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DISSENT, DIVERSITY, AND DEMOCRACY: HEATHER GERKEN AND THE CONTINGENT IMPERATIVE OF MINORITY RULE

Guy-Uriel Charles*

It is my pleasure and honor to participate in this symposium in honor of my friend, Heather Gerken. Heather is one of our generation's leading academics. Her scholarship consistently displays an engagement with an important problem coupled with an ingenious, sometimes counterintuitive, yet always thoughtful, normative framework for thinking about and resolving the problem. She is an absolutely wonderful theorist of the political process. She is also one of the hardest working and conscientious individuals in legal academia.

One would be hard-pressed to find a more supremely thoughtful soul than Professor Gerken. There are many great legal minds; there are also many thoughtful souls in legal academia. But there are a few academics who possess great minds and great souls. I have always counted it as a privilege to be able to call her my friend.

My talk today will be about one of Professor Gerken's intellectual passions: making democracy work for minorities. I will use minorities here in the classical sense to mean a group that is a numerical minority, that is socially discrete, and that has distinctive political interests or preferences from the majority.¹ Part of Professor Gerken's work has been motivated by the important task of making representative democracy work for all of its citizens, including those that are its perennial losers. This motivation is clearly evident in early Gerken works, such as *Second-Order Diversity*,² and *Dissenting by Deciding*.³ But it is also evident in later Gerken works such as *Federalism All the Way Down*⁴ and *Uncooperative Federalism*.⁵ A critical and subtle theme of each of these important pieces is that the institutional structures of democracy ought to permit the effective participation by minorities.

My talk will explore this particular theme in Gerken's work. In light of the aims of this panel, I will focus primarily on *Second-Order Diversity*, which explores this theme more explicitly. But I will also rely on *Dissenting by Deciding*. I will first review the

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1. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

2. Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099 (2005).

3. Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745 (2005).

4. Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4 (2010).

5. Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009).

case as it is laid out in *Second-Order Diversity*. I will then offer some criticisms of Gerken's claims. Finally, I will return to affirm the underlying project and offer some important lessons that we learn from Professor Gerken's work. In particular, I will highlight the fact that Professor Gerken underscores for us the importance of wielding decisive power in a representative democracy. Professor Gerken is a power theorist. She reminds us that self-government is not a procedural exercise; it is not simply a right to speak; it is not simply a right to vote; it is not participation for the sake of political participation. While the expressive and symbolic components of political participation are important to self-government, a core component of self-government is the exercise of meaningful and consequential power.⁶ Even the losers must sometimes be winners if self-government is to be actualized.⁷

PART I

Gerken is a political theorist and quite a good one. Included among the many themes that her work explores is the normative morality of minority rule. She is part of a long line of theorists interested in understanding the limitations of majority decision-making⁸ and the concomitant benefits of minority rule.⁹ Political theorists have long understood that majoritarian decision-making is sometimes morally and normatively problematic.¹⁰ Though majoritarianism is an important democratic principle, it is not an unalloyed good.¹¹ In recognition of the limits of majority rule, political theory has long explored substantive and procedural limits to majority rule.¹²

6. See HURST HANNUM, *AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS* 30 (1990) (describing the "equation" of self-determination: "If self-determination is 'an expression in succinct form, of the aspiration to rule one's self and not to be ruled by others,' then this self-rule implies meaningful participation in the process of government." (footnote omitted)).

7. See LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* 3-6 (1994) (describing what she calls a "Madisonian Majority" in which fairness of majority rule is predicated on an assumption of "shifting majorities" or "taking turns").

8. See generally, e.g., ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* (1956); GUINIER, *supra* note 7; AREND LIJPHART, *THINKING ABOUT DEMOCRACY: POWER SHARING AND MAJORITY RULE IN THEORY AND PRACTICE* (2008).

9. See, e.g., DAHL, *supra* note 8, at 131-32 (discussing that in the American system of democracy, elections cannot be counted on to "reveal the 'will' or the preferences of the majority," but that democracy nevertheless may be distinguished from dictatorship in that democratic elections create "not minority rule but minorities rule").

10. Political theorists often assume that legitimate majority rule is limited majority rule. See, e.g., GIOVANNI SARTORI, *THE THEORY OF DEMOCRACY REVISITED* 31 (1987) (using the term majority rule as a "shorthand formula for limited majority rule, for a restrained majority rule that respects minority rights"). The concern that majority rule may nevertheless take the form of a despotic government can be traced back at least as far as Aristotle. Aristotle, *Politica*, in *THE BASIC WORKS OF ARISTOTLE* 1127 (Richard McKeon ed., 1941). But the modern dialogue regarding the dangers of majoritarian democracies is often traced to the Founders. E.g., 3 JOHN ADAMS, *A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA* 291 (1797).

