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SECOND-ORDER DIVERSE IN NAME ONLY?: SOVEREIGN AUTHORITY IN DISAGGREGATED INSTITUTIONS

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In *Second-order Diversity*¹ and *Dissenting by Deciding*,² Heather Gerken makes a powerful argument that the individuals who are usually on the fringe of our governing institutions — the dissenters, the minorities, the outsiders — exercise power in our majoritarian system that can be undermined if we promote a conception of diversity that treats all institutions as unitary and identical.³ In particular, second-order diversity allows electoral minorities to be in the majority in disaggregated institutions such as juries, school boards, and electoral districts, and it does so without requiring that every institution mirror the demographics of the underlying population.⁴ Requiring statistical diversity, according to Gerken, could sacrifice the control that these groups hold in these discrete political spaces.⁵ In these spaces, electoral majorities are deprived of decision-making authority, adding institutional variation to our system of government and, in the process, creating a framework that better encompasses the entire spectrum of democratic governance as opposed to prioritizing statistical diversity over all other values.⁶ Second-order diversity encourages institutional experimentation by providing a forum for dissenters and electoral minorities to exercise power on behalf of the state and engage in policymaking.⁷ By giving voice to these values, this theory allows minorities to “dissent by deciding” because, in some disaggregated institutions, these individuals control the outcome and influence the broader spectrum of democratic decision-making.⁸

These articles explore governance in its smallest components and ask a very important question — what is the best way to allocate policy-making authority to electoral

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1. Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099 (2005) [hereinafter *Second-Order Diversity*].

2. Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745 (2005) [hereinafter *Dissenting by Deciding*].

3. See *id.* at 1747; *Second-Order Diversity*, *supra* note 1, at 1105.

4. See *Second-Order Diversity*, *supra* note 1, at 1102 (“The notion of ‘second-order diversity,’ proposed here, posits that democracy sometimes benefits from having decisionmaking bodies that do not mirror the underlying population, but instead encompass a wide range of compositions. Second-order diversity involves variation among decisionmaking bodies, not within them.”).

5. See *id.* at 1107–08.

6. *Id.* at 1108.

7. See, e.g., *id.*

8. *Dissenting by Deciding*, *supra* note 2, at 1748.

minorities so that they too can exercise meaningful power in our system? Relatedly, taking a micro-level view of governance also raises interesting questions about whether the power that electoral minorities retain within disaggregated institutions and exercise on behalf of the state is truly sovereign and/or autonomous, and, more importantly, if it has to be. Gerken believes that, in these limited spheres, dissenters can constitute local majorities and make their dissent visible in ways that are denied to them in traditional majoritarian spaces.⁹ As a result, she pushes against “hard” federalism, which is the traditional conception of the states and the federal government as being sovereign within their respective regulatory spheres and would seem to require the existence of a “formal enclave” in order to protect the decisions of dissenters.¹⁰ Nevertheless, expressing dissent through the governing mechanisms of the state seems to mandate that dissenters have at least some variation of sovereign authority in order to distinguish dissenting by deciding from conventional dissent.¹¹ Even if we step back from sovereignty as the core of our federal system, as Gerken does in much of her work, and make it peripheral to understanding the power that minorities exercise in disaggregated institutions, there still has to be some insulation of their decision-making in order to make the power that they exercise in these domains meaningful and enduring.¹² If the decisions of dissenters are easily overturned or dismissed because they are outside of the mainstream, this would undermine many of the normative benefits that second-order diversity provides.

In this short critique of Gerken’s work, I argue that the state has to accord deference to the decisions of electoral minorities in disaggregated institutions so that the authority they exercise in these spheres can be meaningful and contribute to the broad spectrum of democratic ideals that exist within our system of governance. While this deference does not have to be sovereign in a formal sense, at the very least, electoral minorities must be able to act with a significant amount of autonomy in making decisions within these enclaves.¹³ Gerken actively rejects this assertion and expends a great deal of effort to illustrate why our traditional notion of federalism and its rigid division of authority is ill-equipped to protect dissenters within our political system.¹⁴ However, given that the animating premise behind second-order diversity is to increase the likelihood that dissenters can influence democratic output and decision-making, it is impossible to escape the notions of sovereignty and autonomy that animate federalism doctrine in determining what it means to exercise authority on behalf of the state, even in the context

9. *Second-Order Diversity*, *supra* note 1, at 1148.

10. See *Dissenting by Deciding*, *supra* note 2, at 1782, 1784 (“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.”).

11. Cf. *id.* at 1784 (“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.”).

12. See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 19–30 (2006).

13. See Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195 (2012) (defining autonomy as “a right to make policy and exercise regulatory authority,” which, although expansive, is not true sovereignty because there is always the threat of intervention from a higher authority).

14. See *Second-Order Diversity*, *supra* note 1, at 1109.

of disaggregated institutions. But, in the interest of promoting the normative ideals underlying Gerken's theory,¹⁵ it is clear that the level of authority that must be present should vary depending on the institution rather than embracing the rigid notions of sovereignty and formally delineated spaces underlying "hard" federalism.

In this essay, I explore this premise and conclude that promoting second-order diversity as a normative ideal may not require the same level of sovereign authority that we typically think of in the context of "Our Federalism," where entities have final policy-making authority in a specific regulatory sphere. At the very least, it requires a strong conception of autonomy where electoral minorities have plenary authority to which the state defers, allowing them to exercise meaningful power in their respective subunits.¹⁶ By focusing on disaggregated institutions such as juries, county commissions, and electoral districts as Gerken does in much of her work,¹⁷ this essay analyzes the extent to which the decision-making authority of electoral minorities is insulated when they are exercising power on behalf of the state. The goal of this analysis is to ensure that having a normative commitment to second-order diversity means more than simply dissenters having power in name only, but it does so within the context of a sovereignty/autonomy based framework that is considerably more flexible than that offered by "hard" federalism theory.

PART I. UNDERSTANDING MINORITY "POWER" IN DISAGGREGATED INSTITUTIONS

Gerken's work is groundbreaking in many respects, but to the extent that there is any disagreement between us, it is her attempt to divorce conceptions of minority power from any considerations of sovereignty and autonomy, which is the framework that commonly defines the contours of governing authority. Nonetheless, any attempt to paint this as a weakness in her work is a difficult undertaking because Gerken's refusal to be confined by traditional understandings of how power is allocated in our system is what makes her work extraordinary. Yet, I remain convinced that it is important to acknowledge that considerations of sovereignty and autonomy continue to dictate what "power" means and how "power" is exercised in practice. In fact, in attempting to understand the allocation of power between the majority and electoral minorities, it is not necessary to engage in a full scale rejection of traditional federalism principles, as Gerken does.¹⁸

In many ways, federalism theory has had to evolve in order to accommodate the practical realities of the system. The power of the state has significantly diminished over time, leading its authority to be preempted or, alternatively, shared by the federal gov-

15. *Id.* at 1104 (arguing that second-order diversity "provides a strategy for allocating power to electoral minorities that serves as a counterweight to the influence model that otherwise dominates our system;" "creates a distinct type of political space, one where members of the majority experience what it is like to be deprived of comfort;" "provides a richer, more textured view of the democratic order . . . [b]y avoiding [a] push to the middle in every case;" and "allows us to take an experimental approach to designing decisionmaking institutions").

16. See Tolson, *supra* note 13, at 1200–01 (defining sovereignty in this manner); see also Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341, 342 (same).

17. See *Dissenting by Deciding*, *supra* note 2, at 1748; *Second-Order Diversity*, *supra* note 1, at 1112–17.

18. See *Dissenting by Deciding*, *supra* note 2, at 1782–83.

ernment in many domains.¹⁹ As this section shows, despite the evolution of federalism both in theory and practice, there are still lessons to be learned from traditional federalism doctrine and its reliance on sovereign regulatory spheres as its core animating principle. Namely, that some level of authority, even if it is ultimately less than sovereignty, remains vital in order to avoid the outcome that most federalism theorists would view as the worst case scenario: the concentration of governmental power in the hands of a tyrannical majority. This section concludes by drawing on local government law, where localities exercise power on behalf of the state that is subject to preemption in much the same way as authority exercised by other disaggregated institutions. This example provides a concrete illustration of why sovereignty and autonomy, in some form, remain important in understanding minority power, and by implication, Gerken's theory of second-order diversity.

