second Part considers the role dissenting by deciding could play in engaging minorities in the project of self-governance and uses federalism as a counterpoint to the analysis. The third analyzes the relationship between decisional dissent and self-expression, using the politics of recognition as a baseline for comparison. Taken together, these three Parts provide a framework for thinking more systematically about when and where we might value dissent that takes this unusual institutional form.

Two caveats are in order. First, much of the Article is devoted to explicating the affirmative case for dissenting by deciding. That is because, for the reasons noted above, the arguments in favor of conventional dissent have been thoroughly canvassed in the literature. While the Article blends descriptive and normative elements—it tries to offer the most attractive explanation available for an existing feature of our democratic infrastructure—I do not intend to suggest that we ought to make dissenting by deciding possible in every context. The purpose of the Article is simply to identify the benefits decisional dissent offers and to provide a framework for identifying the trade-offs and risks inherent in the choice to pursue those benefits.

Second, the Article is cast at a fairly high level of generality. While it provides some examples to ground the analysis, it does not offer the sort of contextual details that would be necessary to decide precisely when dissenting by deciding is a preferable strategy for institutionalizing dissent. To make such judgments, we would require more detailed information about the identity of the dissenter and the culture of the political community as a whole, the nature of the institutional mission, the dynamics of the political order, and the social domain in which decisional dissent would arise.¹⁰

Part I of this Article puts some meat on the bones of the definition of decisional dissent and deals with several preliminary counterarguments. Part II contrasts the ways in which dissenting by deciding and conventional dissent further three of the main goals of dissent. Part III offers some initial observations about whether and when we would choose decisional dissent over conventional dissent.

10. See generally ROBERT C. POST, CONSTITUTIONAL DOMAINS (1995).

I. THE FORM DISSENT TAKES

A. *The Identity of the Dissenter*

The dictionary defines dissent simply as “withhold[ing] assent; not approv[ing]; object[ing].”¹¹ This paper uses the term *dissenter* in a more specific sense, to refer to someone who subscribes to an outlier view on an issue that she deems salient to her identity. A dissenter is someone whom we would naturally term an “electoral minority” because of the positions she holds. The arguments deployed here can be applied to many types of electoral minorities—racial, socio-economic, political, religious—provided that the views of the population are divided along some axis of difference and the issue is one that individuals would deem germane to their political identity.

Individuals are, of course, complex and multifaceted, and the identity categories used to identify dissenters are not meant to be reductive. Even if every individual has the potential to be in the minority on some issue, my assumption here is that there are categories that will be *salient* to the political process—that will divide the polity along regular lines—even if the precise boundaries of these divisions are either porous or contingent. Even in a Dahlian world where the majority is made up of constantly shifting coalitions,¹² there may nonetheless be groups that are permanently in the minority on some meaningful subset of issues.¹³ Thus, the term *dissenter*, as used here, refers not to someone who happens to be occasionally outvoted in a world of fluid coalition politics, but to someone trapped in a more stable political dynamic.

The reason to exclude from the definition of dissent someone who merely has a different set of preferences than the majority’s is that this problem presumably could be fixed by a mutually acceptable Tieboutian solution.¹⁴ I thus wish to confine the term to instances of *political* disagreement—

11. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 656 (1993 unabridged ed.).

12. See, e.g., ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956); ROBERT A. DAHL, POLYARCHY (1971).

13. Thanks to Kenji Yoshino for suggesting this formulation.

14. I refer, of course, to a situation in which citizens differ as to which set of policies they prefer and are willing to allow others to make their own choices. In such situations, many have argued for local variation—regionalism or federalism—so that everyone can maximize her preferences by choosing among the offerings of different localities. The seminal work is Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956). The idea is nicely illustrated by Michael McConnell’s oft-cited example:

[A]ssume that there are only two states, with equal populations of 100 each. Assume further that 70 percent of State A, and only 40 percent of State B, wish to outlaw smoking in public buildings. The others are opposed. If the decision is made on a national basis by a majority rule, 110 people will be pleased, and 90 displeased. If a separate decision is made by majorities in each state, 130 will be pleased, and only 70 displeased. The level of satisfaction will be still greater if some smokers in State A decide to move to State B

Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484, 1494 (1987).

disagreement that stems from political principle¹⁵—where we can identify winners and losers.

Although the term *dissenter*, as used in this Article, could apply to a variety of political outsiders, the arguments in favor of decisional dissent are at their strongest when the dissenters in question are members of a subordinated group: those instances where disagreement corresponds to power disparities and the continuing legacy of past discrimination, where outlier policy preferences overlap with an outlier social status.¹⁶ (Consider, for instance, whether we might intuitively think of jury nullification differently if the jurors are all-white or all-African-American.) It is in such instances that the questions surrounding dissent seem the most intractable and dissenting by deciding may offer an especially intriguing set of solutions. Because decisional dissent entails not just the dissemination of an outlier view, but the empowerment of would-be dissenters, it may partially address both the problem of disagreement and the problem of inequality. On this view, dissenting by deciding could be thought of as a process-based strategy for addressing the problem of subordination.¹⁷

Finally, for simplicity's sake, the paper deploys a fairly static frame for determining who constitutes a "dissenter." One would expect, of course, that the identity of dissenters would be endogenous—that the composition of the dissenting group and even the boundaries of its identity would be influenced by the options for dissent available. We would similarly expect that dissenting by deciding would generate a distinct dynamic in the relationship between the majority and minority, changing the incentives that guide the actions of each and perhaps even altering the boundaries that define them. While I address some of these issues in this paper¹⁸ and elsewhere,¹⁹ I leave a full account of these complexities for another day.

B. *What Makes Dissenting by Deciding Different?*

There are three main difference between the form taken by conventional and decisional dissent: (1) dissenting by deciding is embodied in a decision, not

15. See JOHN RAWLS, A THEORY OF JUSTICE §55, at 365 (1971)

16. This definition thus bears some resemblance to the definition of racial vote dilution used in election law circles. Cf. Chandler Davidson, *Minority Vote Dilution: An Overview*, in MINORITY VOTE DILUTION 1-23 (Chandler Davidson ed., 1984). For empirical analyses of the overlap between race and perspective, see generally DONALD R. KINGER & LYNN M. SANDERS, *DIVIDED BY COLOR: RACIAL POLITICS AND DEMOCRATIC IDEALS* (1996); JENNIFER HOCHSCHILD, *FACING UP TO THE AMERICAN DREAM: RACE, CLASS, AND THE SOUL OF THE NATION* (1996).

17. I am especially indebted to Frank Michelman for raising this question and to Kenji Yoshino for helping me formulate a response.

18. *Infra* text accompanying notes 69-71, 112-113, 150-152, 172-175.

19. See Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1142-52, 1175-76, 1193-95 (2005).

an argument; (2) it gives electoral minorities a chance to speak truth *with* power, fusing an act of contestation with an act of affiliation; and (3) dissenters who decide are able to act with the authority of the state *collectively* rather than in relative isolation. While I explore each in greater detail in Part II, let me put a few examples on the table to fill in the definition of decisional dissent and deal with some obvious counterarguments.

As I explore in greater detail in Part II.A, one key difference between conventional dissent and dissenting by deciding is that the latter takes the form of a decision, not an argument. As noted above,²⁰ conventional dissenters have two choices: act moderately or speak radically.²¹ 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 majority of the decisionmaking body and to those outside of it.²²

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. Consider the San Francisco example again. During the period that San Francisco married gays and lesbians, newspapers across the country carried stories about the marriages of elderly lesbian couples or gay lovers who had raised children together. As a result, we now have 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.”²³ One supporter of the decision sounded a similar theme, arguing that San Francisco’s decision “put a face on discrimination.”²⁴

Consider also Ernest Young’s intriguing claim about the relationship between federalism and political opposition. Young argues that opposition parties in federal systems are more successful than those, like the British Tories, in non-federal systems because the former have a chance to govern in some subpart of the system. Both Tories and present-day Democrats are challenging the national dominance of another party. But contestation takes a special form in the United States. In Young’s view, “because the loyal opposition can not only oppose but actually govern at the state level” in federal

20. *Supra* text accompanying notes 2-4.

21. 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.

22. 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 94 (offering further analysis of this distinction).

23. Editorial, *supra* note 20.

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

systems, it can “develop a track record of success.”²⁵ Thus, he argues, “the Democrats’ control of so many statehouses” after losing the Senate in 2002 “prepared the ground for a revival of their own party,” whereas the Tories’ electoral failures can be attributed at least in part to the fact that “they lack a testing ground for their ideas.”²⁶ In Young’s view, it is not a coincidence that “four of the last five presidents were former governors who developed a reputation for competence at the state level while the other party held the White House.”²⁷ I will have more to say about the relationship between dissenting by deciding and federalism;²⁸ for the moment, suffice it to say that federalism offers a good example of decisional dissent.

One might object 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 disobedience²⁹—of dissent being expressed through action. The concern instead is that the notion of dissenters wielding state power is a contradiction in terms.

Such a claim takes an unduly narrow view of power in the disaggregated institutions that are the subject of this Article. Where an institution is disaggregated, the power of the polity—by which I mean the political community whose governing system includes that institution³⁰—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 explored here and in a companion piece in the *Harvard Law Review*.³¹ But the fact that electoral minorities wield control over some decisions within a disaggregated structure does not alter their status as

25. Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, Ernest Young, *The Rehnquist Court’s Two Federalisms*, 83 TEX. L. REV 1, 58 (2005).

26. *Id.* (quoting *A Tale of Two Legacies*, ECONOMIST, Dec. 19, 2002, #)

27. *Id.* at 59.

28. *Infra* Part II.B.2.

29. *See infra* notes 96-102 and accompanying text (exploring connections between decisional dissent and civil disobedience).

30. 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.

31. *See* Gerken, *supra* note 19. This article is concerned not with the question of dissent, but the instrumental and intrinsic values associated with varying the membership of disaggregated decisionmaking bodies. It thus addresses some normative and empirical debates that are not discussed here.

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, decisions dissenters render will be outliers, and the views of the majority will prevail in most of the decisions made within that institution. Nor will dissenters control the central decisionmaking body (usually a legislature) that sets statewide policies; they may thus succeed in enacting a policy locally only to have it subsequently overturned at the state level.³² 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 statewide minority remains a statewide minority. Dissenting by deciding should thus not be mistaken for a reversal of fortune.

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. As I explore in greater detail in Part II.B, 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.

Some might object that there is a difference between adopting an outlier policy and engaging in an act of opposition.³³ The argument would be that one cannot simultaneously oppose the state and act on its behalf. Dissenting by deciding looks like a contradiction in terms.

The practice of civil disobedience calls that sharp dichotomy into question. Civil disobedience—a well-known variant of dissent—involves “the purposeful and public defiance of an established law or norm, undertaken with the intent of altering state policy.”³⁴ But civil disobedience is not purely oppositional. 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*.”³⁵ In the words of John Rawls, “[i]t expresses disobedience to law

32. See *infra* notes 53-55 and accompanying text (exploring the effect that this fact may have democratic dynamics).

33. 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.