11. See DAHL, *supra* note 8, at 9-10 ("For the objective test of non-tyranny is not the size of the ruling group; it is whether the ruling group, whatever its size, imposes severe deprivations on the 'natural rights' of [its] citizens."); LIJPHART, *supra* note 8, at 112-21 (arguing that definitions of majority rule often assume "restraints on majorities" and in particular that "the essence of Madisonianism is the restraint of the majority's power").

12. The appropriate limits on majoritarian rule preoccupied the Founders. See, for example, *THE FEDERALIST NO. 51* (James Madison) (advocating for external checks and balances in the context of a president elected independently of Congress), and countless others concerned with the legitimacy of majoritarian rule. See sources cited *supra* note 10.

For the most part, political theory has understood that democracy owes something to political minorities.¹³ And political theory has been relatively clear that what democracy owes to political minorities are procedural safeguards and a limited set of substantive rights.¹⁴ Fundamentally, few have questioned the moral imperative of majorities to wield substantive power, provided of course that they do so within established constraints.¹⁵ But within those constraints majorities are entitled to rule and minorities are expected to lose and all of this is normatively acceptable.¹⁶ This is the standard account.

From at least one perspective in democratic theory, the normative imperative of majority rule is unproblematic because majority coalitions are transitory.¹⁷ To put this in slightly different terms, but in the conceptual formulation of classical democratic theory, majoritarianism is unobjectionable so long as we take turns ruling and being ruled.¹⁸ An important assumption of classical democratic theory is that those who rule will submit to being ruled and those who are ruled will take turns ruling.¹⁹ This is one way of actuating self-government and justifying majority decision-making: not as power but as right.²⁰ Whether one adheres to the more modern Dahlian conception of shifting majority coalitions or the more classical conception that ruler and ruled are ever-changing categories where everyone gets a turn in each condition, the point remains that neither majoritarian nor minority status are expected to be permanent categories.²¹

This critical assumption of democratic theory is thus violated where majority and minority status are permanent or semi-permanent categories.²² Where minorities in a democracy are perpetual losers, one cannot credibly warrant that they are self-governing notwithstanding procedural safeguards and a limited set of substantive rights that may be afforded by a fundamental law to the minority.²³ Of course, the permanent majority is certainly self-governing. But it is difficult to make the same case for the permanent minority, even where the minority has a right to be heard or to dissent from the majority's decision. Where there are permanent majorities and minorities, democratic theorists are presented with two important challenges for democracy. First, how does democracy actualize its fundamental promise — self-rule — for minorities? Second, how does one jus-

13. GUINIER, *supra* note 7, at 78 (“[I]nstitutionalizing minority rights is a necessary constraint on the processes of majoritarian democracy.”); see THOMAS CHRISTIANO, *THE CONSTITUTION OF EQUALITY: DEMOCRATIC AUTHORITY AND ITS LIMITS* 295–99 (2008) (arguing that whether or not a majority acts oppressively, persistent minorities undermine the authority of the majority if democratic authority is premised on public equality).

14. See ANTHONY MCGANN, *THE LOGIC OF DEMOCRACY: RECONCILING EQUALITY, DELIBERATION, AND MINORITY PROTECTION* 103–09 (2006) (discussing (and challenging) the standard argument that constitutionally protected rights are necessary to protect minority interests).

15. See Mathias Risse, *Arguing for Majority Rule*, 12 J. POL. PHIL. 41 (2004) (offering a brief history of arguments in support of majority rule).

16. See *id.* at 48.

17. See DAHL, *supra* note 8, at 34–62; ROBERT A. DAHL, *WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY* (1961).

18. GUINIER, *supra* note 7, at 5–6 (“Taking turns attempts to build consensus while recognizing political or social differences, and it encourages everyone to play.”).

19. *Id.* at 6.

20. *Id.*; see Risse, *supra* note 15, at 48.

21. DAHL, *supra* note 8, at 34–62; GUINIER, *supra* note 7, at 5–6; Risse, *supra* note 15, at 48–49.

22. CHRISTIANO, *supra* note 13, at 226–30; see LUPHART, *supra* note 8, at 122 (discussing the problem of legitimacy that majorities may face in societies with “deep societal divisions”).