Federalism-All-the-Way-Down, Second-Order Diversity, and the Challenge of Longstanding Assumptions in Federalism Theory

In arguing that there must be sufficient space for dissent, Gerken criticizes the federalism model as "too limited a strategy for creating space for decisional dissent."²⁰ In her view, the federalism model poses two problems as an institutional structure capable of furthering the type of dissent that she envisions: "hard federalism provides de jure protection for decisional dissent, whereas many examples of dissenting by deciding arise de facto," and "as a prescriptive matter, there will sometimes be better institutional strategies for promoting the values associated with dissenting by deciding that do not depend on the notion of enclave."²¹

Second-order diversity is premised on the idea that, in resolving questions of institutional design and promoting heterogeneity among institutions, there must be some consideration of the tradeoff between allowing minorities to influence a broad range of decisions or dictating the outcome in a few.²² From Gerken's perspective, the rigid structures

19. Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 7 (2010) [hereinafter *Federalism All the Way Down*] ("Academics argue that sovereignty is in short supply in 'Our Federalism.' They insist that the formal protections sovereignty affords are unnecessary for achieving federalism's ends."). In this piece, I refer to "autonomy" as a weaker form of sovereignty in order to reflect that these groups have broad plenary authority to use the power of the state even though they may lack the final policymaking authority that I argue is the hallmark of true sovereignty. See Tolson, *supra* note 13; see also Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 14 (2004) (noting that sovereignty and autonomy are often conflated in federalism doctrine).

20. *Dissenting by Deciding*, *supra* note 2, at 1782; see also *Second-Order Diversity*, *supra* note 1, at 1128–29. Gerken observes that federalism can "provide[] a strategy for diffusing majority power" but that second-order diversity, by focusing on disaggregated institutions,

[S]trikes a different compromise with majoritarianism. Federalism hinges on the existence of state sovereigns, autonomous realms where the state decisionmaker is preeminent. The disaggregated institutions that are the focus of this Article are quite different. These decisionmaking bodies tend to be charged with applying or implementing the law enacted by the polity (for example, juries applying the law handed down by the state legislature, or school committees implementing state law), and their governing authority does not exist separate and apart from the sovereign's. Their decisionmaking power is thus bounded by the majority's choices.

Id. (internal citations omitted).

21. *Dissenting by Deciding*, *supra* note 2, at 1783.

22. *Second-Order Diversity*, *supra* note 1, at 1105. According to Gerken:

of federalism stymie this process.²³ But in trying to understand the tradeoffs between influence and control, it is also important to entertain questions about how much authority and power electoral minorities should have in disaggregated institutions in order to make the tradeoff worthwhile. In addressing this question, federalism doctrine has something to teach us about the tension between sovereignty, or when an entity has final policy-making authority in a specific regulatory sphere, and autonomy, which is the positive use of governmental power.²⁴ Scholars have split on how much sovereignty is needed in order to further the goals of federalism, but in advocating for variation among institutions that allows minorities to exercise “power,” Gerken should not be so quick to dismiss all types of formerly bounded authority in order to protect the power that dissenters exercise within these institutions.²⁵ This power may be a weaker form of sovereignty than that typically promoted by federalism scholars and the Supreme Court, but it is still a type of autonomy premised on plenary authority not easily disturbed by the state so as to lend credibility to and place the power of the state behind decisions made by dissenters.

To understand this distinction between sovereignty and autonomy, it is useful to draw on Ernie Young’s work on the Rehnquist Court’s federalism revolution, which discusses the tension that exists between sovereignty and autonomy.²⁶ Young argues that the primary distinction between the majority and the dissenters in the Rehnquist Court’s federalism decisions, many of which were decided in a five-to-four-split, is that the Jus-

[W]hile second-order diversity grants electoral minorities control over some decisions, the tradeoff is that electoral minorities lose the chance to influence a broader set of decisions. Although the tradeoff between influence and control is a well-worn debate with regard to unitary institutions like legislatures, there is something new to be said about that debate because of the unique way it plays out in the context of disaggregated institutions. We find a similar set of tradeoffs embedded in the other arguments relating to second-order diversity. The diffuse participatory benefits associated with turning the tables on the majority must be balanced against a discrete set of participatory costs. The benefits of visibility must be offset against the costs of variation, the loss of uniformity that occurs when electoral minorities have the power to issue outlier decisions. And the values associated with cycling [or varying the composition of decisionmaking bodies] should be weighed against the costs associated with endless experimentation, with the decision to make variation and conflict a permanent feature of any institutional structure.

Id.

23. See *Second-Order Diversity*, *supra* note 1, at 1128–29.

24. See Tolson, *supra* note 13, at 1199; Young, *supra* note 19, at 14 (“Although our Framers ‘split the atom of sovereignty,’ shattering the notion that political authority must remain undivided, this notion of unaccountability – that the sovereign is subject to no law – remains central.”); *Id.* (arguing that autonomy suggests “a government doing things – making policy and carrying it out, for the benefit of its citizens – and not simply shielding itself from threats”).

25. See *Federalism All the Way Down*, *supra* note 19, at 8 (arguing that there are parts of “Our Federalism” that do not turn on a sovereignty account but still allow minorities to participate effectively in governance). According to Gerken:

In these areas, institutional arrangements promote voice, not exit; integration, not autonomy; interdependence, not independence. Minorities do not rule separate and apart from the national system, and the power they wield is not their own. Minorities are instead part of a complex amalgam of state and local actors who administer national policy. And the power minorities wield is that of the servant, not the sovereign; the insider, not the outsider. They enjoy a muscular form of voice—the power not just to complain about national policy, but to help set it. Here power dynamics are fluid; minority rule is contingent, limited, and subject to reversal by the national majority; and rebellious decisions can originate even from banally administrative units. I use the term “federalism-all-the-way-down” to describe the institutional arrangements that our constitutional account too often misses—where minorities rule without sovereignty.

Id. at 7–8.

26. Young, *supra* note 19, at 13–15.

tices embrace differing notions of state sovereignty.²⁷ This distinction allowed the Court to embrace categorical rules that strongly favor state sovereignty while simultaneously dismissing state regulatory autonomy.²⁸ Notably, in *National League of Cities v. Usury*, the Court invalidated portions of the Fair Labor Standards Act that regulated the wages and hours of state employees on the grounds that the provision undermined the traditional aspects of state sovereignty.²⁹ Although *National League of Cities* was overruled nine years later, this notion that there are areas of state sovereignty that the federal government cannot invade had a rebirth in the 1990s. In *United States v. Morrison*, for example, the Court invalidated the civil remedy provision of the Violence Against Women Act as exceeding the scope of Congress's power under the Commerce Clause because Congress tried to regulate noneconomic activity, which is traditionally the role of the states.³⁰ Similarly, in *United States v. Lopez*, the Court invalidated the Gun-Free School Zones Act based on this same economic/noneconomic distinction.³¹ Yet the same pro-state sovereignty Justices in the majority in *Lopez* and *Morrison* have also been consistent in finding that state law is preempted by federal law in certain circumstances.³² The end result is, according to Young, that the "Rehnquist Court's strong tendency has been to promote a vision of state sovereignty that bears only an attenuated link to the viability of state governance."³³

One possible explanation for the Rehnquist Court's willingness to protect state sovereignty while affording less protection to the governance prerogatives central to state autonomy is because the Court views sovereignty as raising a qualitatively different question than issues of autonomy. In other words, the Court ropes off certain areas completely from federal intervention — hence the economic/noneconomic distinction in *Morrison* and *Lopez*³⁴ — while recognizing that the state does not have absolute immunity from federal norms in determining how to use and delegate its authority within other regulatory areas.³⁵ Sometimes this distinction is meaningless in practice. For example, the Court has held that Congress cannot abrogate state sovereign immunity pursuant to its commerce authority but essentially allows Congress to place conditions on the receipt of federal funds that achieve the same aim.³⁶ But this distinction does say something about the nature of state authority, that there are times in which the state's power is absolute and other times when it is not; even in the latter situation, the state still exercises

27. *Id.* at 23–24.

28. *Id.* at 24–25.