34. ENCYCLOPEDIA OF DEMOCRATIC THOUGHT 60 (Paul Barry Clarke & Joe Foweraker eds., 2001); see also JOHN RAWLS, A THEORY OF JUSTICE § 55, at 363, 365 (1971) (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 . . .”).

35. Martin Luther King, Jr., *Letters from a Birmingham Jail*, in A TESTAMENT OF

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."³⁶

Both civil disobedience and decisional dissent thus involve *partial* opposition.³⁷ 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.

If one of the strengths of the decisional dissent model is that it represents an institutional strategy for signaling partial opposition, that may also be a weakness. The danger is that the model pulls in too much; it includes outlier decisions that neither reflect a desire to oppose an existing norm nor create the appearance of opposition.

There are at least two responses to this concern. First, as a purely functional matter, whether or not those who issue outlier decisions understand themselves to be dissenters—and whether or not they are viewed as such—their actions further the same democratic aims that are served by conventional dissent. Treating these decisions as a form of dissent simply helps us think more systematically about the best institutional strategies for improving the democratic process. The functional account does not seem to require a more precise definition.³⁸

Second, in assessing whether one can both dissent and decide, we might draw upon the rich and varied history of dissent, a tradition that dates back to Socrates and winds its way through centuries of U.S. history. To be sure, that tradition seems to have two main strands—*speaking with permission* (the free speech/free press tradition, in which the state recognizes the right of dissenters to speak against it) or *acting without permission* (civil disobedience). Dissenting by deciding—acting with permission—represents an unusual fusion

HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 294 (Washington ed., 1986)

36. RAWLS, *supra* note 24, at 366 (footnote omitted); *see also* King, *supra* note 35. 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 2, at 18.

37. Walzer makes this point about civil disobedience. *Infra* notes 91-97 and accompanying text.

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

of the two.

Nonetheless, this odd amalgam of dissenting practices has some historical roots in the dissent tradition. The decision of a jury to nullify, for instance, has long been understood as an act of democratic opposition.³⁹ And there is no reason to think that what is common to both strands of the dissent tradition—a desire to oppose by the dissenters and the perception of opposition by the majority—is inconsistent with the notion of dissenting by deciding. To the contrary, it seems plausible to think that at least some decisionmakers who adopt outlier policies would think of themselves as dissenters and be viewed as such by the majority. Indeed, even *without* a popular conception of dissent capacious enough to encompass outlier decisions, we see scattered but tantalizing examples of this phenomenon in today's political discourse.⁴⁰

A final, key difference between conventional dissent and dissenting by deciding is that the latter allows dissenters to act on behalf of the state *collectively*, rather than in relative isolation.⁴¹ As I explore in greater detail in Part II.C, 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 hold just one seat on a zoning commission. In those

39. 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). One can find other examples of dissent that involve unusual blends of the two strands of the dissent tradition. For instance, protestors have flooded courts or 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.

40. See, e.g., Joan Biskupic, *In Jury Rooms, A Form of Civil Protest Grows; Activists Registering Disdain for Laws With a "Not Guilty,"* 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 Roberston, *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*, 175 N.J.L.J. 1135 (2004) (quoting professor for the view that the decision by local officials to marry gays and lesbians was a "constructive act[] of civil disobedience"); *supra* notes 6 (San Francisco mayor invoking tradition of dissent in explaining his action) and 7 (describing San Francisco's gay marriage decision as civil disobedience).

41. On the importance of community building for "nurtur[ing] the continuing capacity to dissent," see SHIFFRIN, *DISSENT*, *supra* note 2, at 25; SHIFFRIN, *ROMANCE*, *supra* note 2, at 90-93.

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.

II. THE RELATIONSHIP BETWEEN FORM AND FUNCTION: DISSENTING BY DECIDING AND THE GOALS OF DISSENT

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. In this Part, I explore the connections between the three qualities that distinguish decisional from conventional dissent, canvassed above, with three of the primary purposes served by dissent: it contributes to the *marketplace of ideas*, engages electoral minorities in the project of *self-governance*, and facilitates *self-expression*. In each instance, I describe the relative costs and benefits of using decisional dissent to further the goal in question, and I ground the analysis by comparing dissenting by deciding to a more familiar institutional strategy for fostering dissent.

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

One way to identify some of the differences between conventional dissent and dissenting by deciding is to think about how each serves 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 long line of analysis: 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 both 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.”⁴² In legal circles, of course, this argument generally travels under the rubric of the “marketplace of ideas.”⁴³

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. Below I explore that question, suggesting that they are different in Part II.A.1, and speculate as to why this difference might matter to our thinking about how best to institutionalize dissent in Part II.A.2.

1. *Making dissent visible: arguments versus decisions*

Acting moderately v. 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.⁴⁴ 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 out-group—the substance of the dissenters’ views is likely to remain opaque.

42. JOHN STUART MILL, ON LIBERTY 16 (Elizabeth Rapaport ed., Hackett Publishing 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 (W. Johnston ed.) (1644).

43. *Lamont v. Postmaster General of the U.S.*, 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, *General Theory*, *supra* note 9; 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, e.g., 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 (1984); 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 2; SHIFFRIN, ROMANCE, *supra* note 2.

44. As I explore *infra* note 67 and accompanying text, however, although the decision itself is public, the identity and commitments of the dissenters may not be.

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.⁴⁵ 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 v. 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.⁴⁶

45. One might think that these observations would not apply to institutions governed by a unanimity rule, such as the jury. On this view, the only person who matters is the fringe voter, who can "hold out" and force the other jurors to acquiesce to her more extreme position. While voting rules plainly affect jural deliberations, group dynamics matter a great deal as well. Indeed, contrary to the intuition about hold-outs, "strong social-psychological evidence [suggests] that the pressure to conform [is] nearly irresistible when a single person [is] faced with a unanimous majority." Phoebe C. Ellsworth, *One Inspiring Jury*, 101 MICH. L. REV. 1387, 1396 (2003). Thus, the jurors most likely to determine the outcome of a case are those at the "tipping point" of the jury, not those who hold the most extreme position in the group. For a summary of the empirical evidence regarding the tipping point in jury decisionmaking, identifying which jurors are likely to represent the counterpart to the swing voter, see, for example, Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y & L. 622, 692 (2001) (finding different thresholds for acquittal and conviction, and challenging the traditional hypothesis that the critical threshold is the two-thirds mark); Robert J. MacCoun & Norbert L. Kerr, *Asymmetric Influence in Mock Jury Deliberation: Jurors' Bias for Leniency*, 54 J. PERSONALITY & SOC. PSYCHOL. 21 (1988) (examining the "asymmetry effect" in mock jury settings where juries operated under different standards of proof). For some empirical evidence regarding the complexity of group dynamics on the jury, see Devine, *supra*. For a discussion of the effect of voting rules on jury deliberations and verdicts, see, for example, *id.* at 669; Douglas Gary Lichtman, *The Deliberative Lottery: A Thought Experiment in Jury Reform*, 34 AM. CRIM. L. REV. 133 (1996); CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT 164-65 (2003).

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

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 formally overruling it. Decisional dissent can thus force members of the majority to act, reevaluate, and engage with the decision and with those who made it.⁴⁷ It thereby allows electoral minorities to engage in the type of agenda setting that is otherwise difficult for those outside the political mainstream.⁴⁸

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,⁴⁹ 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

47. Here again, dissenting by deciding bears some resemblance to civil disobedience. *See, e.g.*, King, *supra* note 35, at 291 (arguing that civil disobedience "seeks to create . . . a crisis and foster such a tension that a community which has constantly refused to negotiate is forced to confront the issue. It seeks so to dramatize [an] issue that it can no longer be ignored"). For a comparison between civil disobedience and dissenting by deciding, see *infra* notes 89-95 and accompanying text.

48. 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* (Waveland Press 1988).

49. Bolton, however, made national headlines when a controversy erupted over the town's piggeries. As Boston commuters began to move into the small farming town, some discovered that the seemingly pristine acreage they had purchased was downwind from Bolton's odiferous pig farms. These newly minted Boltonites therefore tried to zone the pig farmers out of business, a strategy that resulted in a dramatic town meeting where the old townies and newcomers clashed. As with all great American stories, country wisdom—which included the unimpeachable argument that "[i]f they win, it will be cows and sheep next"—triumphed over urban wiles. The story was picked up by numerous news outlets nationwide. *See, e.g.*, Paul DellaValle, *Bolton Voters Reject Ban on New Piggeries*, BOSTON GLOBE, July 26, 1983; Paula Froke, *It's a Landslide 'Oink'—Pigs Win the War*, MIAMI HERALD, July 27, 1983, at A3; *Hogtied—Mass. Town's New Residents Want to Limit Piggeries*, PHILA. INQUIRER, July 26, 1983, at A3; *Town's Farmers Defeat Forces Opposing Pigs*, N. Y. TIMES, July 27, 1983, at A12.

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 dissent visible at the upper echelons of power using conventional means—like state or national legislatures—where enough attention is paid to the debate to justify organizing a minority caucus.⁵⁰

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.⁵¹

Dissenting by deciding, then, is an equalizer of sorts. It provides an avenue for average citizens to make disagreement visible. Because at least some of the opportunities for decisional dissent stem from the everyday participatory opportunities that allow a mass democracy to function, the coins of *these* realms 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.⁵²

One might object that the power to decide is meaningless for dissenters as long as the centralized authority can overrule it. 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?⁵³ Even when the majority overrules the dissenters, however, there is reason to think that the conversational dynamic

50. 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 5, 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.

51. For further exploration of this idea, see *infra* Part III.F.

52. 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 40.

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

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.⁵⁴ 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.⁵⁵

The risks. Even if dissenting by deciding in some instances provides a more effective tool for agenda setting, that does not mean it is more effective in improving the quality of our decisions. Issues can get on the agenda too quickly. Forcing those in power to speak on an issue will not always further the dissenters' cause. To the contrary, when dissenters force a response from the majority at too early a stage in the debate, they may generate a backlash that sets the dissenters' goals back. In short, *acting* radically may get an issue taken off the table when *speaking* radically would not.

Consider again San Francisco's decision to marry gays and lesbians. That decision generated ripple effects that conventional expressions of dissent had never generated. It was not merely that the decision emboldened other jurisdictions in New Jersey, New York, New Mexico, and Oregon to follow suit.⁵⁶ The decision also meant that attorneys general in other states had to decide whether to recognize those marriages.⁵⁷ The California courts were

54. 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.

55. 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 54, at 1242-55, 1266-70. Thanks to Bill Buzbee for suggesting this line of analysis.

56. See Joshua Akers, *Clerk Says She Was Doing Job by Issuing Licenses*, ALBUQUERQUE J., June 15, 2004, at 1 (discussing the issuance of same-sex marriage licenses in New Mexico); David Von Drehle & Alan Cooperman, *Same-Sex Marriage Vaulted Into Spotlight*, WASH. POST, Mar. 8, 2004, at A1 (discussing the political ramifications of issuing same-sex marriage licenses in New York, California, and Oregon); Thomas Crampton, *Issuing Licenses, Quietly, to Couples in Asbury Park*, N.Y. TIMES, Mar. 10, 2004, at B5; *Gay Marriage Chronology*, BURLINGTON FREE PRESS, May 16, 2004, at 4.