23. CHRISTIANO, *supra* note 13, at 226–28.

tify majority-rule in the case of permanent majorities and permanent minorities?

This is the challenge that Gerken takes on. She confronts the question — though not precisely in the terms I have laid out above — most directly in *Dissenting by Deciding*.²⁴ *Dissenting by Deciding* is intriguing and ambitious. It takes seriously the notion that minorities ought to wield decisive political power.²⁵ Gerken's solution to the problem of permanent majorities and minorities is relatively straightforward, which is to design institutional structures so that minorities can wield consequential power.²⁶ Let us consider her argument in relative detail.

Gerken's opening move is the argument that perpetual minorities²⁷ who disagree with a permanent majority's decision generally "have two choices with regard to governance: act moderately or speak radically."²⁸ By acting moderately, Gerken means that minorities can threaten to dissent from the majority's decision in order to influence the majority's decision. Other than actually dissenting — I will return to this point momentarily — for Gerken, acting moderately, that is, influencing the majority's decision is the best that minorities can expect, at least when it comes to governance.²⁹ She explains:

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.³⁰

Importantly, the final decision, even as influenced by the minority's threat of dissent, is not the minority's decision, but that of the majority.³¹ The minority is not participating in governance, not wielding the power of the state, but making an argument to the decisionmaker, always the majority.³²

In the alternative, minorities can dissent. Or in Gerkenian terms, they can speak radically.³³ When minorities dissent, they do so "with a critical rather than authoritative voice; they speak on behalf of themselves, not the polity."³⁴ In any event, whether acting moderately or speaking radically, minorities do not wield political power.³⁵ They are always "speaking truth to power" as opposed to acting with power.³⁶

24. Gerken, *supra* note 3, at 1746–47.

25. *Id.* at 1747.

26. *Id.* at 1748.

27. She uses the words "dissent" and "dissenters." *Id.* at 1746. But for ease of clarity, I will generally use the term minority or minorities.

28. *Id.*

29. *Id.* at 1747.

30. *Id.*

31. *Id.*

32. *Id.* I shall return to question this construction. Why is the decision, which is made with the minority's input and influence, imputed only to the majority and not to the minority as well? This is an odd conception of state power.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

In order to act with power, or in Gerken's terms, in order to act radically, minorities need to dissent by deciding.³⁷ "Dissenting by deciding," Gerken instructs, "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."³⁸ Dissenting by deciding is the process by which minorities use and create localized institutions that enable minorities to become majorities and thus wield consequential political power.³⁹

Dissenting by deciding's ("DBD") antagonist is what Gerken calls conventional dissent.⁴⁰ Gerken argues that DBD is different from conventional dissent in three ways:

- (1) dissenting by deciding is embodied in a decision, not 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.⁴¹

I will refer to these distinctions respectively as the act/speech distinction; the consequential/expressive distinction; and the private/state distinction. Gerken argues that when minorities engage in conventional dissent they are always engaged in making arguments.⁴² Recall her point that even when minorities threaten to dissent from the majority's decision unless the majority modifies its decision in their favor — a move that she terms acting moderately — dissenters are not really acting but making arguments.⁴³ Thus "one key difference between conventional dissent and dissenting by deciding is that the latter takes the form of a decision, not an argument."⁴⁴ This is the act/speech distinction and it refers to Gerken's argument that DBD is action but conventional dissent is speech.⁴⁵

Gerken further argues that DBD is different from conventional dissent because it gives minorities a chance to speak truth with power.⁴⁶ She explains that DBD "allows dissenters to challenge the majority's views at the same moment they act on behalf of the state."⁴⁷ DBD, Gerken explains, "offers electoral minorities not only the dignity to participate, but the dignity to decide."⁴⁸ This is the consequential/expressive distinction. The essence of this argument is that minorities are able to wield consequential political power in a world in which we adjust institutions to reflect the values of DBD.⁴⁹ In a world outside of the principles of DBD, participation by minorities is simply expressive.⁵⁰ Participation is inconsequential because minorities are not sufficiently numerous

37. *Id.*

38. *Id.* at 1748.

39. *Id.*

40. *Id.* at 1759–61 (comparing conventional dissent with dissenting by deciding).

41. *Id.* at 1754.

42. *Id.*

43. *Id.* at 1746–47.

44. *Id.* at 1754.

45. *Id.*

46. *Id.* at 1756.

47. *Id.*

48. *Id.* at 1776.