29. *Nat'l League of Cities v. Usury*, 426 U.S. 833, 854–55 (1976).

30. *United States v. Morrison*, 529 U.S. 598, 615–19 (2000).

31. *United States v. Lopez*, 514 U.S. 549, 565–67 (1995).

32. Young, *supra* note 19, at 31 (describing preemption cases as “the quintessential autonomy cases” because they “concern whether the states can regulate third parties within their own jurisdiction, pursuant to their own view of the public interest, or whether that authority will be displaced by federal control”); *see also* *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 550–51 (2001) (holding that state regulations for tobacco advertisements were preempted by federal law).

33. Young, *supra* note 19, at 31.

34. *See Morrison*, 529 U.S. at 613; *Lopez*, 514 U.S. at 564–65.

35. *See Lorillard Tobacco Co.*, 533 U.S. at 550–51.

36. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2608 (2012) (holding the Affordable Care Act as beyond the scope of Congress' commerce authority because the law compels individuals not already in commerce to purchase a product but is valid pursuant to Congress' power to tax).

broad power despite the ever-present threat of preemption by the federal government.³⁷

Similarly, when the state delegates authority to local government institutions like juries, county commissions, and school boards, this authority does not have to be based on pure sovereignty but still can be autonomous and meaningful. Indeed, despite the constant threat of state intervention, the fact that individuals within these institutions retain “power,” in one form or another, is beyond dispute. Disaggregated institutions are undoubtedly still components of the state, which we generally view as sovereign.³⁸ To argue that this sovereignty is lost when the state delegates some of its power to smaller units is analytically problematic. It could be, however, that the power takes a different form the further down the ladder it goes. Federalism is about more than sovereignty and substance; federalism is also about recognizing that there are different mechanisms to delegate power from the center, and it can be done in a way that does not leave the periphery powerless. Thus, the “hard federalism” that Gerken warns about in her scholarship is actually much more amenable to being used in a second-order diversity framework than it originally appears because federalism can allow dissenters on the fringes to retain significant decision-making authority that does not have to mirror the power exercised at the state level.³⁹

Framing disaggregated institutions as autonomous bodies using positive governmental authority is also consistent with many of the ideals of “hard” federalism.⁴⁰ Protecting decisions made by electoral minorities, even at the sub-state level, can help preserve the balance of federalism between the states and the federal government because it is a key component of how the state has chosen to allocate authority within its own borders.⁴¹ To the extent that federalism is also about protecting individual liberty, there is room for second-order diversity in traditional federalism doctrine because it allows electoral minorities to exercise their self-expression through decisions that influence the broad range of societal preferences.⁴²

Given these factors, the reality is that it is difficult, if not impossible, to get away from some account of sovereignty or autonomy in federalism theory altogether and, by implication, in trying to understand the power that dissenters exercise in disaggregated institutions. I do not mean to suggest that the fit between federalism, second-order diver-

37. See Franita Tolson, *Partisan Gerrymandering as a Safeguard of Federalism*, 2010 UTAH L. REV. 859, 871–72 (2010) (arguing that states retain broad authority over the time, place, and manner of elections because Congress has rarely exercised its authority to alter or change state electoral regulations).

38. See *Second-Order Diversity*, *supra* note 1, at 1162 (noting that “second-order diversity grants electoral minorities the power not just to articulate their views, but to resolve democratic controversies in the best way they see fit”).

39. Young, *supra* note 19, at 15 (discussing how sovereignty and autonomy overlap). See also *Second-Order Diversity*, *supra* note 1, at 1161 (arguing that the ability of electoral minorities to issue outlier decisions is the “primary benefit afforded by variation in democratic outputs”).

40. See e.g., *Dissenting by Deciding*, *supra* note 2, at 1790–91.

41. See Young, *supra* note 19, at 16 (noting that the “rules of ‘process federalism’ derive their force and structure from the need to prevent malfunctions in the political and institutional mechanisms that ordinarily act to preserve the federal balance in the absence of judicial intervention”).

42. See *Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991) (“One fairly can dispute whether our federalist system has been quite as successful in checking government abuse as Hamilton promised, but there is no doubt about the design. If this ‘double security’ is to be effective, there must be a proper balance between the States and the Federal Government. These twin powers will act as mutual restraints only if both are credible. In the tension between federal and state power lies the promise of liberty.”).

sity, and dissenting by deciding is a comfortable one. In many ways, Gerken's work highlights the tension that emerges when we try to transplant our traditional understanding of power and authority into a context in which those factors take a back seat to other goals that can be realized through the second-order diversity framework. For example, Gerken is undoubtedly correct that dissent often emerges de facto and in nontraditional spaces.⁴³ She is also correct that rigid application of a fully theorized federalism model could constrain rather than promote the dissent that she views as valuable.⁴⁴ Yet many of the examples that Gerken relies on in her work are examples in which dissenters exercise the power of the state, despite their overarching goal of using the subunit as a medium for dissent — a jury that renders a verdict in a case; voters in a majority-minority district casting a vote for their preferred candidate⁴⁵ — are all examples of formally bounded spaces that can promote the diversity of viewpoint with which Gerken is concerned. Yet, unless these units can operate with some level of autonomy, a concept that plays a significant role in "hard" federalism theory, the effectiveness of their dissent is significantly undermined.

Only in the most extreme cases can dissenting by deciding effectively operate without some type of autonomy that can effectively insulate decision-making. For example, Gerken points to the decision of San Francisco city officials to marry gay and lesbian couples and a school board mandating the teaching of creationism as "dissenting by decision" because both stand as examples of those with a minority viewpoint using power allocated to them by the state to express dissent.⁴⁶ In pointing to these examples, Gerken is absolutely right that removing sovereignty has allowed us to "push federalism all the way down" and observe how minorities exercise power in subunits and influence national debates despite the absence of sovereignty.⁴⁷ However, for outlier decisions that do not trigger a national dialogue or that may involve more pedestrian policy matters, autonomy can be important in ensuring that dissenters have meaningful and lasting authority in these spheres.

From my view, the absence of autonomy can lead to decisions by dissenters being overturned or disturbed by others too quickly and too summarily. This may not be entirely problematic for Gerken, who focuses more on the importance of "voice" and less on the importance of power.⁴⁸ Indeed, there is much to commend in this argument. In the same sex-marriage controversy, the city officials in San Francisco undoubtedly pushed the national conversation forward because of their decision to marry these couples, even if the decision was short-lived before being overturned.⁴⁹ Gerken argues that the decision by city officials to marry same-sex couples gave us, as a nation, "a concrete practice, not just an abstract issue, to debate."⁵⁰ Although there is some truth to this, the abil-

43. *Dissenting by Deciding*, *supra* note 2, at 1783–84.

44. *Id.* at 1784.

45. *See, e.g., id.* at 1787; *Second-Order Diversity*, *supra* note 1, at 1159–60.

46. *Id.* at 1748.

47. *Federalism All the Way Down*, *supra* note 19, at 8.

48. *Dissenting by Deciding*, *supra* note 2, at 1793.

49. *See Federalism All the Way Down*, *supra* note 19, at 9 ("Minority rule without sovereignty is more attractive because it allows the national majority to reverse a decision if it is willing to spend the necessary political capital to do so.").

50. *Second-Order Diversity*, *supra* note 1, at 1162.

ity of the lower court to halt the actions of city officials a mere thirty days after the first couple received their license is striking and important.⁵¹

Perhaps this outcome — the decision by a court to stop what would arguably be an “outlier” decision at the time — was unavoidable. According to the California Supreme Court, there was no controlling precedent for reading California’s historical definition of marriage as extending beyond a union between a man and a woman.⁵² More importantly, the state legislature arguably did not intend that San Francisco Mayor Gavin Newsom’s discretion would extend to granting licenses to same-sex couples.⁵³ But the reality is that the mayor had an advantage of timing in moving the ball forward on the same-sex marriage issue, forcing the hand of many states and localities into confronting it head on.⁵⁴ His defiance (and willingness to be the outlier vis-à-vis other municipalities) brought the same-sex marriage issue front and center, showing the value of second-order diversity as a mechanism for dissent.

