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Revisiting Progressive Federalism: Voice, Exit, and Endless Money

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Revisiting Progressive Federalism: Voice, Exit, and Endless Money

McKILLOP BRADFORD ERLANDSON*

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INTRODUCTION

People are lazy. With television you just sit—watch—listen. The *thinking* is done for you.¹

—Roger Ailes, *Former Communications Advisor to President Nixon*

A memo by Roger Ailes, recently unearthed at the Richard Nixon Presidential Library, proposed a method of using centralized media to affect policymaking on a mass scale.² With enough fiscal resources, actors outside of the government structure could influence decision-making by exploiting the relative costs of democracy³ to manipulate local voices.⁴

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1. Memorandum for the President From Roger Ailes: A Plan for Putting the GOP on TV News, available at <http://edge-cache.gawker.com/gawker/ailesfiles/ailes1.html>.

2. Ailes would eventually attempt to execute this vision in founding Fox News. See Tom Junod, *Why Does Roger Ailes Hate America*, *ESQUIRE* (Jan. 18, 2011), <http://www.esquire.com/features/roger-ailes-0211> (profiling how Roger Ailes changed political media in America).

3. Economists propose that the high cost of becoming an informed voter weighed against the low chance of casting the deciding vote lead to a “rational ignorance” among individual voters. See ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 244–46 (1957).

4. Adam Clark Estes, *Report: Roger Ailes Started Planning Fox News While Working for Nixon*, *THE WIRE* (June 30, 2011), <http://www.thewire.com/politics/2011/06/roger-ailes-nixon->

Today, the influence of groups with minority views seeking meaningful participation in democratic decision-making remains muscular but unbalanced. While theories of federalism attempt to describe methods to protect these dissenters, in practice, there is little affordable recourse for individuals without substantial means. High costs and risks associated with physical relocation can make the option prohibitive, so citizens frustrated with policy must try to turn around unfavorable policies from within.

In recent years, progressives have begun to shake off aversion to federalism and warm to new functionalist adaptations. Progressive federalism⁵ seeks to expand on the traditional outlets for vocalizing discontent. The idea moves democracy beyond the ballot box and open debate in the public square by reimagining the government-citizen relationship.⁶ It rethinks the space in which we govern by breaking down the formal wall of “sovereignty”⁷ from the federal government, all the way down to sub-local specialized units of governance. This flexible space recognizes an interdependence inherent in the shared and limited resources of government that empowers citizen administrators with a rougher and organic variant of voice—disloyalty.⁸ This permits communities to exercise minority-rule and push back on normative policy directives from above by challenging their marching orders below.⁹ What results is greater competition of ideas in free market politics.

But this theory is incomplete. It describes a two-dimensional system of checks and balances in horizontal and vertical governance where officials are in a perpetual battle for policymaking influence. While it empowers the voices of the minority, it fails to consider the relative costs of different manifestations of voice and is naïve to how money

gawker-documents/39469/ (detailing the release of documents demonstrating Roger Ailes' idea to use political pressure via the media to reshape the power of governance and strengthen the executive branch under the Nixon Administration).

5. See Leon Neyfakh, *How to Fix America From Below*, BOSTON GLOBE (Oct. 7, 2012), <http://www.bostonglobe.com/ideas/2012/10/06/heather-gerken-how-fix-america-from-below/KZMC5AYrBBWSgw0jMESc5M/story.html> (profiling Heather Gerken and her work on federalism all the way down); Heather K. Gerken, *A New Progressive Federalism*, 24 DEMOCRACY JOURNAL.ORG (Spring 2012), <http://www.democracyjournal.org/24/a-new-progressive-federalism.php?page=all> (promoting a new model of centralization that allows minorities to rule and produce a healthier democracy at large).

6. Citizens are heavily involved as “servants,” tasked with administering and implementing the policies multiple governments. Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 8 (2010) (“[S]ervants exercise a muscular form of ‘voice,’ as they can set policy rather than merely complain about it.”).

7. See *id.* at 12.

8. Heather K. Gerken, Lecture, *Exit, Voice, and Disloyalty*, 62 DUKE L.J. 1349, 1349 (2013).

9. Gerken, *supra* note 6 (“[M]inority-rule is contingent, limited, and subject to reversal by the national majority; and rebellious decisions can originate even from banally administrative units.”).

ultimately comes to dominate free speech.¹⁰ Minority views imagined in progressive federalism remain dependent on their shared geography for influence, as without support from peers, disloyal actors are merely “lone wolves” who can be replaced. They compete with government¹¹ and private organizations¹² seeking to influence policymaking below that can flex their muscles using a deluge of cash. In this battle of money versus action, the relative costs for monied “outsiders” are comparatively small. For this reason, progressive federalism ultimately fails in its goal of minority inclusion because it perpetuates economic inequality.