49. *Id.*

50. *Id.* at 1776–77.

to have a sufficient impact on the outcome. Thus, the value of participation by minorities is simply expressive.⁵¹

Finally, DBD differs from conventional dissent because it enables minorities to wield the power of the state.⁵² Gerken argues, "collective action for dissenters is necessarily private action."⁵³ Because the operating assumption of conventional dissent is proportional representation, conventional dissent simply confirms the marginal status of permanent minorities.⁵⁴ Minorities are either losers in governance institutions or they are private actors protesting the decision of state actors.⁵⁵ In any event, they do not wield the power of the state.⁵⁶

PART II

There is much to admire in *Dissenting by Deciding*, not least of which is the article's ambition, sophistication, and audacity. I will get to these strengths in the next part. But first I want to raise three questions about the case for decisional dissent as laid out in the article. Some of these questions Gerken addresses in the article, though not quite to my satisfaction, and some are not addressed at all.

My first question is whether one can still remain a dissenter while exercising political power as the state. When a subnational element of the state exercises consequential political power in a federated system (e.g., a town or city), I do not understand how one can meaningfully characterize that exercise of power as dissent. It seems to me that one loses the conceptual power of dissent when dissent is conceived in such terms. Dissenters do not wield state power; once they do, they are dissenters no longer, they are the state. This is precisely the problem that opposition parties and movements face when they gain state power. They can no longer behave as dissenters. They no longer have the leeway and the legitimacy that comes with being dissenters; they now have the burden of the state. Moreover, as supporters of those formerly dissident movements have recognized, the powers of state are transformative and cannot be underestimated. Former dissidents' allies who now wield state power are no longer dissidents; they now speak with the authority and threat of the state.

Gerken recognizes this problem and addresses it squarely;⁵⁷ though not convincingly, in my view. To the objection that dissenters wielding state power is a category error *per diffinitionem*, she concludes, without argument, "[s]uch a claim takes an unduly narrow view of power in . . . disaggregated institutions."⁵⁸ Because of their minority status, even where minorities constitute a majority in a disaggregated institution, "the fact that electoral minorities wield control over some decisions within a disaggregated struc-

51. *Id.* at 1777.

52. *Id.* at 1778.

53. *Id.* at 1758.

54. *Id.* at 1750.

55. *Id.*

56. *Id.*

57. *Id.* at 1755 ("The concern . . . is that the notion of dissenters wielding state power is a contradiction in terms.").

58. *Id.*

ture does not alter their status as dissenters.”⁵⁹ Wielding power in one domain, say for example constituting a decisive majority on a school board, does not change the fact that the minority remains a minority in all of the other domains.⁶⁰

Fair enough, perhaps. But this response does not meet the central objection, which is that when the minority exercises the power of the state, it is the state.⁶¹ The minority may be dissenters in other domains, where they do not wield state power. But they are not dissenters in the domain or domains in which they do wield state power. We cannot use their status in domains in which they do not wield power to judge and characterize their status in the domains in which they do wield state power. This is why we cannot meaningfully characterize the decision of minorities when they wield state power as acts of dissent. These decisions are clearly acts of state. Thus, the notion of dissenters wielding state power is a “contradiction in terms.”

Moreover, lumping together minorities exercising state power and those that are effectively powerless seems to rely upon an essentialist assumption, which is that what links these minorities together is their minority status and not, for example, their power status. This essentialism is problematic when it masks significant differences between and among minorities. To lump together minorities exercising state power and those that do not is to ignore a significant difference.

This leads to my second question, which is whether the idea of dissenting by deciding is itself a contradiction in terms. Gerken anticipates one version of this question and addresses it in the article.⁶² She notes that some might argue that dissenting by deciding is a contradiction in terms because they might be of the view that “one cannot simultaneously oppose the state and act on its behalf.”⁶³ I think this characterization slightly misses the point. The idea that one can simultaneously oppose the state and act on its behalf should not be controversial. The clearest example is the case of the public defender. Here is an individual who is appointed by the state, works for the state, acts on its behalf, and also simultaneously acts in opposition to the state. The objection is not to the idea that an entity might both represent the state and be in opposition to it. The objection is, I think, slightly subtler than that. It is to the idea that a decision of the state is itself oppositional. How can a decision of the state be simultaneously a decision oppositional to the state? This is the critical objection.