At the same time, the debate over same-sex marriage also highlights the extent to which the effectiveness of dissent can be tied to the scope of the authority delegated to actors in disaggregated institutions by the state, a limitation that could stifle dissent in the context of an issue that is not as politically contested as same-sex marriage.⁵⁵ A court overturned Mayor Newsome’s decision within thirty days so it had very little precedential value, although Newsome was successful in triggering a national debate.⁵⁶ Gerken would arguably see this as a win-win because in her view, these forums provide a vehicle for dissent while simultaneously allowing the majority to overturn minority decisions that are too far outside of the mainstream.⁵⁷ But for disaggregated institutions that issue less controversial outlier decisions, circumventing their ability to express dissent by narrowing the scope of their authority or summarily overturning their decisions can raise serious issues to the extent that we care about giving these groups both voice and power. Much like Mayor’s Newsom’s actions, similar concerns about “outlier decisions” can be raised with respect to the school board that teaches creationism or the jury that gives a light sentence because it opposes the state’s harsh sentencing regime.⁵⁸ But we have to balance our ability to subject these decisions to meaningful oversight so as to not undermine majoritarian preferences or our normative commitment to second-order diversity. To avoid this outcome, the decisions of minorities in disaggregated institutions cannot be

51. *See id.*

52. *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 686 (Cal. Ct. App. 2006) (“California’s historical definition of marriage does not deprive individuals of a vested fundamental right or discriminate against a suspect class . . .”).

53. *Id.* at 705.

54. *See Rona Marech, The Battle Over Same Sex Marriage: One Year Later, Both Sides Claim Victory, but Courts Will Decide*, S.F. CHRON. (Feb. 12, 2005, 4:00 AM), <http://www.sfgate.com/news/article/THE-BATTLE-OVER-SAME-SEX-MARRIAGE-One-Year-Later-2731442.php> (“[Mayor] Newsom’s decision to issue marriage licenses to same-sex couples spurred similar actions around the country and ignited a national debate. And over the next 12 months, gay couples legally wed in Massachusetts, Canada’s high court gave gay marriage a legal thumbs-up, 11 states passed constitutional amendments banning same-sex marriage, and almost twice as many states prepared to follow suit.”).

55. *See Dissenting by Deciding*, *supra* note 2, at 1748–49.

56. *See Marriage Cases*, 49 Cal. Rptr. 3d at 686–87; Marech, *supra* note 54.

57. *Dissenting by Deciding*, *supra* note 2, at 1756.

58. *Id.* at 1748–49.

rendered impotent and without the force of law.⁵⁹ Second-order diversity is not only about voice, it is also (unavoidably) about power.⁶⁰

Why Sovereignty and Autonomy Are Still Important: Lessons From Local Government

I should be clear that this essay is not an attempt to force sovereignty back into the core of Gerken's theory of federalism nor her work on second-order diversity and dissent; rather, it is to present an alternate account of why sovereignty, even if in a weak form more analogous to autonomy, is still relevant to understanding the power that minorities exercise in disaggregated institutions. In particular, the constitutional structure was designed to preserve state authority in certain policy-making spheres while delegating enumerated powers to the federal government.⁶¹ Less attention has been given to what occurs when the state delegates some of its authority to subunits in order to carry out official duties.⁶² Drawing an analogy to the state-local government relationship sheds light on the relationship between electoral minorities and the state because in both situations you have smaller units exercising state authority.⁶³ As I mentioned in the prior section, the state's sovereign authority, even if diluted, does not disappear when the state cedes some of its authority to local subunits, and this remains true even when we are focusing on disaggregated institutions as Gerken does.⁶⁴ Indeed, scholars considered local governments powerless until this view was challenged in Richard Briffault's groundbreaking article *Our Localism: Part I – The Structure of Local Government Law*, in which he argued that cities have significant formal legal power and informal discretionary authority that gives them a great deal of discretion over certain policy areas.⁶⁵ While the scope of local authority is somewhat narrow because such governments exist at the pleasure of the state, they are still quite powerful by virtue of the fact that the state has

59. A recent example would be Governor Bob McDonnell's decision to force the Virginia board of health to apply regulations passed by the legislature to existing abortion clinics after the board had decided to exempt existing clinics and only apply the regulations to future clinics. The regulations are onerous and will likely have the effect of shutting down all of the abortion clinics in Virginia. See Jim Nolan, *Bob McDonnell Quietly Certifies Revised Abortion Clinic Regulations*, HUFFINGTON POST (Jan. 2, 2013, 7:30 AM), http://www.huffingtonpost.com/2013/01/02/bob-mcdonnell-abortion-clinics_n_2394391.html.

60. See *Second-Order Diversity*, *supra* note 1, at 1104, 1163.

61. See John C. Yoo, *Sounds of Sovereignty: Defining Federalism in the 1990s*, 32 IND. L. REV. 27, 29 (1998).

62. See, e.g., *id.* ("Broadly stated, the framers understood the Constitution to grant the national government primarily those powers involving foreign relations. The states would retain primary jurisdiction over almost all other domestic matters, such as taxation, judicial administration and law enforcement, and social and moral legislation. In defending the Constitution from Anti-federalist claims that the Necessary and Proper Clause gave the national government unlimited powers, Madison declared that federal powers 'will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will for the most part be connected.'") (internal citation omitted).

63. See *Second-Order Diversity*, *supra* note 1, at 1163–64.

64. See, e.g., Richard Briffault, *Our Localism: Part I – The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 10 (1990) (noting that "[t]he original form of home rule amendment treated the home rule municipality as an *imperium in imperio*, a state within a state, possessed of the full police power with respect to municipal affairs and also enjoying a correlative degree of immunity from state legislative interference."). Today, according to Professor Briffault, forty-one states use some form of home rule in which local municipalities are granted significant authority by the state. *Id.* at 10–11 (citing MELVIN B. HILL, *STATE LAWS GOVERNING LOCAL GOVERNMENT STRUCTURE AND ADMINISTRATION* 43 (1978)).

65. Compare Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1062–67 (1980), with Briffault, *supra* note 64.

delegated extensive authority to these municipalities.⁶⁶ As Professor Briffault observes, this point often gets lost in the scholarly literature because state legislatures will pass laws that govern local matters, but many times these laws come at the request of local governing bodies.⁶⁷ Similarly, state courts often intervene on local matters because it is difficult to separate matters of local concern from subjects that may be of importance to the state.⁶⁸

Even if local governments are circumscribed in their authority, at least to an extent that we would not describe them as sovereign entities similar in form to the state,⁶⁹ they still retain enough autonomy such that their decision-making enjoys some level of finality because there is very little intervention from the state.⁷⁰ While the risk of state intervention is always present, this risk has not inhibited the ability of local governments to break barriers in a number of policy areas that govern the everyday lives of citizens. As a result of this deference, local municipalities enjoy an autonomy that helps to promote the type of experimentation often touted in federalism doctrine. As Professor Briffault has observed:

Certainly, whatever the technically limited status of local units and their formal subservience to the state, local governments have wielded substantial lawmaking power and undertaken important public initiatives. Even during the late nineteenth and early twentieth centuries—the heyday of Dillon’s Rule, the era of plenary state power and the unsteady beginnings of home rule—American city governments pioneered in public health, education, parks, libraries, water supply, sanitation and sewage removal, street paving and lighting and mass transit, building the infrastructure that still serves modern urban centers. City governments owned and operated public utilities, regulated private utilities, professionalized their administrations and employment structures and experimented with a broad range of political and governmental innovations, including the council-manager and commission forms of government, competitive bidding on public works, planning and zoning, and nonpartisan elections. This could not have been accomplished without significant legal power.⁷¹

There are also instances in which local authority has been vindicated in the face of conflicting state mandates, contrary to the notion that local governments are completely powerless in the face of state authority.⁷² Despite this, the absence of *pure* sovereignty in

66. Briffault, *supra* note 64, at 8 (discussing Dillon’s Rule, a canon of construction for interpreting the scope of local government authority, under which “local governments may exercise only those powers ‘granted in *express words*,’ or ‘those *necessarily or fairly implied* in or *incident* to, the powers expressly granted,’ or ‘those *essential* to the declared objects and purpose of the [municipal] corporation—not simply convenient, but indispensable”) (citation omitted); see also *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907); Briffault, *supra* note 64, at 9 (noting that “Dillon’s Rule and the notion of plenary state power are the formal background norms for state-local relationships”) (citation omitted); Frug, *supra* note 65, at 1112 (arguing that although Dillon’s vision of society has been abandoned in most states, “Dillon’s statement of the law . . . largely remains intact,” still leading courts to construe local government power narrowly).