57. See Dean E. Murphy, *California Attorney General Is Pressed on Gay Marriage*,

forced to decide whether the marriages were lawful. And elected officials across the country found it difficult to avoid taking a position on the issue because it was no longer merely a theoretical debate.⁵⁸

What we do not yet know is whether the decision of San Francisco (and Massachusetts) has furthered a cause or resulted in a backlash. On one view, the Democrats' losses and the anti-gay marriage state initiatives passed during the 2004 election show that the localities went "too far, too fast."⁵⁹ On another view, there has been surprisingly *little* backlash to these marriage decisions. To be sure, when individuals were faced with an up-or-down vote on the issue, these initiatives passed by large margins. But what we did not see in the wake of these localities' decision to marry gays and lesbians is massive protests or political mobilization signaling deep-seated anger. Further, contrary to the view of many pundits in the wake of the election, empirical analysis reveals that "gay marriage and abortion were far from the most important predictors of vote choice" and had "no effect" on the decisions of most voters, "even those in states with an anti-gay marriage initiative on the ballot."⁶⁰ On this view, the real-life instantiation of gay marriage has confirmed what we already knew—that the majority of U.S. voters disagrees with the idea. But it also taught us something we did not know—where the gay marriage question falls in the majority's list of national priorities.

The point here, then, is not that dissenting by deciding is more likely to lead the majority to change its views. The point is simply that San Francisco's example of decisional dissent has affected the political landscape differently than conventional dissent ever did. For good or for ill, the debate about gay marriage is different than it was eighteen months ago, and the notion of dissenting by deciding may help explain the democratic dynamic behind that fact.

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

N.Y. TIMES, Feb. 25, 2004, at A19 (describing the response to San Francisco's decision).

58. *See id.* (noting that Mayor Bloomberg of New York has staked out a position on the issue despite "[i]n the past . . . be[ing] more or less silent on the issue").

59. Dean E. Murphy, *Some Democrats Blame One of Their Own*, N.Y. TIMES, Nov. 5, 2004, at A18 (quoting Senator Diane Feinstein); *see* Jeffrey Rosen, *Immodest Proposal: Massachusetts Gets It Wrong on Gay Marriage*, THE NEW REPUBLIC, Dec. 22, 2003; Jeffrey Rosen, *Kennedy Curse: On Sodomy, The Court Overreaches*, THE NEW REPUBLIC, July 21, 2003; MICHAEL J. KLARMAN, *BROWN AND LAWRENCE (AND GOODRIDGE)* (Univ. Va. Legal Working Paper Series, Univ. Va. Pub. Law & Legal Theory Working Paper Series, Working Paper No. 16, Feb. 18, 2005), at http://law.bepress.com/uvalwps/uva_publiclaw/art16/ (arguing that *Goodridge* has resulted in a backlash against the gay-rights movement).

60. Sunshine Hillygus & Todd Shields, *Moral Issues and Voter Decision Making in the 2004 Presidential Election*, 38 PS: POL. SCI. AND POL. (forthcoming April 2005).

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.⁶¹ Decisional dissent gives us a concrete practice to examine, a real-world example to debate. We not only get to see whether the idea works, but how the new policy fits or clashes with existing institutional practices. *Speaking* radically thus looks different from *acting* radically.⁶²

Consider a set of examples drawn from Michael Klarman's recent work on the *Brown* era.⁶³ 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[ly]" reason that "the pace of school desegregation accelerated,"⁶⁴ 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

61. 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).

62. 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. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) ("[The specific injury requirement] tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action."); ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 115 (2d ed. 1986) ("[T]here are sound reasons, grounded not only in theory, but in the judicial experience of centuries, here and elsewhere, for believing that the hard, confining, and yet enlarging context of a real controversy leads to sounder and more enduring judgments."); 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) ("A specific and concrete injury helps frame issues in a factual context suitable for judicial resolution."); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 222 (1988) (stating that one of the "stated purposes of standing" is "that a concrete case informs the court of the consequences of its decisions").

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

64. *Id.* at 360.

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.”⁶⁵ 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.”⁶⁶

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.⁶⁷ 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, “[i]t was televised scenes of *officially sanctioned* brutality against black demonstrators that transformed northern opinion on race.”⁶⁸

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.”⁶⁹ 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.

The risks. The point, again, is not that a decision is a superior vehicle for conveying a dissenting view; it is simply a different one. Even setting aside the ugly costs of dissent, like the example described above, dissenting by deciding

65. *Id.* at 345-46.

66. *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, *id.*).

67. KLARMAN, *supra* note 63, ch. 7.

68. *Id.* at 442.

69. MILL, *supra* note 41, at 16. Steven Shiffrin makes a similar point about racist speech. *See* SHIFFRIN, *DISSENT*, *supra* note 2, at 78.

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.⁷⁰

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 Democratic governor who holds power at a time when Republicans dominate national politics, 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, 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.⁷¹ But this strategy may also dilute or complicate the dissenters' message in a way that undermines the effectiveness of their arguments.

Finally, because those who dissent by deciding speak not on behalf of themselves, but on behalf of an institution, it may change the way the majority understands and responds to the dissenters' position. On the one hand, when dissenters speak through an institutional channel, it may shift the debate from

70. See Gerken, *supra* note 19, at 1168-69 (discussing these issues in greater detail).

71. Consider, for instance, the remarkable path that those who want schools to teach creationism have taken. They have moved from demands that creationism be taught in the schools to a two-pronged attack on evolution. 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 (2000); Center for Science and Culture, *Top Questions*, <http://www.discovery.org/csc/topQuestions.php> (last visited Jan. 31, 2005) (describing the basic tenets of intelligent design theory). Proponents of teaching creationism 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 (leading opponent of the theory of evolution claiming that "[t]he threat of indoctrination does not come from allowing students to ponder the philosophical issues raised by the origins question. Instead, it comes from force-feeding students a single ideological perspective.").

the politics of identity to the politics of ideas.⁷² For instance, when San Francisco married gays and lesbians, did we understand the dissenters to be gays and lesbians or simply a majority of San Franciscans? On the other hand, there are risks to severing the link between identities 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 idea, but to complain about institutional actors' exceeding their authority.⁷³

2. *Comparing institutional alternatives: Sunstein and the dynamics of democratic decisionmaking*

Once we understand the difference between the type of visibility afforded by conventional dissent and dissenting by deciding, the question is when we would choose one strategy for institutionalizing dissent over another if we subscribe to Mill's view that dissent can improve our decisionmaking. The analysis above suggests that this assessment will turn largely on context—what level of decisionmaking are we describing? Will the dissenters' message be muddied if it is channeled through a governance decision or corrupted if it is channeled through state action? Would a concrete instantiation of the dissenters' view make it more visible? Are there such severe costs associated with decisional dissent, as with the *Brown* example, that the game is not worth the candle?

A useful way to ground the analysis may be to consider an alternative method for advancing the Millian aim of improving decisionmaking: Cass Sunstein's recent work on the dynamics of dissent.⁷⁴ Because Sunstein's work draws upon the Millian tradition and focuses on specifying mechanisms for institutionalizing dissent, it provides a useful example for thinking about the role dissenting by deciding might play in furthering the aims of dissent.

The dynamics of decisionmaking—conformity, polarization, and cascades—and the appropriate institutional cure. Sunstein identifies three decisionmaking pathologies where dissent may provide a needed corrective: conformity, polarization, and cascades.⁷⁵ *Conformity* refers to the human tendency to do what everyone else is doing. The presence of a dissenter, say, on a corporate board or in an investment group can reduce the pressure to conform and thus free individuals on a decisionmaking body to share information or challenge the wisdom of a particular course of action. *Polarization* takes place when a group of people who agree upon an outcome reinforce each other's

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

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

74. SUNSTEIN, *supra* note 29.

75. *Id.* at 10-11 (defining all three terms).

views during the decisionmaking process. As a result, the group takes a more extreme position than one would predict given its members' predeliberation tendencies.⁷⁶ *Cascades* involve conformity over time; a set of decisionmakers makes a choice and subsequent decisionmakers, influenced by the apparent agreement of the first movers, make the same choice even if they would have not reached such a decision independently.⁷⁷

A recognition of the differences between conventional dissent and dissenting by deciding suggests that the phenomena Sunstein identifies may require different institutional cures. Conventional dissent—which is achieved by the presence of one or more potential dissenters on every decisionmaking body—seems the natural cure for conformity and polarization. The presence of one or more dissenters in every group seems likely to reduce the chances that the group will reach the “wrong” decision.

Dissenting by deciding, however, may be necessary to avoid cascades. If cascades stem from the unanimity among the decisions of first movers, an outlier decision seems like the most effective strategy for eliminating the appearance of consensus. It seems to provide the right kind of visibility for the dissenters' view.

Indeed, it seems at least theoretically possible that, by destroying the appearance of unanimity in decisions rendered, dissenting by deciding may even help the dissenters with whom Sunstein is primarily occupied—the minorities *within* a decisionmaking body—to “screw [their] courage to the sticking place”⁷⁸ and speak up. After all, if conformity by individuals stems from the perception that everyone else thinks differently, dissenting by deciding at least makes clear that others hold the same outlier view as the would-be dissenter.

To put these concepts in more concrete terms, consider how these phenomena play out in the context of Sunstein's example of appellate panels. Sunstein argues that, given the important role dissent plays in helping people to get the right answer in a group decisionmaking process, each appellate panel would ideally include a judge who has been nominated by a different party than that which nominated the other judges sitting on the panel. His proposal would mean that each panel would contain either two judges nominated by Democrats and one nominated by a Republican, or two Republican nominees and one Democratic nominee. Sunstein, in other words, seeks conventional dissent on appellate panels.⁷⁹

From the perspective of individual cases, one might think this proposal is all to the good. If we are worried about conformity or polarization, Sunstein's proposal is an excellent one. It would reduce the likelihood that group members

76. *Id.* at 11.

77. *Id.* at 10-11.

78. WILLIAM SHAKESPEARE, *MACBETH*, act 1, sc. 7.

79. SUNSTEIN, *supra* note 29, at 166-193.

would goad one another into a more extreme position than the group's members' predeliberation views would suggest.

If we are worried about *cascades*, however, we would probably want to encourage *decisions* that embody a dissenting view. If an outlier decision is our goal, it is not clear that we want a system in which each appellate panel includes someone from the other party. What we might lose under such a plan is dissent visible at the aggregate level—a decision that embodies the dissenting or outlier view—which would eliminate the appearance of consensus and short-circuit the cascade. If cascades are our biggest concern, it may be useful to have the perspective that an “ideologically amplified” decision made by an all-Democratic nominee or all-Republican nominee panel would provide.⁸⁰

The trade-off between conventional and decisional dissent. The notions of conventional dissent and dissenting by deciding also suggest a trade-off embedded in the choice we make about the appropriate mechanism for institutionalizing dissent. The two strategies can, of course, coexist—even complement one another—within a democratic scheme. Nonetheless, this framing device suggests that it may not always be possible to foster *both* types of dissent simultaneously within the same institution. At least within a given institution, there is a trade-off between conventional dissent and dissenting by deciding: decisional dissent may reduce the risk of cascades but increase the risk of conformity or polarization, and conventional dissent may reduce the risk of conformity or polarization while increasing the risk of cascades.