Professor Gerken seems to respond to this point in the article with what I think could be a powerful rejoinder. She points to the practice of jury nullification as an example of an oppositional decision.⁶⁴ The jury nullification example is arresting. But if it is right, it also raises more significant rule of law concerns about dissenting by deciding. Jury nullification is controversial and oppositional because the jury is defying established legal rules that would otherwise dictate the outcome of the case. The decision of the jury is not in and of itself oppositional. The practice of jury nullification is oppositional, but only because it is contrary to law. If we were to legalize the practice of jury nullification,

59. *Id.* at 1755–56.

60. *Id.* at 1756.

61. *See* *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

62. Gerken, *supra* note 3, at 1756.

63. *Id.*

64. *Id.* at 1758.

it would no longer be oppositional. It is only oppositional to the extent that it is in opposition to clearly established law. While I understand the idea of dissenting by deciding to favor decisional heterogeneity, a point to which I will return, I do not understand it to advocate law-breaking in support of decisional heterogeneity. That is, I do not understand dissenting by deciding to advocate in favor of illegal departures from the norm. Thus, the jury nullification example cannot be right.

My last question is whether the three distinctions — the act/speech distinction, the consequential/expressive distinction, and the private/state distinction — that DBD relies upon to distinguish DBD from conventional dissent are sufficiently compelling. The fundamental point underlying each of the three distinctions is the argument that when minorities engage in conventional dissent they are always engaged in expressive speech as private individuals.⁶⁵ They are making arguments.⁶⁶ By contrast, when they are engaged in decisional dissenters, they act and they do so consequentially because they are wielding the power of the state.⁶⁷

My main worry here is that the distinction between conventional dissent and DBD is overblown. The criticism of conventional dissent assumes that conventional dissenters do not wield power and they do not act with the power of the state. I am not sure that criticism is accurate. We have many examples of conventional dissenters or minorities wielding significant power and sometimes acting with the power and authority of the state. Consider the case of a minority party in a multiparty system. In proportional systems, small minority parties wield considerable power and they act decisively with the authority of the state.⁶⁸ This is the case of the Shas Party in Israel.⁶⁹ It has wielded considerable power disproportionate to its size because its assent has often been necessary to enable one of the main parties to form a coalition government.⁷⁰ As part of a coalition government, Shas is the state and part of the governing coalition in every sense in which that term is meaningful.⁷¹ One can make the same point about a swing Justice on the U.S. Supreme Court.⁷² Justice Kennedy is often the example here.⁷³ The point is that minority status need not mean marginalization. Sometimes minorities are able to wield decisive state power.

65. *Id.* at 1758–59.

66. *Id.* at 1760.

67. *Id.* at 1762–63.

68. Douglas Amy, Frederick McBride & Robert Richie, *New Means for Political Empowerment: Proportional Voting, POVERTY & RACE RES. ACTION COUNCIL* (Nov.-Dec. 2000), available at http://www.prrac.org/full_text.php?text_id=138&item_id=1789&newsletter_id=53&header=Community+Organizing&kc=1 (advocating for proportional representation as a way to empower political minorities and offering examples of successful proportional voting in practice in Texas).

69. See Yael Yishai, *Israel's Shas: Party Prosperity and Dubious Democracy*, in *WHEN PARTIES PROSPER: THE USES OF ELECTORAL SUCCESS* 231, 237–46 (Kay Lawson & Peter H. Merkl eds., 2007) (describing the Shas party as wielding significant power not by becoming a majority party itself but by becoming one of the parties in almost every coalition that the Israelis put together).

70. *Id.* at 238.

71. See *id.* at 238–44.

72. See Andrew D. Martin, Kevin M. Quinn & Lee Epstein, *The Median Justice on the United States Supreme Court*, 83 N.C. L. REV. 1275, 1276–77 (2005).

73. *The Statistics*, 125 HARV. L. REV. 362, 367 (2011) (showing Justice Kennedy agreeing with the disposition of the case 91.2% of the time, more than any other Justice).

Moreover, it is worth pointing out that dissenting need not always be symbolic or expressive. Dissenting is an act;⁷⁴ the threat of dissent where credible can and sometimes does lead to a modification of a majority's position.⁷⁵ Majorities sometimes prize consensus or fear dissensus.⁷⁶ Where this is the case, minorities can use — and have — a majority's fear of dissensus to force the majority to modify its position.⁷⁷ Can we call the modification of the majority's preferred outcome, the majority's outcome, without including the minority's significant and critical influence? I do not think so. The resulting decision, which reflects the input of both the majority and the minority, ought to be attributable to both the majority and the minority. This is why the sharp distinctions that DBD draws between acting and speaking, symbolism and consequentialism, and private and state are not sufficiently compelling. Minorities as dissenters do often act consequentially and with the power of the state.