67. Briffault, *supra* note 64, at 13.

68. *Id.* at 13–14.

69. The description of local governments as sovereign is also inapt for other reasons. For example, local governments are not immune from federal regulation in the same way as states. See *Cnty. Commc’ns. Co. v. City of Boulder*, 455 U.S. 40 (1982).

70. Briffault, *supra* note 64, at 15–18.

71. *Id.* at 15 (citations omitted).

72. See, e.g., *Lawrence Cnty. v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256 (1985); *Washington v.*

local governance could also be a benefit for reasons identified in Gerken's scholarship; namely, that it allows governing majorities to police the outliers, or those localities that veer so far from the mainstream so as to raise concerns.⁷³ The absence of sovereignty also allows the state to intervene in order to impose uniform rules over what would otherwise be considered a local matter to address shortcomings in policy and governance.⁷⁴ For example, disparities in taxable wealth have led to inequities in school funding, an area traditionally governed by local government.⁷⁵ Because courts treat school funding as a local issue, many of the challenges to the tax schemes used by these governments have failed even though a uniform system of funding provided by the state may be a better solution to the problems of financial inequity among schools.⁷⁶ This is one instance in which the local government's lack of sovereignty should have probably dictated a different outcome.

Nevertheless, the autonomous authority of local government, while not always ideal and sometimes counterproductive, still serves as a useful example for understanding the authority that smaller entities have when they are acting with the power of the state.⁷⁷ As the school funding example illustrates, the willingness of courts to disturb local decision-making often turns on the background norm of whether it is an area traditionally regulated by local bodies; in other areas, local decision-making is often disturbed by contrary state rules and regulations with little recourse available for these municipalities.⁷⁸ Yet the ability to act in the name of the state, with the power of the state, lends credibility to the decision-making of local municipalities in a way that is important for giving voice to local interests.⁷⁹ I posit that this remains true even if we go beyond the state-local relationship, to disaggregated institutions like juries, county commissions, and electoral districts, which I discuss in the next section. These institutions, to the extent that we are willing to insulate their decision-making from interference, can also promote dissent and serve as the "laboratories of democracy" often touted in federalism theory.⁸⁰

PART II. GIVING "POWER" TO DISSENT IN DISAGGREGATED INSTITUTIONS

As the prior section shows, sovereignty does not disappear when states delegate authority to smaller parcels, although arguably the form of authority is sufficiently autonomous to allow local entities to dictate policy outcomes and act independently of the

Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982). In each case, the Supreme Court found the state statute at issue was unconstitutional.

73. See *Dissenting by Deciding*, *supra* note 2, at 1756.

74. See *id.* at 1773.

75. See Briffault, *supra* note 64, at 19–21.

76. *Id.* at 27 ("Most of these courts candidly acknowledged the existence of substantial spending differences among school districts, which they recognized were largely attributable to differences in local taxable wealth. But they held that interlocal wealth and spending differences did not undermine the legitimacy of the state delegation of responsibility for the provision and funding of basic public services to local governments. Instead, unequal levels of local services and taxation were deemed characteristic of the American system of local government.") (citation omitted); see also *Robinson v. Cahill*, 385 A.2d 457 (N.J. 1976); *Buse v. Smith*, 247 N.W.2d 141 (Wis. 1976).

77. See Briffault, *supra* note 64, at 81.

78. *Id.* at 39.

79. See *id.* at 8, 15.

80. See *New State Ice Co. v. Leibmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

state. Moreover, the idea that the decisions of disaggregated institutions should have a certain amount of insulation from state interference is consistent with federalism doctrine. Drawing on the examples that Gerken relies on in her work — in particular, juries, county commissions, and electoral districts⁸¹ — I argue that the absence of autonomy significantly undermines the ability of electoral minorities to give power to their dissent.

Juries and the Tradeoff between Influence and Control

Gerken argues that there is value in having a jury that is second-order diverse; that, because of random assignment, there will be a significant number of juries in which minorities are sizable enough to dictate the outcome.⁸² The second-order diversity framework forces minorities to determine “whether they want to influence the decisions rendered by a lot of juries—for instance, soften all verdicts a bit—or control the decisions rendered by a few.”⁸³ Yet this analysis is incomplete for a couple of reasons. The first is that there are rarely any jury trials in our modern system.⁸⁴ As a result, the opportunity for minorities to “dissent by deciding” is significantly limited in this context.⁸⁵

Second, for those jury trials that do occur, Gerken does not adequately consider the extent to which the jury’s discretion is constrained by the judge. Like other disaggregated institutions, the jury has evolved and as it has become more representative, its authority has also diminished.⁸⁶ During colonial times, trial judges were prohibited from exercising “coercive” power over the jury; thus, judges did not give jury instructions and had limited ability to comment on the evidence or the credibility of witnesses.⁸⁷ Moreover, evidentiary rules were more liberal, allowing a significant amount of information to reach the jury that would be out of bounds in modern times.⁸⁸ In some states, juries also had the ability to question witnesses.⁸⁹

The modern jury is significantly more limited in its ability to perform an active role in adjudication.⁹⁰ As one commentator noted, the jury no longer resolves issues of both law and fact, like colonial juries; instead, the judge plays more of a role in “seeking

81. *Second-Order Diversity*, *supra* note 1, at 1103–04.

82. *Id.* at 1112–13.

83. *Id.* at 1139.

84. See, e.g., FLA. BAR, REPORT OF THE SPECIAL COMMITTEE TO STUDY THE DECLINE IN JURY TRIALS (2011), available at [http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/2CC9BF48C4496442852579950050E988/\\$FILE/final%20report%20jury%20special.pdf](http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/2CC9BF48C4496442852579950050E988/$FILE/final%20report%20jury%20special.pdf).

85. One possible bright spot is that settlement occurs in the shadow of trial. As a result, the likely decision of local jurors could have some influence on potential settlement. However, to the extent that dissenters hand down outlier decisions in jury trials, one of the potential benefits of second-order diversity, their influence on settlement is, by definition, limited because it does not represent the mainstream, or likely decision of local jurors.

86. See *Second-Order Diversity*, *supra* note 1, at 1112.

87. Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377, 439–44 (1996).

88. *Id.* at 444.

89. See Jeffrey S. Berkowitz, Note, *Breaking the Silence: Should Jurors Be Allowed to Question Witnesses During Trial?*, 44 VAND. L. REV. 117 (1991). Note, however, that some states are starting to experiment with juror questioning of witnesses as a reform of the trial process. See, e.g., Brian Skoloff, *Jurors ask Jodi Arias About Religion, Memory*, USA TODAY (Mar. 6, 2013), <http://www.usnews.com/news/us/articles/2013/03/06/arias-to-answer-juror-questions-in-murder-case>. If adopted, this could help increase the power of the jury relative to the judge.

90. See Smith, *supra* note 87, at 474.

truth" and deciding law than the jury because of the court's power to issue instructions to the jury, direct the verdict, weigh evidence, and assess the credibility of witnesses.⁹¹ These changes occurred as the jury became more representative of the underlying populace.⁹² During the colonial period, most states limited jury service to qualified voters, a category usually defined as white, male property owners.⁹³ Early in the nineteenth century, the increasing power of the jury corresponded to the rise of mass politics and the widespread expansion of suffrage beyond freeholders.⁹⁴ Even as the right to vote became more universal, however, the jury continued to be a place of exclusion for women and minorities.⁹⁵

During the late nineteenth century, much of the discretion previously possessed by the jury was delegated to the judge.⁹⁶ As late as 1851, fifteen states allowed juries to decide questions of law, but this function of both criminal and civil juries was dissolved by 1895.⁹⁷ Not coincidentally, a lot happened in the interim. In the 1860s, Congress passed laws allowing African Americans to testify in state and federal courts.⁹⁸ During Reconstruction, African Americans regularly sat on juries in some southern states.⁹⁹ The Civil Rights Act of 1875 forbade disqualification of jurors on racial grounds, followed by the 1880 Supreme Court decision in *Strauder v. West Virginia*, which held that the Fourteenth Amendment rights of an African American defendant were violated because he was convicted by a jury from which African Americans were excluded on the basis of race.¹⁰⁰

91. *Id.*; see also R. J. Farley, *Instructions to Juries - Their Role in the Judicial Process*, 42 YALE L.J. 194, 202 (1932) ("In America by the time of the Revolution and for some time thereafter, the power to decide the law in criminal cases seems to have been almost universally accorded the jury and quite generally, it determined the law in civil cases.") (citation omitted).