Specifically, if we seek dissent on every decisionmaking body (to avoid the dangers of conformity or polarization), we must spread dissenters out across decisionmaking bodies rather than concentrating them in a few. These bodies are therefore likely to be roughly similar in their composition—and thus likely to render a roughly similar set of moderate decisions. Cascades, of course, occur precisely in such circumstances—when there appears to be an emerging consensus among the first movers. If cascades are the concern, in contrast, we would want to give dissenters control over some decisionmaking bodies, reducing their numbers elsewhere but fostering occasional outlier decisions. That strategy, of course, precludes the presence of dissenters on every decisionmaking body and thus increases the likelihood that conformity or polarization will occur in some places. Put differently, politically homogenous decisionmaking bodies—the ones most likely to be plagued by conformity or polarization—are likely to produce *visible* dissent in the system as a whole, and politically heterogeneous groupings submerge dissent at the aggregate level and thus create the risk of cascades.

Consider again Sunstein's proposal to ensure that every appellate panel contains at least one judge nominated by the other party. Consistent with the

80. *Id.* at 179.

empirical evidence, we would expect the decisions those panels render to be relatively homogenous, as the presence of the Republican nominee would moderate the decision rendered by the otherwise all-Democratic-nominated panel, and the presence of the Democratic nominee would moderate the decision rendered by an otherwise Republican-nominated panel.⁸¹ Designing appellate panels to produce a more moderate set of decisions creates the risk of what Sunstein terms a “precedential cascade,” where subsequent appellate panels follow the lead of the initial panels in ruling on a question.⁸² Subsequent appellate panels—or the Supreme Court—might be less likely to depart from the “moderate” view than they would be if the set of appellate decisions on a given issue varied. Dissenting by deciding (in the form of an “ideologically amplified” decision), then, would be useful to offset the precedential cascade that seems likely to take place were all appellate decisions to resemble one another.⁸³

In sum, the notion of dissenting by deciding suggests a trade-off embedded in the dynamics of dissent: guaranteeing dissent within individual decisionmaking bodies may systematically submerge dissent within the system as a whole. It may be precisely when dissent flourishes at the intraorganizational level—when it takes the form of conventional dissent—that

81. Sunstein terms this phenomenon “ideological dampening.” *Id.* at 167.

82. *Id.* at 59. Sunstein suggests that dissenting opinions may serve that role. In order to answer that question in this context, we would want to know whether dissents are more moderate when written for a mixed panel and whether, in the presence of significant agreement among two-judge panels, dissenting opinions will constitute *effective* dissents in light of the arguments sketched above. For instance, does the label “dissent” undermine the ability of a dissenting opinion to short-circuit a cascade? See Heather Gerken, *Dissent, Diversity, and the Global Polity*, in *LEGISLATURES AND CONSTITUTIONALISM: THE ROLE OF THE LEGISLATURE IN THE CONSTITUTIONAL STATE* (Kahana et al. eds.) (forthcoming 2005).

83. In one respect, the example of appellate panels is an unfortunate one for purposes of this paper, as it suggests that decisional dissent comes from homogenous bodies of would-be dissenters. While it is certainly true that homogeneous decisionmaking bodies—those consisting solely of would-be dissenters—would generate visibility, my assumption is that visibility can also be generated as a general matter by decisionmaking bodies that are simply dominated by would-be dissenters. Thus, as I discuss below, *infra* Part III.E, the point of decisional dissent as a general matter is *not* to create decisionmaking bodies that exclude members of the majority, but simply to create decisionmaking bodies that minority group members dominate. Indeed, many of the values associated with dissenting by deciding demand the presence of majority group members on the decisionmaking body. See *infra* Part III.E. The analysis above is based on the assumption that, because appellate panels (1) contain only three members, and (2) are drawn from a fairly narrow stratum of the population, we would see much less variation from a minority-dominated appellate panel (with two members nominated by the minority party and one nominated by the majority party) than we would from a minority-dominated body that contains many members and is drawn from a broader swath of the population. That is, my assumption is that even a minority-dominated, non-ideologically amplified panel—where two judges appointed by the minority party moderate their decisions due to the presence of a third judge appointed by the majority party—is not going to render a decision that is significantly different from majority-dominated, non-ideologically amplified panels.

dissent visible at the interorganizational or aggregate level would be sorely missed.

This analysis suggests an interesting dilemma for electoral minorities: whether it is better to seek conventional or decisional dissent in situations where cascades are likely to occur. Conventional dissent among first-movers should increase the likelihood of a cascade. But it will also help *moderate* the set of decisions that triggers that cascade, so the uniform answer produced by the cascade will be a moderate one. Dissenting by deciding among first-movers may short-circuit or postpone a cascade. But if it fails to do so, electoral minorities may have lost the chance to moderate the decisions that ultimately become the consensus choice.

Nor is this trade-off solely a concern for electoral minorities; it also matters for those seeking productive strategies for institutionalizing dissent and thereby improving democratic decisionmaking more generally. After all, while we can imagine that some cascades are likely to be fruitful ones,⁸⁴ we can also assume that first-movers will not always reach the “right” answer (or at least not the “right” answer for subsequent adopters). Encouraging dissenting by deciding—differences in policy perspectives that are visible at the aggregate level—may serve an important purpose. It offers decisionmaking bodies a wider menu of models for appropriate choices, thereby allowing them to adopt a set of policies or principles that are tailored to their individual needs and forestalling or minimizing the harms potentially associated with a decisionmaking cascade.

Finally, it is worth reemphasizing how much context is likely to matter in making these assessments. Sunstein’s work on dissent is useful for purposes of this paper because it presents these questions in a particularly crisp way; it filters out the identity of the dissenters, the size of the dissenting group, and a variety of institutional features that might be crucial for our assessment of whether conventional dissent or dissenting by deciding is preferable. Moreover, although cascades are much more prevalent than most of us think,⁸⁵ using cascades as an example places a thumb on the scale of this debate. A cascade is an example where *formal* power—the ability to issue a decision—takes on great significance. The example used here may thus obscure other values associated with visibility that would favor conventional dissent—for instance, the importance of presenting one’s views in a comprehensive and uncompromised fashion, without the potential for distortion or obfuscation that may be associated with dissent channeled through a decision.

84. Ryan Goodman and Derek Jinks, for instance, have explored how to harness cascades in the service of promoting international human rights. See Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. (forthcoming 2004); Ryan Goodman & Derek Jinks, *Toward an Institutional Theory of Sovereignty*, 55 STAN. L. REV. 1749 (2003).

85. For a description of the surprising prevalence of cascades in the decisions of nation-states and state and local governments, see Gerken, *supra* note 77.

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.⁸⁶ 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 “human 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 cooperative action for the common good.”⁸⁷

In thinking about the ways in which dissent 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

86. 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). 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, *Why the State?*, 100 HARV. L. REV. 781, 788 (1987); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1416 (1986); 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; FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL INQUIRY* 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.

87. *Id.* at 42; see also JED RUBENFELD, *FREEDOM AND TIME* 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 and Social Structure*, *supra* note 86, 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).

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,"⁸⁸ adding that:

[f]or 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."⁸⁹

Similarly, Steven Shiffrin has argued that protecting the rights of dissenters to protest helps bind them to the political community,⁹⁰ 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.⁹¹

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? I explore possible reasons for reaching this conclusion in Part II.B.1, and I compare competing strategies for creating avenues for decisional dissent in Part II.B.2.

1. *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."⁹² Further, giving dissenters a chance to participate in the

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

89. *Id.* at 97.

90. See Emerson, *General Theory*, *supra* note 9, 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"); SHIFFRIN, *DISSENT*, *supra* note 43, at 18.

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

92. 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.

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 may go one step further in forging ties between 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. Dissenters, too, get a chance to “take turns standing in for the whole.”⁹³

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.⁹⁴ 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, in some senses, equated with disagreement with the polity.

Decisional dissent, in contrast, blends dissent with an act of governance.

93. 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).

94. 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. The dissent piece to their involvement drops out, in a sense. Dissenting by deciding, in contrast, allows dissenters to act *radically*—to oppose the majority even as they issue a decision.

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. Dissent involves both an act of affiliation and an act of contestation.

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.⁹⁵ The relevant difference between conventional and decisional dissent, however, is that 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 from the polity is distinguished from membership in the majority—not merely as a matter of rhetoric, as is possible with conventional dissent, but as a matter of institutional practice.

On this view, dissenting by deciding fits more clearly with Michael Walzer's view of how we should understand at least one form of dissent. Walzer argues that civil disobedience—a particularly strong form of dissent that shares some of the characteristics of decisional dissent—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.”⁹⁶ Someone engaged in civil disobedience, Walzer believes, has only “partial claims” against the state;⁹⁷ his “loyalties are divided,” as “he is not in any simple sense a citizen” or a rebel,⁹⁸ but partially both, precisely because “the processes through which men incur obligations are unavoidably pluralistic.”⁹⁹ Civil disobedience merely stems from the existence of overlapping memberships, and “there is considerable evidence to suggest that the state can live with, even if it chooses not to accommodate, groups with partial claims against itself.”¹⁰⁰

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.”¹⁰¹ Unlike conventional dissent, dissenting by deciding does not demand an

95. See *infra* note 111 (discussing Kalven's description of civil rights protesters).

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

97. *Id.* at 14.

98. *Id.*

99. *Id.* at 15.

100. *Id.* at 11-12.

101. *Id.* at 220.

external emigration to accompany what Walzer terms the “internal emigration” of a dissenter.¹⁰² A dissenter can speak for the state, like any other citizen, even when she speaks her mind.

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 conventional dissent 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 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).¹⁰³ Harry Kalven’s suggestion that the “citizen-critic” is “our most important public official”¹⁰⁴ 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 pro-environmentalists will be forced to vote against worthy projects 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, risks, and benefits. Here again, dissenting by deciding is merely a different strategy for promoting dissent, not necessarily a better one. To

102. *Id.* at 14.

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

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

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 to 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.¹⁰⁵ In the words of Dalia Tsuk, “[b]y 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.”¹⁰⁶ 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

105. See, e.g., MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 159 (1999); CAROLD 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, *The New Religion and the Constitution*, 116 HARV. L. REV. 1397, 1401 (2003); Kathleen M. Sullivan, *Sex, Money, and Groups: Free Speech and Association Decisions in the October 1999 Term*, 28 PEPP. L. REV. 723, 743 (2001); Dalia Tsuk, *Corporations Without Labor: The Politics of Progressive Corporate Law*, 151 U. PA. L. REV. 1861, 1876-77 (2003); Dalia Tsuk, *The New Deal Origins of American Legal Pluralism*, 29 FL. 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).