PART III

Now, one could argue that these criticisms are beside the point. It is not clear to me that the main lessons of DBD hang on the distinctions between dissent and decisional dissent. Recall here that the true question at hand is what democracy owes minorities. Put differently, what are the commitments that a society committed to self-rule owes potentially permanent political losers? Is it normatively acceptable for democracy to say to political minorities, self-rule for me but not for thee?

Gerken's answer is clear and unequivocal. The promise of self-rule must be kept for minorities as it is for majorities.⁷⁸ Moreover, it is not sufficient to provide procedural rights of participation, such as the right to speak or vote.⁷⁹ It is also not enough to protect a limited set of substantive rights.⁸⁰ Minorities are entitled to wield consequential political power. There is a morality to self-rule. It may be a contingent moral imperative; I would argue that it is certainly a contingent moral imperative. But it is a moral imperative nonetheless.

There are important implications here that Gerken points us toward. First, constitutional law scholars and scholars of law and politics have too long neglected the importance of political power and political power matters.⁸¹ Constitutional law is rightly focused on structures and rights. But constitutional law scholars as well as scholars of law and politics ought to confront power and political outcomes directly and not as simply as a function of rights and structure.

74. See generally William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427 (1986).

75. See LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE 76–77* (1998) (discussing how Justices will use their dissents and concurrences as “bargaining tools”).

76. See LIPHART, *supra* note 8, at 111 (“Especially with regard to the most important decisions and to issues that cause deep splits in societies, democracies almost uniformly deviate from majoritarian decision-making rules, to adopt mechanisms more likely to rally a broad consensus.”).

77. See Michael Abramowicz & Maxwell L. Stearns, *Beyond Counting Votes: The Political Economy of Bush v. Gore*, 54 VAND. L. REV. 1849, 1896 (2001) (discussing “memoranda indicating that Justices at least sometimes are willing to vote in ways inconsistent with their first-choice policy preferences”).

78. Gerken, *supra* note 3, at 1750.

79. See *id.*

80. See *id.* at 1750–51.

81. HAROLD D. LASSWELL, *POLITICS, WHO GETS WHAT, WHEN AND HOW I* (1950) (“The study of politics is the study of influence and the influential.”).

Second, decisional heterogeneity is a contingent normative good. Assume a world in which there are multiple minorities with distinctive preferences, we ought to prefer decisional heterogeneity as opposed to homogeneity.⁸² This is the fundamental logic of federalism.⁸³

Third, it follows from the second point that whenever we can design institutions to make possible decisional heterogeneity, we ought to do so. To be sure, those institutions ought to be consistent with other democratic commitments. So, again, this is a contingent point. But decisional heterogeneity ought to be an important aim of institutional design, which is why there is normative value to disaggregated units.

Fourth, it also follows that we ought to be careful about nationalizing and constitutionalizing fundamental commitments. If we take decisional heterogeneity very seriously, we should nationalize commitments only when we are sure that they are fundamental and there are few, if any, benefits from decisional heterogeneity. There are important reasons for nationalization but it is worth fighting about what ought to be nationalized and what ought to be left to local preferences.

Fifth, there is a particular lesson for race and law scholars. Scholars of race and law ought to care more about federalism and federalism scholars ought to care more about race. Federalism scholars are generally at best racial agnostics and race scholars are generally nationalists. Of course there are important historical reasons for race scholars to be leery of federalism arguments. There are, however, also good reasons for race scholars to begin a reconsideration of the relationship between federalism and race. To the extent that race scholars care about minority rights, they ought to care a lot more about federalism than they currently do. By the same token, it is high time for federalism scholars to confront and conquer federalism's racist history. Race is the big African elephant in the room that federalism scholarship and doctrine have essentially tried to ignore. To the extent that federalism is about providing opportunities for minorities to rule,⁸⁴ it is strange that federalism scholarship and doctrine do not care significantly more about the political power of America's quintessential minorities, racial groups. A reconsideration and incorporation of race into federalism doctrine and scholarship is necessary to rehabilitate if not cleanse federalism.

I am confident that these Gerkenean insights will guide our field for many decades to come.

82. See Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855, 882–83 (2002).

83. See *id.* at 882 (“[O]ne of federalism's great merits [is] the space it provides for rich political heterogeneity . . .”).

84. This is certainly not all that federalism is about, but self-rule is certainly an important and critical component.