92. See Smith, *supra* note 87, at 464-65.

93. Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 869 (1994).

94. MAX RADIN, *HANDBOOK OF ANGLO-AMERICAN LEGAL HISTORY* 217 (West Publ'g Co. 1936) ("[I]n the several states the power of the judge became more and more restricted in the era that accompanied the rise of Andrew Jackson and the reorganized Democratic Party . . . with the emphasis shifting more and more to the jury. In many jurisdictions judges were prevented from commenting on the evidence. In some, juries were made the judges of law as well as fact."); Larry D. Kramer, *The Pace and Cause of Change*, 37 J. MARSHALL L. REV. 357 (2004).

95. Alschuler & Deiss, *supra* note 93, at 878 ("The early nineteenth century saw a rapid movement away from property qualifications and toward universal suffrage for white males, yet the liberalization of voting requirements was not always accompanied by a similar liberalization of requirements for jury service. As this article will explain in greater detail, the reform of jury qualifications has often lagged behind the reform of qualifications for voting. In many states, unpropertied white men, African-Americans, and women did not serve on juries until considerably after they gained the vote.") (citation omitted).

96. Notes and Comments, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170, 170, 176 (1964) ("On the one hand, the jury's right to decide questions of law, a colonial heritage acknowledged earlier in the century, was lost. The directed verdict and the special verdict, both methods of limiting the jury's function to fact-finding, were introduced. On the other hand, attempts were made in a majority of the states to preclude trial judges from commenting on the evidence. By the end of the [nineteenth] century, jury trial was a substantially different process from what it had been in the early days of the Republic.") (citation omitted).

97. Smith, *supra* note 87, at 452.

98. Alschuler & Deiss, *supra* note 93, at 885.

99. *Id.* at 886.

100. *Strauder v. West Virginia*, 100 U.S. 303 (1880); Alschuler & Deiss, *supra* note 93, at 892.

With the end of Reconstruction, the rights of African Americans to serve on juries remained unenforced throughout the South until the 1960s.¹⁰¹ Women similarly were excluded from jury service, despite being granted the right to vote in 1919, until their plight gradually changed in the 1960s and 1970s.¹⁰² The jury pool selection mechanism used by many states during this time period, known as the key-man method, also contributed to the exclusion of women and minorities.¹⁰³ Unlike random selection, the key-man method allowed jury commissioners to tap community leaders (“key men”) who personally recommended individuals, usually white men, for jury service.¹⁰⁴ Women and minorities began to play a more substantial role in the American jury system after the adoption of the 1968 Federal Jury Selection and Service Act and the Uniform Jury Selection and Service Act, both of which eliminated the key-man jury and broadened the potential jury pool,¹⁰⁵ as well as the Supreme Court’s decision in *Batson v. Kentucky*,¹⁰⁶ which constitutionalized the issue of jury selection by prohibiting the use of *voir dire* to exclude jurors on the basis of race.

As juries became more integrated, their power was significantly circumscribed in state courts, in Supreme Court precedents, and ultimately, under the Federal Rules of Civil Procedure. For example, Rule 49 of the Federal Rules of Civil Procedure provides that “[t]he court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact.”¹⁰⁷ This rule has been criticized for “erod[ing] the power of the jury” by decreasing the likelihood that legal questions will be submitted to the jury.¹⁰⁸ Similarly, the directed verdict in Rule 50 provides another mechanism by which judges can circumvent the power of the jury because the rule allows the judge to enter a verdict before the claims can go to the jury, or alternatively, to overturn the jury verdict at the end of trial based on the sufficiency of the evidence.¹⁰⁹ The Supreme Court has acquiesced in the Federal Rules’ delegation of power from jury to judge, holding that the jury should follow judicial instructions on the law in criminal trials;¹¹⁰ that the jury’s domain is factual, not legal;¹¹¹ and that the jury’s judgment can be bypassed¹¹² — certainly not the jury system as it existed in 1791.

101. Alschuler & Deiss, *supra* note 93, at 894.

102. Compare *Hoyt v. Florida*, 368 U.S. 57, 59 (1961) (denying that there were “any arbitrary [or] systematic exclusions” of jurors in an all-male jury in a woman’s murder trial), with *Taylor v. Louisiana*, 419 U.S. 522, 537 (1975) (stating that “it is no longer tenable to hold that women as a class may be excluded to given automatic exemptions based solely on sex if the consequence is that criminal jury venires are almost totally male”).

103. See VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 53–54 (1986).

104. *Id.*

105. *Developments in the Law — The Civil Jury: III. Jury Selection and Composition*, 110 HARV. L. REV. 1408, 1451–53 (1997).

106. *Batson v. Kentucky*, 476 U.S. 79 (1986).

107. FED. R. CIV. P. 49(a)(1).

108. Smith, *supra* note 87, at 486–88.

109. FED. R. CIV. P. 50(a)–(b).

110. *Sparf & Hansen v. United States*, 156 U.S. 51, 102 (1895). But see Jack B. Weinstein, *Considering Jury “Nullification”: When May and Should a Jury Reject the Law to Do Justice*, 30 AM. CRIM. L. REV. 239 (1992–1993).

111. *United States v. Dougherty*, 473 F.2d 1113, 1132 (D.C. Cir. 1972) (noting that juries no longer retain the power to acquit despite instructions received from the judge on the law).

112. *Singer v. United States*, 380 U.S. 24, 34 (1965) (“[T]here is no federally recognized right to a criminal trial before a judge sitting alone, but a defendant can . . . in some instances waive his right to a trial by jury.”); *Patton v. United States*, 281 U.S. 276, 298 (1930) (holding that a criminal defendant has the power to waive his

The fact that the jury is more representative, but less powerful, matters in making the cost/benefit analysis that the second-order diversity framework commands. To the extent that we care about jury verdicts in the aggregate and using outliers to influence verdicts overall,¹¹³ juries have limited ability to independently express dissent because of constraints imposed by both judges and statutes. Perhaps what this means is that, in determining the tradeoff between influence and control, we should tinker with the rules that govern juries in order to make them more autonomous and independent of the judge. One such possibility may be employing a higher standard of proof before a judge can disturb a jury verdict. Or maybe the value of jury autonomy provides another justification for statutes that prohibit jury nullification, a law that exist in almost every state.¹¹⁴ Or we may ultimately conclude that because the power of the jury has been significantly limited, its ability to influence jury verdicts in the aggregate is not worth sacrificing the control that electoral minorities can exercise in a certain subset of jury trials. At the very least, such discussions illustrate the importance of jury autonomy to the second-order diversity framework.

Pushing the second-order diversity framework to assessing the micro-level rules that apply in a jury setting could also be beneficial for considering proposed jury reforms. The framework of second-order diversity highlights many of the problems with jury rules raised by commentators that have been exacerbated by the delegation of authority from the judge to the jury.¹¹⁵ For example, Rule 30 of the Federal Rules of Criminal Procedure and Rule 51 of the Federal Rules of Civil Procedure permit the judge to instruct the jury either at the close of the evidence, after closing arguments, or both.¹¹⁶ Some commentators have advocated for altering these rules to allow for “preinstruction,” where the judge advises the jury at the outset of the trial because it allows the jury to assess the evidence with an eye towards the factors that the judge identified in his or her instructions and it helps jurors to link the evidence to the relevant issues.¹¹⁷ But the disadvantages of preinstruction, particularly when considered in light of the second-order diversity framework, are significant:

First, to the extent that jurors exhibit tendencies to settle on a verdict early in the trial—preinstruction may exacerbate this tendency. Second, preinstruction may focus all, or at least most, of the jurors on the same issues and testimony. To the extent that the deliberative process is enriched by a diversity of perspectives and attitudes, that process may be diminished by the homogenization encouraged by preinstruction.¹¹⁸

right to a jury trial).