106. Tsuk, *Corporations Without Labor*, *supra* note 105, at 1876-77.

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.¹⁰⁷

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,¹⁰⁸ dissenting by deciding could lead to the absorption of private values into the public realm. 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.

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.

Further, channeling dissent through accepted political channels might initially seem to strengthen the hand of dissenters. Dissenting by deciding may seem more respectable than conventional dissent—more like governance and less like politics. It may move 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.”¹⁰⁹ Harry Kalven, for example, noted the power of dissent when it is connected to a reaffirmation of one’s membership in the community. He describes the genius of civil-rights protests that “symbolized . . . a deep grievance, not a break with the society. [Protesters] prayed, they pledged allegiance to the flag, they sang ‘God Bless America,’ and—in [one instance]—they even stopped for a red traffic light.”¹¹⁰ These acts of affiliation during the moment of dissent helped protestors, to borrow a phrase Kalven uses elsewhere, “trap democracy in its own decencies.”¹¹¹ As

107. Sullivan, *The New Religion*, *supra* note 105, at 1401.

108. *See id.*

109. 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” rather than the “non-rational, 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.

110. HARRY KALVEN, *THE NEGRO AND THE FIRST AMENDMENT* (1965).

111. *Id.* at 67. The lessons Kalven draws from civil rights protests has apparently not

noted above,¹¹² dissenting by deciding goes one step further, as the dissenters' act of affiliation is officially recognized as such by the state.

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,¹¹³ 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. Channeling dissent through accepted channels of governance risks diluting dissent. The rhetoric of the closed fist can be more powerful than that of the open hand; outsiders may be more effective at generating change than insiders. 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. 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.

2. Comparing institutional alternatives: federalism

If we think there are values associated with dissenting by deciding, the obvious question is how best to preserve channels for its exercise? The First Amendment, of course, has long been used as a tool to create and preserve avenues for dissent that takes a conventional form. But we lack a

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.

112. See discussion *supra* pp. 126-27.

113. This argument plays into a fourth argument Emerson offers in favor of free expression. See Emerson, *General Theory*, *supra* note 9, 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.

comprehensive institutional strategy for creating space for dissent that takes the form of a decision. We know how to ensure that people can *speak* radically; we have not yet figured out how to ensure that people can *act* radically.

To be sure, there are areas where we have a model for conceptualizing the connection between governance and dissent—American federalism being the dominant example. But the federalism model is too limited a strategy for creating space for decisional dissent. The federalism model (at least “hard” federalism, its strongest variant¹¹⁴) depends on creating a formally bounded space for decisional dissent. Hard federalism invokes the notion of sovereignty to protect local minorities from national interference. That leads to two types of problems. First, as a descriptive matter, the federalism model is too limited to be used to protect dissenting by deciding in the many areas where such formal enclaves do not exist. Put simply, hard federalism provides *de jure* protection for decisional dissent, whereas many examples of dissenting by deciding arise *de facto*. Second, as a prescriptive matter, there will sometimes be better institutional strategies for promoting the values associated with dissenting by

114. For purposes of this discussion, unless I note otherwise, the term *federalism* refers to what I call “hard” or “*de jure*” federalism—the reliance on state sovereignty and the creation of formally protected realms where states may act without federal interference. Federalism writ large, of course, encompasses a wide variety of institutional arrangements, many of which would fall into the category of *de facto* rather than *de jure* protections for empowering regional minorities. 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”); Young, *supra* note 25, at 16-17 (offering a somewhat different formulation for distinguishing between “hard” and “soft” federalism). Examples of this sort of “soft” or “*de facto*” federalism include the many areas where the federal government and states exercise concurrent jurisdiction; in these areas, absent federal preemption, the state may wield power along with, or in the absence of, the federal exercise of power. Moreover, there are areas of cooperative federalism, where the state and federal governments regulate together. 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.

In each of these instances of soft federalism, the space left for decisional dissent depends—as with the examples described below, *infra* notes 117-121 and accompanying text—on an informal give-and-take between the national government and the states. See, e.g., John P. Dwer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183 (1995) (describing the way that pragmatic concerns, informal bargaining, and political give-and-take among state and federal officials affect the implementation of federal environmental law); 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).

deciding, strategies that do not depend on the notion of enclave. If we value dissenting by deciding because it allows dissenters to affiliate with the polity even as they express disagreement with it, protecting dissent through formal notions of sovereignty may weaken the link between dissenters and the polity.¹¹⁵ I discuss each claim in turn.

De jure v. de facto protection for dissenting by deciding. Federalism is perhaps the most fully theorized strategy for preserving opportunities for decisional dissent. It has not been cast in these terms, of course, and serves a variety of ends unrelated to the notion of dissent. Nonetheless, federalism can be understood at least in part as a strategy for allowing would-be dissenters to govern in some subpart of the system. Unsurprisingly, then, some scholars of federalism have explored a number of the values associated with what I have termed dissenting by deciding.¹¹⁶

As a purely descriptive matter, there is at least one crucial difference between hard federalism and other variants of decisional dissent. Federalism facilitates dissenting by deciding through an enclave strategy; it creates a formally delineated space where would-be dissenters exercise sovereign power. If we are interested in creating space for dissenters to decide, one of the obvious advantages of an enclave strategy is that it guarantees a protected space in which the minority is shielded from interference by the majority. It thus provides *de jure* protection for decisional dissent. But dissenting by deciding often emerges *de facto*, where there is no formally delineated space for dissent.¹¹⁷ Because most disaggregated institutions where dissenting by deciding occurs are at the lower end of the political hierarchy, the chance to register dissent through a decision in such contexts emerges *ad hoc*, either by the grace of the majority or out of practical necessity. These decisionmaking bodies are usually charged with implementing or applying a legislative

115. Cf. WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP* 182 (1995) (arguing that self-government rights that protect national ethnic minorities from intrusion by the national government are “unlikely . . . to . . . serve an integrative function” because they rest on the claim that “there is more than one political community, and that the authority of the larger state cannot be assumed to take precedent over the authority of the constituent national communities”).

116. Barry Friedman, *Valuing Federalism*, 82 *MINN. L. REV.* 317, 389-94, 397-400, 401-02 (1997-98) (analyzing whether federalism promotes democratic participation, encourages innovation, and fosters cultural diversity); Seth F. Kreimer, *Federalism and Freedom*, 574 *ANNALS AM. ACAD. POL. & SOC. SCI.* 66 (2001) (arguing that the protection of state autonomy enables states to serve as competing sources of norms); Porterfield, *supra* note 9 (suggesting that the protections afforded to private expression should be extended to state measures designed to express disapproval of foreign regimes); Jason Mazzone, *The Social Capital Argument for Federalism*, 11 *S. CAL. INTERDISC. L.J.* 27 (2001-2002) (arguing that federalism promotes social capital); Young, *supra* note 9 (discussing participatory, expressive, and experimental values associated with state autonomy).

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

mandate—a jury applying the law enacted by the legislature, a school committee implementing the policy set by an education department.¹¹⁸

Dissenting by deciding in these instances involves *interstitial* dissent. Electoral minorities can dissent only within the space left open by the centralized decisionmaker. 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.¹¹⁹ 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,¹²⁰ we nonetheless see a representative of the whole checking another representative of the whole.

118. This list would even include the “softer” variants of federalism, where states and the federal government exercise concurrent jurisdiction or engage in cooperative federalism. *Supra*, text accompanying note 114.

119. Thanks to Brucke Ackerman for prodding me to think more about this question.

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

Under a disaggregated system, we find *part* of the polity checking the whole, thus moving us in the direction of a federalism model (without the overlay of sovereignty). A jury representing a subpart of the polity checks legislative overreaching.¹²¹ Members of a legislative committee can prevent legislation from going forward even if a majority of their colleagues support it. A school committee may subvert a policy decision handed down by a legislature in the way it implements that mandate.

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.

In sum, while hard federalism formally reserves a space for would-be dissenters to decide, dissenting by deciding often emerges in a more haphazard fashion and can be subject to expansion or contraction, depending on the majority's views. The hard federalism model, which hinges on *de jure* protection for decisional dissent, thus does not apply to the full range of contexts where dissenting by deciding emerges *de facto* in the American political system. We need a more capacious language before we can devise an appropriate institutional strategy for preserving avenues for decisional dissent.

The enclave strategy and strengthening civic ties. Turning from the descriptive to the prescriptive, hard federalism may also fall short as a universal model for creating space for dissenting by deciding. That is, we might well conclude that a *de jure* strategy for protecting decisional dissent is not always the best one. While the benefit derived from hard federalism is the existence of formal and permanent space for dissent, the costs to this strategy similarly stem from reliance on an enclave for protecting dissenters. Although the protection for dissenting by deciding may be less reliable (or at least less predictable) in a *de facto* rather than a *de jure* model, the dissenting decisions ultimately rendered under a *de facto* system may be more likely to cement the ties between the dissenter and the polity. That is because, under a federal regime, one must be a member of a separate—even competing—sovereign in order to engage in decisional dissent.

To the extent that dissenting by deciding involves a blend of affiliation and contestation, a *de facto* strategy for protecting decisional dissent—one that does

121. 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.

not rely on the notion of enclave—may go further in allowing dissenters to affirm their membership in *the* polity at the same time they express disagreement with the views of the majority. If dissenting by deciding under a federal system takes the form of a patchwork quilt—clearly delineated red or blue squares stitched together to form a single fabric—decisional dissent under a *de facto* strategy looks more like a kaleidoscope. 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. Every decision, no matter what its color and shape, becomes part of a larger pattern in the kaleidoscope. It is therefore difficult to separate “us” from “them.”¹²²

It is, of course, hard to assess whether these distinctions matter in practice because we lack a shared language to describe in general terms the many instances of decisional dissent we see in the American context. My point here is simply that the language of hard federalism—replete with references to separate, even competing sovereigns—does not quite describe the phenomenon and may, indeed, undermine some of the possibilities associated with this odd fusion of governance and dissent.

The type of full-blown cultural analysis that would be necessary to prove such a claim is beyond the scope of this paper. Here I can offer just one example of why I think the language of hard federalism does not fully capture what makes dissenting by deciding unique. I turn to what one author has termed the “judicial culture”—“the empirical assumptions, historical interpretations, and normative ideals . . . that seem to inform and influence . . . current constitutional law . . .”¹²³ The most useful data point for these purposes seems to be *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), a case that squarely presents the relationship between state-based dissent and national identity.