113. *Second-Order Diversity*, *supra* note 1, at 1139.

114. New Hampshire recently passed a statute allowing defense counsel in criminal proceedings to inform the jury of its right to nullify laws. See Michael Suede, *Jury Nullification In New Hampshire Becomes Reality*, POLICYMIC (July 2012), <http://www.policymic.com/articles/10603/jury-nullification-in-new-hampshire-becomes-reality>.

115. See Leonard B. Sand & Steven Alan Reiss, *A Report on Seven Experiments Conducted by District Court Judges in the Second Circuit*, 60 N.Y.U. L. REV. 423, 437–39 (1985).

116. FED. R. CRIM. P. 30; FED. R. CIV. P. 51.

117. Sand & Reiss, *supra* note 115, at 438–39 (noting that the American Bar Association has approved of preinstruction).

118. *Id.*

Since second-order diversity places a premium on the heterogeneity that emerges from the random assignment of jurors, then preinstruction, which encourages jurors to be homogenous in their view of the evidence, may not adequately value this benefit. It also narrows the window of dissent in which minorities can rally their fellow jurors into seeing things from their vantage point, in essence minimizing the opportunity for dissent. A similar assessment could be made for other jury reforms and whether proposed changes adequately respect the values of second-order diversity.

To be sure, it is difficult to adequately consider second-order diversity in this context because of the limitations of our jury trial system discussed above.¹¹⁹ Unlike local governmental units, the jury's lack of autonomy and the infrequency of jury trials overall make it difficult for these disaggregated institutions to provide a forum for meaningful dissent. Moreover, the reforms that may need to occur, some of which I highlight above, may not be worth the cost to the system as a whole, particularly if we view judges as more steady and reliable than juries.¹²⁰ There may be a higher likelihood that minorities will be able to exercise "power" through dissent in forums such as county commissions and electoral districts—a contention I explore below.

Autonomy in Other Types of Disaggregated Institutions

Gerken does a great job of describing how second-order diversity can inform the debate surrounding the costs and benefits of choosing certain electoral forms over others. She highlights the fact that creating districts and other governing units is about more than electing representatives who influence legislative outcomes; it is also about electing representatives who can distribute goods and services back into the district.¹²¹ Indeed, sitting on the board of a county commission or being the majority in a legislative district can help minorities in a few ways including agenda setting, using issues to frame the public debate, and allowing legislators to wield power over goods and services even if the legislator is not in the majority.¹²²

Specifically, Gerken points to the case of *Presley v. Etowah County Commissioner*¹²³ as evidence that having second-order diverse institutions can be valuable where "political preferences find their strongest expression at the level of disaggregated local institutions" like the board in *Presley* where "individual board members presided over their own fiefdoms, making policy decisions, and doling out patronage independently of one another."¹²⁴ Yet second-order diversity is an important consideration in this context precisely because of the power wielded by individual board members (making the board an effective expression for minority dissent), power that was ultimately reduced in antic-

119. In reality, it may be more advantageous to encourage institutional design rules that result in more majority-minority juries, rather than promote rules that give minorities more power on juries in part because minorities almost never sway a majority of voters to swap their votes. However, the reality is that given our current political environment, the latter is more likely than the former.

120. Many of the reforms that lessened the power of juries occurred because there was a wide distrust of the jury's decision-making abilities.

121. *Second-Order Diversity*, *supra* note 1, at 1133.

122. *Id.* at 1134–35.

123. *Presley v. Etowah Cnty. Comm'n*, 502 U.S. 491 (1992).

124. *Second-Order Diversity*, *supra* note 1, at 1142.

ipation of the appointment of an African American board member, which arguably affects the ability of the board to be a mechanism that facilitates minority viewpoints.¹²⁵

The Etowah County Commission's primary responsibility was to maintain and repair the roads within the county, a function that gave each commissioner significant authority over the funds allocated to his "road district."¹²⁶ In 1986, a federal district court ordered the four member Commission to restructure itself into a six-member board with each commissioner elected from single member districts rather than at-large, a change which would make the Commission more racially representative.¹²⁷ In response, the Commission passed resolutions that denied each new commissioner control over the funds allocated to his specific road district and the workers and operations within the district.¹²⁸ However, existing commissioners retained authority and discretion over the operations and funds allocated to their road districts.¹²⁹ The facts of *Presley* raise two very important questions: Does our normative commitment to second-order diversity require that we acknowledge that the power of the Commission is now diminished, even if technically the Commission still remains an institution in which electoral minorities can express dissent through their individual commissioner? Or does this commitment require us to ensure that the Commission is an *effective* medium to express dissent to the extent that we define dissent as "dissenting by deciding"?

At issue in *Presley* was whether the resolutions changing the power structure of the Commission had to be pre-cleared under section 5 of the Voting Rights Act, which requires that any changes to electoral laws in certain covered jurisdictions be pre-cleared with the federal government before the change can go into effect.¹³⁰ Although the Court found that these changes did not have to be pre-cleared, the resolutions undermined the ability of the Commission to serve as a forum for effective and meaningful dissent. Thus, it should matter, for purposes of section 5, that the Etowah County Commission altered its prior practice of giving each commissioner authority over the funds and resources allocated to his respective district.¹³¹ If disaggregated institutions are a means for electoral minorities to express dissent (by power), it is relevant that the Court failed to see the full implication of the Commission's actions that took power away from local commission-

125. *Presley*, 502 U.S. at 496–97.

126. *Id.* at 495–96. The Court described the structure of the Commission as follows:

The entire electorate of Etowah County voted on candidates for each of the five seats. Four of the seats corresponded to the four residency districts of the county. Candidates were required to reside in the appropriate district. The fifth member, the chairman, was not subject to a district residency requirement, though residency in the county itself was a requirement.

Each of the four residency districts functioned as a road district. The commissioner residing in the district exercised control over a road shop, equipment, and road crew for that district. It was the practice of the commission to vote as a collective body on the division of funds among the road districts, but once funds were divided each commissioner exercised individual control over spending priorities within his district. The chairman was responsible for overseeing the solid waste authority, preparing the budget, and managing the courthouse building and grounds.

Id.

127. *Id.* at 496.

128. *Id.* at 496–98.

129. *Id.* at 497, 99.

130. 42 U.S.C. § 1973c (2012).

131. *Id.* at 497. See also *id.* at 504 (holding that preclearance was not required because the resolution had "no connection to voting procedures" and "leaves undisturbed the composition of the electorate").

ers.¹³² The loss of autonomy in order to facilitate racial discrimination also circumscribed the ability of individual commissioners to further the goals of second-order diversity championed by Gerken. In reality, the changes instituted by the Commission limited the ability of racial minorities to express dissent through their individual commissioner and, consistent with a normative commitment to second-order diversity, needed to be pre-cleared.¹³³ This approach recognizes that there is not a neat delineation between controlling and influencing the electoral process, and as such, micro-level decisions that complicate the ability of racial minorities to exercise meaningful authority should raise red flags. In assessing the tradeoff between influence and control, the cost-benefit analysis must determine whether the control is actually meaningful within the institution.

Along the same lines, second-order diversity and the need for meaningful authority is also relevant in the context of redistricting disputes. *Georgia v. Ashcroft*, for example, involved the issue of whether the Georgia state legislature could replace majority-minority districts with influence and coalition districts in its redistricting plan for the state senate without violating section 5 of the Voting Rights Act since Georgia is a covered jurisdiction.¹³⁴ The dispute centered on the tradeoff between influence and control, forcing the Supreme Court to consider whether the state legislature can create influence and coalition districts to increase minority power statewide by ensuring a democratic majority in the state legislature, or if the plan was “retrogressive” under section 5 because there were fewer majority-minority districts in which African Americans were more likely to elect their candidate of choice.¹³⁵

The Court held that the state can, consistent with section 5, replace majority-minority districts with influence and coalition districts in order to increase the opportunity for African Americans to participate in the political process, as opposed to creating a few majority-minority districts which “virtually guarantee the election of a minority group’s preferred candidate in those districts” but “risks isolating minority voters from the rest of the state.”¹³⁶ Gerken, however, does not view the lesson of *Georgia v. Ashcroft* as being solely about legislative control.¹³⁷ Instead, Gerken prioritizes values other than control that should influence the design of legislative districts: “making electoral minorities visible,” “assigning group members to the role of permanent junior partner,” “symmetry in distributing participatory opportunities,” “[conceiving] of some districts as

132. *Presley*, 502 U.S. at 505–06 (“Under the view advanced by appellants and the United States, every time a state legislature acts to diminish or increase the power of local officials, preclearance would be required. Governmental action decreasing the power of local officials could carry with it a potential for discrimination against those who represent racial minorities at the local level.”). *But see* *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969).

133. *See Second-Order Diversity*, *supra* note 1, at 1146 (noting that one of the benefits of second-order diversity is that it “forces members of the majority to realize that they could be in the minority on some decisionmaking body, knowledge that could reduce their incentive to ride roughshod over minority interest”). Divesting the board of power at a moment when minorities were able to make a play for some authority stands contrary to the normative values underlying the second-order diversity framework.

134. *Georgia v. Ashcroft*, 539 U.S. 461, 470 (2003) (“The plan as designed by the Senate ‘unpacked’ the most heavily concentrated majority-minority districts in the benchmark plan, and created a number of new influence districts.”).

135. *Id.* at 479–80.

136. *Id.* at 480–81.

137. *Second-Order Diversity*, *supra* note 1, at 1188.

mini-governance units,” and using “heterogeneity as a strategy for dealing with group conflict.”¹³⁸ Given these considerations, the issue in *Ashcroft* is actually much more complicated than the Court’s primary focus on the benefit that minorities receive if their party of choice retains legislative control. Where legislative control is not at stake, then considerations of second-order diversity provide a framework for giving weight to a different set of costs, such as those listed above, that should factor into democratic design.¹³⁹

In reality, the criteria that Gerken points to as factors in the cost/benefit analysis in designing electoral districts require that electoral minorities speak with some level of authority, either as an important swing voting bloc or as a member of the legislative majority.¹⁴⁰ Gerken is correct that consideration of the above-listed factors forces us to think beyond legislative control.¹⁴¹ Nonetheless, Gerken minimizes the extent to which the cost/benefit analysis also should factor in those design details that make electoral minorities powerful in lieu of having a legislative majority. Notably, we also must consider the micro-level rules that govern a particular institution in determining the tradeoff between influence and control. Instead of framing the question as whether “African Americans [are] better off electing a sizeable Congressional Black Caucus . . . or pursuing an influence model . . . that . . . allow[s] the Democrats to keep power in the House,” as Gerken does,¹⁴² the question should be if African Americans elect a sizable Congressional Black Caucus, are the rules of Congress structured in a way that will allow them to be a swing voting bloc or otherwise promote or block legislation that affects their constituents? The House of Representatives, as it is currently composed, does not operate in this manner; thus, in my opinion, the focus in this context should always be on how minorities can achieve majority status. If the House were governed by rules similar to those in the Senate, with its filibuster that gives electoral minorities significant power,¹⁴³ then the answer might be different. In contrast, other disaggregated institutions are similar to the Senate in the level of power that they give to minority legislators. Gerken points to the Chicago ward system as one example in which an individual legislator can provide significant benefits to his constituents even if he is unable to command a majority to pass legislation;¹⁴⁴ the Commission at issue in *Presley* (as it was originally constructed) is another.¹⁴⁵

Indeed, this is why the Commission’s move to make individual commissioners less powerful in *Presley* was so troubling — it marginalized the ability of minorities to use the power of the state to express dissent within this small microcosm that, prior to the changes, actually offered a forum for dissenting by deciding. The micro-level rules matter, and the framework of second-order diversity, at least when some attention is given to

138. *Id.*

139. *Id.* at 1189.

140. *See id.* at 1133.

141. *Id.* at 1121.

142. *Id.* at 1133.

143. *See* S. Comm. on Rules and Admin., 113th Cong., Standing Rules of the Senate Rule XXII (2013), available at <http://www.rules.senate.gov/public/index.cfm?p=RuleXXII>.

144. *Second-Order Diversity*, *supra* note 1, at 1135.

145. *Presley v. Etowah Cnty. Comm’n*, 502 U.S. 491 (1992).

the sovereign authority within the disaggregated institution, actually helps to push the cost/benefit analysis even further.

The other factors that Gerken points to — treating electoral districts as “mini-governance units” and using heterogeneity to deal with intragroup problems¹⁴⁶ — are a bit more complicated. There are arguably benefits that come from the creation of majority-minority districts, not least of which is the guarantee that minorities can elect their candidate of choice in order to have pork pushed into their district and to protect their interests in the governing body.¹⁴⁷ But the *Ashcroft* Court’s warning of political isolation should not be understated. Outside of pushing pork into the district, the greatest policy and legislative accomplishments occur in the context of banding together with representatives of shared political affiliation, which makes it difficult to view any one district as a mini-governance unit, particularly in the context of a state legislature or Congress.¹⁴⁸ Majority-minority districts can also complicate the politics that occur within groups, as these districts often have depressed voter turnout because of the sense among voters in the district that their votes do not count.¹⁴⁹ In the end, we assume that the representatives elected from these districts are an accurate reflection of the viewpoints within the district because they often “look like their constituents,” but to the extent that we care about the second-order value of mediating intragroup problems, perhaps we should not be so quick to take this as gospel.¹⁵⁰

To be clear, Gerken has shown that majority-minority districts are second-order diverse in a way that make them important as an avenue for dissent because they are a variation in democratic design that can provide an alternative viewpoint. However, once one factors in the true cost of control versus influence in light of the considerations of sovereignty and autonomy highlighted herein, the cost/benefit analysis embraced by the second-order diversity framework is significantly more complicated than Gerken believes. Nonetheless, Gerken’s work forces us to think about these issues in new and important ways, and to reassess long held assumptions about what democratic institutions best represent the interests of electoral minorities.

CONCLUSION

In articulating her theories of “dissenting by deciding” and “second-order diversity,” it is clear that Heather Gerken is not trying to mirror the federalism that exists at the federal-state level; in particular, her focus on disaggregated institutions complicates the analysis because groups within these institutions often lack the sovereignty that exists

146. *Second-Order Diversity*, *supra* note 1, at 1188–89. Gerken views the heterogeneity of institutions as a way to provide “additional information about how and when people divide” in order to “vary our strategies for dealing with group conflict.” *Id.* at 1104. Variation in legislative design by, for example, constructing majority-minority districts is one way to test out different theories of governance.

147. *Id.* at 1135.

148. Scholars have noted the difficulty of assessing any one legislative district or redistricting plan in isolation in other contexts. See, e.g., Adam Cox, *Partisan Fairness and Disaggregated Redistricting*, 2004 SUP. CT. REV. 409 (2004) (arguing that the harm from gerrymandering the state’s congressional districts can be determined only by reference to Congress as a whole).

149. See Franita Tolson, *Increasing the Quantity and the Quality of the African-American Vote: Lessons for 2008 and Beyond*, 10 BERKELEY J. AFR.-AM. L. & POL’Y 313, 339 (2008) (arguing that there is a correlation between majority-minority districts and depressed voter turnout).

150. *Id.*

within the traditional federalism framework. By pushing federalism "all-the-way-down," however, disputes over whether the authority that electoral minorities retain in these enclaves is "sovereign" or "autonomous" cannot be avoided. The ability of the majority to easily disturb the policy preferences of electoral minorities in disaggregated institutions seems inconsistent with the notion of giving "power" to dissent. Oftentimes, the inclination of those in power is to try to minimize the effects of minority authority by giving them control in name only.

As this essay shows, assessing the tradeoff between influence and control has to include some consideration of whether the power that electoral minorities exercise within disaggregated institutions is actually meaningful and enduring. While this does not require "sovereignty" in its truest sense, it does require autonomy so as to allow these groups to participate in the full spectrum of democratic governance. In some cases, the absence of autonomy limits the ability of some disaggregated institutions (like juries) to serve as an effective medium for dissent. But this does not mean that the promises of second-order diversity can never be realized, as entities such as electoral districts, county commissions, and other types of disaggregated institutions still hold out the promise that they can serve as enclaves in which these groups can govern in a meaningful and enduring way.