In *Term Limits*, the Supreme Court invalidated Arkansas’s imposition of term limits on federal candidates for Congress.¹²⁴ The term-limit rule was passed by the voters of Arkansas by initiative. The Justices had much to say

122. One might fairly respond that if would-be dissenters go “too far” in the eyes of the majority, their decision will *not* be embraced as an act of affiliation, but viewed as the decision of an outlier group. The O.J. Simpson verdict might represent this type of phenomenon. But even here, the informal nature of the protection afforded to dissenting by deciding may provide a useful corrective in the long term. Under a federal system, there may be nothing the people in a blue state can do to affect the policies of a red state, or vice versa. But members of the majority in a single polity can place limits on the power of decisional dissent precisely because the institution in question *is* formally part of the same polity. In the long run, that fact may help push the activities of would-be dissenters into more politically palatable channels. Whether one thinks the result is a healthy dose of realism for dissenters or a dynamic that waters down dissent so as to make it meaningless, it leads to a different type of affiliation than the federalism strategy.

123. Richard H. Pildes, *Democracy and Disorder*, 68 U. CHI. L. REV. 695, 696 (2001).

124. 514 U.S. 779 (1995).

about what the Constitution and the historical record revealed about the term-limits rule. What is most intriguing about the opinion for these purposes is that the Justices seemed to lack a vocabulary for deciding what, precisely, the citizens of Arkansas were doing in passing the rule. The only language available to them was the language of hard federalism¹²⁵—competing sovereigns and enclaves for dissent—and that language could not be used to describe what had occurred in Arkansas.

Justice Stevens's majority opinion, for instance, leaned heavily on the idea that the term-limits rule was the product of a dissenting enclave. Indeed, the notion of competing sovereigns seemed to push the majority to conclude that the Arkansas initiative would threaten the relationship between the nation and her citizens, perhaps even undermine our national identity. The phrase that best captures the majority's reasoning—repeated no fewer than five times by the majority and termed the “most important[]” premise of the decision¹²⁶—was that “such a state-imposed restriction is contrary to the ‘fundamental principle of our representative democracy’ . . . that ‘the people should choose whom they please to govern them.’”¹²⁷

The odd thing about the majority's insistence that “the right to choose representatives belongs not to the States, but to the people,”¹²⁸ was that it was the *citizens* of Arkansas who adopted the term-limits provision by initiative.

125. The same is true of the scholarship the decision has generated. One of the most important analyses of the case is titled “Dueling Sovereignities,” see Kathleen Sullivan, *Dueling Sovereignities: U.S. Term Limits, Inc. v. Thornton*, 109 HARV. L. REV. 78 (1995), and most other authors adopt a similar view of the case. See, e.g., Charles Fried, *Foreword: Revolutions?*, 109 HARV. L. REV. 13 (1995); Chris Marks, *U.S. Term Limits, Inc. v. Thornton and United States v. Lopez: The Supreme Court Resuscitates the Tenth Amendment*, 68 U. COLO. L. REV. 541 (1997); Rebecca E. Zietlow, *Belonging, Protection and Equality: The Neglected Citizenship Clause and the Limits of Federalism*, 62 U. PITT. L. REV. 281 (2000); Neil M. Richards, Note, *U.S. Terms Limits v. Thornton and Competing Notions of Federalism*, 12 J.L. & POL. 521 (1996). The outlier in this respect is Robert Nagel. Robert F. Nagel, *The Term Limits Dissent: What Nerve*, 38 ARIZ. L. REV. 843 (1996). While he reads the majority, as I do, as relying heavily on the notion of competing sovereigns, *id.* at 844-45, 850-51, he demonstrates some sympathy for an alternative view, “the possibility that state interests may legitimately help to define the national interest.” *Id.* at 851. David Barron's work on localism sounds a related theme, as he emphasizes the role that local governments can play in giving substantive content to constitutional principles. See David Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism* 147 U. PENN. L. REV 487 (1999).

126. *Id.* at 806. Similarly, the primary precedent on which the majority relied was *Powell v. McCormack*, 395 U.S. 486 (1969), where Congress had refused to seat Adam Clayton Powell, whom the people of one of New York's congressional districts had elected to the House. 514 U.S. at 797-98. In addition to *Powell's* historical analysis of the Qualifications Clause, its “critical postulate that sovereignty is vested in the people, and that sovereignty confers on the people the right to choose freely their representatives to the National Government,” *id.* at 794 (citing *Powell*, 395 U.S. at 541), was central to the *Term Limits* majority's decision.

127. 514 U.S. at 783 (internal citation omitted).

128. 514 U.S. at 820-21.

The citizens were, in fact, “choos[ing] whom they please to govern them”—they chose not to be governed by someone who had already served three terms in the House of Representatives or two terms in the Senate. Had the term-limits rule been passed by the state legislature, the majority’s fears would have been easier to grasp because it would at least have been possible to imagine a sort of interinstitutional competition between the state and federal legislatures.¹²⁹ But the idea that the *citizens* of Arkansas were somehow interfering with their *own* relationship to the national government seems quite odd.

Perhaps sensing this disconnect, the majority responded to this issue in a footnote, where it insisted that “the voters of Arkansas, in adopting Amendment 73, were acting as citizens of the State of Arkansas, and not as citizens of the National Government.”¹³⁰ Justice Kennedy’s concurrence pursued a similar theme.¹³¹

Notice the oddly compartmentalized conception of citizenship embraced by both the majority and Justice Kennedy. Both opinions seem to assume that the voters of Arkansas can issue an outlier decision only if they are acting as citizens of Arkansas rather than as citizens of the United States. The two identities, however, must remain distinct. On this view, the decision of the state polity cannot be embraced as a decision of the national polity—hence the majority’s odd conclusion that it is possible to cast a vote in one’s capacity as a citizen of the state that undermines one’s relationship to the nation. Put differently, because the federalism model—with its language of enclave and separate spheres—so dominated the analysis, it was difficult for the Justices to imagine that the Arkansas voters were embracing a national identity even as they adopted an outlier view.

Justice Thomas might have been able to make much hay of these conceptual back flips, but he, too, lacked a vocabulary for describing precisely

129. At least some of the historical material on which the majority relied plainly refers to this type of competition. *See, e.g., id.* at 809 (quoting Hamilton’s observation that placing the power to regulate national elections “in the hands of State *legislatures* . . . would leave the existence of the Union entirely at their mercy”) (emphasis added); *id.* at 809-11 (describing several examples of the reluctance of the Framers to cede power over the national government to state *legislatures*).

130. *Id.* at 822 n.32.

131. Justice Kennedy noted that “[t]he Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other.” *Id.* at 838 (Kennedy, J., concurring). Given this strict dichotomy, Kennedy viewed the decision of the citizens of Arkansas to enact the term-limits initiative as “the *State’s* attempted interference with the federal right to vote” *Id.* at 844 (Kennedy, J., concurring) (emphasis added). It was thus a “right[] that do[es] not derive from the state power in the first instance but that belong[s] to the voter in his or her capacity as a citizen of the United States.” *Id.* For Kennedy, as for the majority, the issue boiled down to one of sovereignty: “That the States may not invade the sphere of federal sovereignty is as incontestable, in my view, as the corollary proposition that the Federal Government must be held within the boundaries of its own power when it intrudes upon matters reserved to the States.” *Id.* at 841.

what the voters of Arkansas had done. Thomas plainly noticed the odd assumption about citizenship that undergirds the majority's opinion.¹³² Nonetheless, he was unable to gain much intellectual traction from the fact that the citizens of Arkansas had adopted the provision in question.¹³³ Although the dissent half-heartedly resists the majority's claim that citizens act in their capacity as citizens of the state or nation, but not both,¹³⁴ the bulk of its analysis seems nonetheless to rest on the same assumption.¹³⁵

Term Limits, then, suggests the powerful hold that the notion of competing sovereigns has upon the imaginations of the Justices. The language of hard federalism makes it difficult for them to view the vote of the citizens of Arkansas as anything but a threat to the national sovereign. They cannot see the outlier decision of the citizens of Arkansas as an act of national affiliation or conceptualize a departure from uniformity to represent a decision of *the* national polity (or at least some part of it).

To get a better sense of the potential shortcomings of the hard federalism model here, consider whether these opinions could have been written in this fashion if voters in four or five congressional districts scattered throughout the country had voted out their congressional representatives after two terms or if they had signed a pledge or contract to do so. It is difficult to imagine the Court

132. For instance, he opened his dissent by remarking dryly that the majority opinion "defends the right of the people of Arkansas 'to choose whom they please to govern them' by invalidating a provision that won nearly 60% of the votes cast in a direct election and that carried every congressional district in the State." *Id.* at 845 (Thomas, J., dissenting). Similarly, he rejected Justice Kennedy's claim that the term-limits rule interfered with the relationship between the nation and its citizens because "when one strips away its abstractions, the concurring opinion is simply saying that the people of Arkansas cannot be permitted to inject themselves into the process by which they themselves select Arkansas' representatives in Congress." *Id.* at 859 (Thomas, J., dissenting). And he observed, quite rightly, that "even if one believed that the Framers intended to bar state legislatures from adopting qualifications laws that restrict the people's choices, it would not follow that the people themselves are precluded from agreeing upon eligibility requirements to help narrow their own choices." *Id.* at 884.

133. For example, he devotes a scant two paragraphs of his eighty-one-page dissent to the distinction between the people of a state and the state legislature. *Id.* at 883-84. Perhaps even more tellingly, although Justice Thomas relies heavily on the Tenth Amendment, he discusses only the powers reserved to "the States," not "the people," U.S. Const., Amend. X., and does not even mention the Ninth Amendment.

134. *See, e.g.*, 514 U.S. at 858 ("When the people of Georgia pick their representatives in Congress, they are acting as the people of Georgia, not as the corporate agents for the undifferentiated people of the Nation as a whole."); *id.* at 859-60 ("Even at the level of national politics, then, there always remains a meaningful distinction between someone who is a citizen of the United States and of Georgia and someone who is a citizen of the United States and of Massachusetts The people of each State have retained their independent political identity.");

135. Thomas directs his energies not to debunking the federal-state dichotomy established by the majority opinion, but to challenging the majority's conclusion that the power in question was reserved to the national sovereign rather than to the state one. *Supra* note 126.

invalidating those choices on the ground that these decisions were made in the voters' capacity as citizens of congressional districts x, y, and z and *not* as citizens of the national polity. It is even more difficult to imagine the Justices finding that those decisions somehow threatened our national identity.¹³⁶ The Court, of course, might nonetheless have forbidden the use of a precommitment device (like the statewide initiative in *Term Limits*) to achieve those aims.¹³⁷ It might equally have concluded that the Constitution embodied the national majority's conscious decision not to allow departures from uniformity in the qualifications for national office. But the threat of competition that does so much work in the majority opinion and the concurrence would be unavailing.

The *Term Limits* decision is thus suggestive of the need for a more capacious vocabulary for understanding the phenomenon of decisional dissent, one that does not rest so heavily on the notion of formally designated enclaves. A federalism strategy for fostering dissenting by deciding has obvious strengths. The enclave strategy may more effectively guarantee space for would-be dissenters to engage in governance than any alternative. But the hard federalism model may also reduce the chance that an act of dissent will be perceived as an act of affiliation with the polity. We might therefore sometimes prefer alternative strategies for institutionalizing decisional dissent, even if they make dissent less reliably available.

For instance, we might want at least some decisions rendered by dissenters to be embraced as decisions of *the* polity, as they often seem to be with juries or appellate panels.¹³⁸ Or we might look to the regional government model, where territory plays an interesting role in delineating the relationship between minority and majority.¹³⁹ While local governments lack the formal autonomy that sovereignty guarantees, territorial boundaries lend these institutions a level of functional independence that seems to exceed that accorded to many other disaggregated institutions.¹⁴⁰ And the notion of overlapping citizenship seems to sit more comfortably in this context: one can imagine oneself both as a resident of San Francisco (which brings with it a distinctive sense of

136. They might have viewed these decisions as Robert Nagel views the term-limits initiative struck down in *Term Limits*, part of a "continuing role [for] state-based policies in shaping the national culture," a collaborative effort between the states and the union to shape a shared national identity. Nagel, *supra* note 120, at 851.

137. For an in-depth exploration of this notion and the potential arguments in favor of a term-limits rule, see Einer Elhauge, *Are Term Limits Undemocratic?*, 64 U. CHI. L. REV. 83 (1997).

138. See *infra* Part III.D

139. I am indebted to Dan Weiner for suggesting this line of inquiry.

140. See Gerald E. Frug, *Beyond Regional Government*, 115 HARV. L. REV. 1763, 1789 (2002) ("Cities are creatures of the state, and state officials regularly and routinely subject them to detailed supervision and control" but due to "emotional . . . attachment to local decisionmaking," states find that "[h]aving delegated considerable authority over [certain] issues to local governments, states are largely unwilling to override their decisions even though they have the power to do so").

community identity) and as a resident of California. It may also be harder for a Californian to identify San Franciscans as “not us”¹⁴¹ in the easy fashion that residents of red states and blue states seem to identify one another. Finally, we might want to think about other regionally defined entities as a model. A school committee’s decision, for instance, is understood to be the decision of a *state* entity, but we also know that it will affect only a single school system. Would-be dissenters, then, are understood to be part of the polity, but only part of it.

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 identity. 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.¹⁴² Here I move away from the purely individualist model of self-expression that dominates First Amendment scholarship and consider more group-oriented conceptions of identity¹⁴³—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.¹⁴⁴

141. Cf. *id.* at 1793 (“[n]o one thinks of municipal boundaries as dividing one pre-political ‘people’ from another.”). But see Richard Ford, *Law’s Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843, 922-25 (1999) (offering a critical reading of *Romer v. Evans* as standing for the proposition that minorities must withdraw into enclaves in order to wield power). For a different view of the relationship between *Romer*, local government, and the protection of minorities, see Barron, *supra* note 125, at 587-97.

142. See, e.g., C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (1989); JOHN STUART MILL, ON LIBERTY (YEAR?); DAVID A.J. RICHARDS, TOLERATION AND THE CONSTITUTION 165-77 (1986); SHIFFRIN, ROMANCE, *supra* note 2 (1990); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978); Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225 (1992).

143. For an analysis and critique of this strain of First Amendment scholarship, see, e.g., SHIFFRIN, *supra* note 43; Nan Hunter, *Escaping the Expression-Equality Conundrum*, 61 OHIO ST. L.J. 167 (2000); 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.

144. 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 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 MARTHA MINOW, NOT ONLY FOR MYSELF: IDENTITY, POLITICS, AND THE LAW 50-51 (1997); IRIS MANION YOUNG, INCLUSION AND DEMOCRACY 99 (2000); IRIS MANION

Dealing with dissent is difficult in this context because we are dealing not just with disagreement, but disagreement that corresponds to power disparities and the continuing legacy of past discrimination. 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 community¹⁴⁵—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, so too an individual's participatory experiences may 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."¹⁴⁶ Just as proponents of conventional dissent seek to ensure the presence of a dissenter on every decisionmaking body, proponents of the

YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 46 (1990). 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 88, 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).

145. *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); IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 92 (1990); 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).

146. 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 108, ch. 2; PHILLIPS, *supra* note 72; NANCY ROSENBLUM, MEMBERSHIP AND MORALS ch. 9 (1998); MELISSA S. WILLIAMS, VOICE, TRUST, AND MEMORY: MARGINALIZED GROUPS AND THE FAILINGS OF LIBERAL REPRESENTATION (1998); IRIS MARION YOUNG, INCLUSION AND DEMOCRACY 121-53 (2000); YOUNG, *supra* note 109, at 44, 183-91; Jane Mansbridge, *Should Blacks Represent Blacks and Women Represent Women? A Contingent "Yes"*, 61 J. POL. 628 (1999).

politics of recognition seek to guarantee racial and ethnic minorities a presence—or voice—in every part of the political process.¹⁴⁷ 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 had a chance to control the outcome of those decisions.

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, allows racial minorities to *act together*. As a result, these two strategies for institutionalizing dissent create quite different fora for the expression of group identity. I examine the “politics of recognition” as a strategy for institutionalizing dissent in Part II.C.1, and I contrast it with decisional dissent in Parts II.C.2 and II.C.3.

1. *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 10 or 20 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.¹⁴⁸ At a

147. See, e.g., YOUNG, *supra* note 144, at 183-91.

148. Cf. *Grutter v. Bollinger*, 539 U.S. 306, 318-19 (2003) (describing testimony of

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 state 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.

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”).

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.

2. *Dissenting by deciding: Fusing the collective act with the public one*

Dissenting by deciding, in contrast, fuses the public act with the collective one. Because 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 involves many voices, not one. It thus provides an institutional solution for those seeking to move away from an individualist understanding of dissent.¹⁴⁹

Perhaps more importantly, group members speak together at the same moment that they speak on behalf of the state.¹⁵⁰ 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.¹⁵¹ It also resonates with Lani Guinier and Gerald Torres’s conception of “political race”: “Unlike identity politics, political race

149. See SHIFFRIN, ROMANCE, *supra* note2, at 91-96.

150. 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 86, 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”).

151. 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 51-52 and accompanying text (discussing Meiklejohn).

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.”¹⁵²

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.

3. Tradeoffs 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. While the

152. GUINIER & TORRES, *supra* note 88, at 16.

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.

III. WHEN SHOULD WE FAVOR DISSENTING BY DECIDING OVER CONVENTIONAL DISSENT?: GENERATING A PRODUCTIVE CONVERSATION BETWEEN PERIPHERY AND CENTER

Once we have grasped the trade-offs embedded in these competing—and complementary—strategies for institutionalizing dissent, the next question is when we would choose one over another. That is, even if we are convinced that a healthy democratic infrastructure would include a mix of decisional and conventional dissent, we must still decide which variant of dissent to seek within a given institutional setting. Where is dissenting by deciding more likely to generate a productive conversational dynamic between dissenters and the majority, between the periphery and the center? Although the type of detailed, contextual analysis necessary to make such a judgment is beyond the scope of this Article, this Part offers some preliminary thoughts on the questions we would want to answer in making such choices.

A. The Center's Opening Conversational Gambit

In considering what form of dissent will generate a productive conversational dynamic between the center and the periphery, we might focus first on the center's opening gambit. After all, much of the analysis above is concerned with the dissenters' side of the conversation. But in conversations between the center and periphery, it is often the center that speaks first, and the success of the periphery's response may depend on what kind of conversational opening the center provides.

One could imagine the beginning of the conversation between the majority and dissenters taking at least two forms: a question or an answer. The center might ask an open-ended question. For instance, it might frame a broad norm and leave lower-level decisionmaking bodies considerable discretion to implement it. Block grants, certain educational mandates, and the freedom granted to local prosecutors¹⁵³ seem to fit in this category. Alternatively, the center might begin the conversation with an answer by issuing a command to lower-level decisionmakers—examples might include sentencing rules, *Brown v. Board of Education*,¹⁵⁴ or *Roe v. Wade*.

Those two strategies seem likely to elicit different kinds of responses from the periphery. If we set aside our views of the *content* of the command (something particularly hard to do with cherished commands, like *Brown*) and simply focus on the political dynamic it sets in place, the former seems more likely, on average, to generate a productive conversation in the short term. To return to Corbett's metaphor,¹⁵⁵ a question rather than an answer—a broad grant of discretion rather than an order—seems more likely to be seen as an open hand and thus greeted with one in response. As a symbolic matter, a grant of discretion rather than a command seems more likely to be perceived by dissenters as a sign of trust. As a practical matter, a grant of discretion offers a public decisionmaking process into which minorities can productively channel their energies. A conversational gambit that begins with an answer, in contrast, offers the periphery a less appetizing set of choices: yes or no, accept or nullify. While this gambit is the obvious choice where the majority cannot tolerate disuniformity, resistance seems more likely to be the response in the short term.

B. The Length of the Conversation

In the long term, however, it becomes more difficult to predict which opening conversational gambit is most likely to succeed. If we imagine this

153. See, e.g., William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004).

154. See, e.g., KLARMAN, *supra* note 63, at 72 (arguing that *Brown* radicalized white southerners because "it left [them] no choice but to desegregate their schools").

155. *Supra* note 74 and accompanying text.

conversation as a minuet, we might worry about backlash from the center after the dissenters have responded. Backlash seems quite likely when the periphery resists rather than implements the majority's command. But backlash can also come when a minority gets the bit in its teeth—it takes the discretion it has been granted further than the majority anticipated, thus creating the appearance that it has hijacked the apparatus of governance for its own purposes. The backlash against the decisions by San Francisco and Massachusetts to marry gays and lesbians might offer one example of this phenomenon. The fact that we often term jury nullification “lawless” is another.¹⁵⁶ And backlash, of course, begets backlash.¹⁵⁷

C. *The Dissenters' Target Audience*

Another consideration that might influence whether and when dissenting by deciding represents a sensible strategy for institutionalizing dissent may hinge on the audience dissenters are targeting. If dissenters seek to persuade like-minded citizens or think that the majority is simply missing needed information to reach the correct decision, dissent that takes the form of an argument may be a more productive strategy than dissent that takes the form of a decision. After all, dissenters simply need to correct a misperception on the majority's part, and conventional dissent—provided it is sufficiently visible—seems more likely to achieve this aim because it presents the dissenters' views in a more comprehensive and analytically pure form.

If instead one wants to challenge the majority's view—to prove that an idea would work in practice or to challenge the majority's assumption of hegemony—dissenting by deciding seems a more likely avenue for effecting change.¹⁵⁸ This seems particularly true to the extent that viewpoint and identity coincide, and dissenters seek to challenge not only a policy choice, but the majority's implicit assumption that it is entitled to make that choice in the first place.

Thus, where we are dealing with a subordinated group, dissenting by deciding may further two goals simultaneously. First, it offers a real-world instantiation of the group's views. Second, it turns the tables on the majority,

156. That term, interestingly enough, has also been invoked in describing San Francisco's decision to marry gays and lesbians. Editorial, *The Road to Gay Marriage*, N.Y. TIMES, Mar. 7, 2004, at A12 (“Mayor Gavin Newsom's critics called his actions lawless, but the law was, and still is, murky.”).

157. See *supra* text accompanying note 64 (discussing Klarman's view of the political dynamic created by Brown).

158. Cf. Minow, *supra* note 38, at 734 (arguing that one reason to engage in civil disobedience “is to disturb the premises of the legal system that itself excludes or degrades an entire class of people,” and suggesting that suffrage protests involving women attempting to cast votes both “exercised a privilege of assertion and exhibited the point behind the protest that the excluded can themselves act and deserve both the rights and personal dignity accorded to others”).

allowing members of the subordinated group to shed their usual role as dissenters or influencers and engage directly in an act of self-governance.¹⁵⁹ Subordinated group members are not playing the accustomed role of outsider, but represent a central force in the decisionmaking process. They are able to express views that differ from the majority without sacrificing a chance to speak on behalf of the polity. And, in doing so, they can demand recognition of their right to speak.

Dissenting by deciding may thus help redefine what is “normal” in 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).¹⁶⁰ Put differently, dissenting by deciding allows subordinated dissenters to challenge the majority’s presumption that it is entitled to decide as well as its views on which policy is the best one.

D. The Institutional Site for the Dissenters’ Response

Another set of considerations that might guide our assessment of which type of dissent we wish to promote depends on institutional mission. The most obvious reason for rejecting decisional dissent has to do with the costs that arise when local minorities get to decide rather than merely to speak. There are some dissenters whom we do not want to empower—for example, those who will use the power as a local majority to oppress a local minority, as was the case with Jim Crow.

Further, there are some institutions whose structure and normative underpinnings make it a hard fit for decisional dissent. Imagine for these purposes that we can group disaggregated institutions into roughly three categories: *spatially* defined decisionmaking bodies (local governments, zoning boards, school boards, states), *temporally* defined decisionmaking bodies (juries or appellate panels), and decisionmaking bodies that serve the role of *agent* (as some view legislative committees). We may find that dissenting by deciding fits better with some categories of decisionmakers than others.

For instance, one of the most obvious set of concerns one might have about decisional dissent has to do with the costs of variation.¹⁶¹ If we allow dissenters to decide, we can expect democratic outputs to vary. The costs of variation may be modest where we are talking about spatially defined decisionmaking bodies,

159. For a more in-depth analysis of the values associated with “turning the tables,” see Gerken, *supra* note 31, at 1142-60.

160. It is thus in keeping with Steven Shiffrin’s view of the purpose of conventional dissent: unsettling “unjust hierarchies” based upon “existing customs, habits, traditions, institutions, and authorities.” SHIFFRIN, *DISSENT*, *supra* note 2, at 93.

161. I explore these issues in greater depth in Gerken, *supra* note 31, at 1161-68, 1180.

where geographic boundaries provide a means for rendering variation more predictable. The costs of variation may be quite heavy, however, in those disaggregated institutions where the decisionmaking body is supposed to serve the role of the “agent” of the central decisionmaker since the latter’s job is simply to carry out orders.

Similarly, as a normative matter, our willingness to tolerate variation may depend on the type of institution at issue. Indeed, there may be an interesting relationship between the willingness of the majority to tolerate decisional dissent and the jurisdictional reach of the institution in question.¹⁶² Consider the difference between promoting decisional dissent in a temporally defined institution, like the jury or an appellate court, and a spatially defined one, like a local government. In the former case, a decisionmaking body temporarily renders a decision whose jurisdictional reach extends to the entire polity. In the latter case, a territorially defined institution like a city or a state renders a decision whose jurisdictional reach extends only to its borders.

Interestingly enough, norms about variation seem weaker for the latter than the former. For instance, the norm against variation in jury decision is quite strong. But we seem to be more comfortable with variation in the context of school committees or the policies of local governments; we might disagree with the choice made, but we seem less likely to view it as a usurpation of authority.¹⁶³

The obvious explanation for this phenomenon is the different set of norms surrounding judicial decisionmaking. For instance, Robert Post has argued that these norms are so powerful that even dissent of the conventional sort in the judicial context can jeopardize certain social understandings of the law because it “potentially undermines the certainty and confidence which is a principal virtue of judicial decisionmaking.”¹⁶⁴ But this phenomenon may also be a sign that we are less comfortable with dissenting by deciding precisely when we think would-be dissenters are speaking on behalf of *the* polity rather than just part of it.¹⁶⁵ When a jury decides someone is guilty, that decision binds

162. I am indebted to Matt Price for suggesting this line of analysis.

163. George Kateb, for instance, argues that representative democracy generally involves a part standing in for the whole but specifically exempts the judiciary from his claim that “political authority is in essence partial.” Kateb, *supra* note 57, at 360.

164. Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1348 (2001); *cf. id.* at 1381-83 (arguing that the practice of dissent is shaped by cultural understandings of law and suggesting that judicial dissent is less likely in an institutional context favoring “autonomous law” and where legal actors “take pains to draw ‘a sharp line between legislative and judicial functions’” (citation omitted)).

165. The suggestion that a decision of a court or jury is perceived as the decision of *the* polity rests heavily on the claim that we usually think of these institutions as *unitary*. While I think the claim is a fair descriptive one, it is certainly in some tension with the broader normative thrust of much of my research—that the decisions of juries or appellate panels are better understood as *part* of the whole, and that we should understand the views of *the* polity

everyone in the state. When a city decides to adopt a voucher program, it affects only residents of that city.¹⁶⁶ What that distinction means is that dissenting by deciding may be palatable to the majority—for better or worse—in those disaggregated institutions that are territorially defined because the social understanding is that decisionmakers are speaking on behalf of part of the polity, but only part of it.

E. The Composition of the Decisionmaking Body

One might also think carefully about the composition of the decisionmaking bodies used to promote decisional dissent in evaluating what type of dissent is most likely to generate a productive conversation between the center and the periphery. One might worry, for instance, that dissenting by deciding is simply a recipe for creating mini-polarization machines¹⁶⁷—homogeneous bodies on both sides of the divide that do nothing more than help like-minded individuals confirm the wisdom of their respective views. Rather than generating meaningful dialogue between the majority and the minority, the decisions rendered simply polarize the other side and solidify the opposition.

While some of the values associated with dissenting by deciding might be served—in rare instances, better served¹⁶⁸—by such homogeneous groupings, the presence of majority group members is necessary to achieve at least some of the intriguing possibilities associated with decisional dissent.¹⁶⁹ Indeed, my own normative vision of decisional dissent involves not homogeneous groupings, but minority-dominated institutions where members of the majority are present but stand in the shoes of the minority. That strategy for institutionalizing dissent allows for dissent to emerge *within* as well as *from* the decisionmaking body.¹⁷⁰ It thus seems more likely in the long run not only to generate a healthy conversational dynamic between periphery and center, but to destabilize existing political dynamics in a fashion that might help combat the

to emerge not from a single decision, but from the collective decisions of many disaggregated bodies. *See* Gerken, *supra* note 31, at 1137-38.

166. This possibility sheds an interesting light on one of the developments that took place about the gay marriage debate in Massachusetts. State officials have refused to marry gays and lesbians from other states. The refusal was nominally based on an arcane state statute that dated back to the period in which interracial marriage was prohibited in many states. But the political assessment behind it is quite easy to grasp. Massachusetts officials presumably thought that the state's marriage policy would generate less controversy if it applied to Massachusetts residents only—that is, if dissenters were not making this decision on behalf of *the* national polity.

167. Thanks to Cass Sunstein for raising this question.

168. *See supra* notes 78-83.

169. *See supra* text accompanying notes 152-153.

170. *Cf.* SUNSTEIN, *supra* note 44, at 161-62 (canvassing the potential value associated with deliberative enclaves while emphasizing the need to ensure that “enclave representatives are subject to the broader debate”).

problem of subordination.¹⁷¹

F. The Identity of the Dissenter: Average Citizens v. Dissenting Elites

Finally, our view on which form of dissent best achieves our aims may be influenced by our assessment of what part of the political hierarchy is most likely to generate productive change. If we think that what I have termed “dissenting elites”¹⁷² are most likely to generate useful reform, conventional dissent seems like our only option for the reasons noted above.¹⁷³

If, however, we think that productive change is more likely to emanate from below, dissenting by deciding seems like the right tool for average citizens to effect meaningful change. Indeed, each of the trade-offs described above suggests that decisional dissent might be especially well-suited for fostering dissent at the lower end of the political hierarchy. First, dissenting by deciding may help make the views of average citizens and low-level decisionmakers visible to the polity in a system where the views of dissenting non-elites are easily ignored. Second, where dissenting by deciding is possible, people who do not have much power in the system get to control a part of it. Decisional dissent thus gives average citizens not only an opportunity to reform the system, but an incentive to do so—a genuine reason for calling it their own. Finally, group members who usually serve the state in relative isolation get a chance to act collectively, perhaps generating more political energy than conventional dissent in such instances. In sum, if we are worried about bottom-up reform¹⁷⁴—the hope that the views of everyday citizens will result in transformative change—dissenting by deciding represents an intriguing institutional strategy for fostering dissent.

Envisioning everyday acts of citizenship as a form of dissent, of course, might change the way we view dissent and dissenters. If the notion of “dissenting by deciding” were to become as deeply embedded in the American “patois” as conventional dissent, we might have a quite different view of what it means to dissent. The overlay of dissent might invest everyday acts of citizenship with greater meaning, making it more likely that people will connect the nitty-gritty details of governance to involvement in a national conversation or view participation as a chance to pursue radical change through incremental means.

171. See *supra* note 123 and accompanying text; Gerken, *supra* note 31, at 1150 (describing minority-dominated decisionmaking bodies as a “process-based strategy for combating subordination, using the processes that tend to reinforce status inequalities to erode them”).

172. See *supra* text accompanying notes 49-**Error! Bookmark not defined.**

173. *Id.*

174. See, e.g., SHIFFRIN, *DISSSENT*, *supra* note 2, at 76 (noting that “it seems unlikely that the most important or effective criticism of abuse of power will come from the most powerful”).

CONCLUSION

Should the arguments above prove persuasive, much work remains to be done on this project. Most obviously, this paper is a conceptual and normative project, not an empirical one. Significant empirical work remains before we can fully assess the merits of conventional dissent and dissenting by deciding as competing—or complementary—strategies for institutionalizing dissent. Moreover, any such assessment requires more information about the context—what type of institution is involved, what type of dissenter we are describing, what are the precise political dynamics at stake, etc.

Nonetheless, if one shares Steven Shiffrin's view that "the institutional promotion of dissent is necessary to combat injustice,"¹⁷⁵ this paper represents a first step toward building a more comprehensive framework for evaluating how best to institutionalize dissent. What this analysis reveals is that dissenting by deciding is a quite different strategy for channeling dissent than our usual conception of dissent. It furthers the values we associate with dissent in different ways, thus providing us more flexibility in achieving the aims of a healthy 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 closer, 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, or it may tame dissent by undermining its rebellious or iconoclastic possibilities. Should the notion take root, 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.

What is perhaps most intriguing about dissenting by deciding, however, is its transformative possibilities. As noted above, 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.

175. *Id.* at 91.