In this Note, Section I will briefly summarize the traditional voice and exit methods of feedback used by citizens in our democracy to signal dissatisfaction with state policy. Section II will describe the role of minority feedback in formal and functional theories of federalism, and highlight the benefits of reimagining power as decentralized in the theory of progressive federalism. These descriptions will highlight the failures of the sovereignty approach and explain how decentralization empowers minority voices as a practical matter.

In Section III, I will argue that progressive federalism is an incomplete model that leads to economic inequality. This claim is rooted in the Supreme Court’s recognition of political money as free speech that competes with other forms of voice.¹³ I will discuss how private organizations of “outsiders” engage in policymaking using money as speech to the detriment of minority voices without fiscal resources and how this intrusion’s perversion is similar to governmental distortion of policy through block grants. Section III will close with an egregious case study that illustrates the vulnerability of minority rule under progressive federalism. Finally, Section IV will provide suggestions to extend the decentralized model of progressive federalism. The Internet has allowed us to break down geographic dependence. I will explore how this technology

10. See Jeremy W. Peters, *73,000 Political Ads Test Even a City of Excess*, N.Y. TIMES (Oct. 16, 2012), at A1 (highlighting the discontent in the citizenry of Las Vegas as the most saturated political media market during the 2012 election cycle).

11. See Maurice R. Dyson, *Are We Really Racing to the Top or Leaving Behind the Bottom? Challenging Conventional Wisdom and Dismantling Institutional Repression*, 40 WASH. U. J. L. & POL’Y 181 (2012).

12. See *Frontline: Big Sky Big Money* (PBS television broadcast Oct. 30, 2012) (chronicling how IE Western Tradition Partnership in Montana and Colorado acquire candidate signatures and highly personal information about the candidates in order to send out mass mailings and letters under the candidates name); see also Kim Barker et al., *Documents Found in Meth House Bare Inner Workings of Dark Money Group*, HUFFINGTON POST (Oct. 29, 2012), http://www.huffingtonpost.com/2012/10/29/western-tradition-partnership_n_2038210.html.

13. See generally *Buckley v. Valeo*, 424 U.S. 1 (1976).

offers a platform to lower the relative cost of participation through voice and revitalizes the potential for exit.

While progressive federalism purports to enhance minority participation, its decentralized approach exacerbates economic inequality. Minority groups using fiscal resources as free speech come to dominate the voices of minorities who use non-monetary means to participate in policymaking. There may be ways to manage the relative costs of participation using new technology. Only by controlling these costs can we stem the tide of economic inequality that threatens to become the hallmark of the twenty-first century.¹⁴

I. SIGNALING DISCONTENT TO POLICYMAKERS

Legal scholars readily turn to economist Albert O. Hirschman's theory on methods of response to decline in firms and states¹⁵ when discussing the intersection of our democracy and federalism. His work finds that individuals dissatisfied with state governance can provide feedback to induce state action toward improvement through one of two means: voice or exit.¹⁶ This model describes voice as any attempt to turn around a problematic situation and exit as any attempt to escape the problem entirely.¹⁷

Our system of democracy provides multiple avenues to voice discontent. Citizens are afforded a direct procedural or structural opportunity¹⁸ to have a say in decision-making at the ballot box. This procedural opportunity for feedback sometimes presents itself directly, like in the case of direct referenda, but it more frequently appears in the periodic election of proxies in governance. Put bluntly, "[i]f the public disapproves of government policy, they can vote to 'throw the bastards' out and elect a new set of bastards who will, hopefully, do better."¹⁹

These procedural channels for voice are complemented by another avenue made possible by the substantive guarantees of the First Amendment.²⁰ Free speech and protest allow dissenters to take to the public

14. Ian Talley, *IMF Warns Inequality Is a Drag on Growth*, WALL ST. J. (Mar. 13, 2014), <http://online.wsj.com/news/articles/SB10001424052702304185104579437193433238018>; Eduardo Porter, *A Relentless Widening in the Disparity of Wealth*, N.Y. TIMES (Mar. 12, 2014), at B1.

15. See generally ALBERT O. HIRSCHMAN, *EXIT, VOICE AND LOYALTY* (1970).

16. *Id.* at 5.

17. K. Dowding et al., *The Exit of Residential Mobility or the Voice of Political Action? Strategies for Problem Solving in Residential Communities*, 33 JOURNAL OF APPLIED PSYCHOLOGY 321, 338 (2003).

18. Gerken, *supra* note 8.

19. Ilya Somin, *Foot Voting, Federalism, and Political Freedom* 3 (Nov. 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2160388.

20. U.S. CONST. amend. I.

square to communicate dissatisfaction with the current state of affairs and seek to convince fellow citizens that something is wrong with the status quo. This exercise of voice may arise in forms ranging from orderly debate, to defiant demonstrations.²¹ Hirschman's observation of protests at Kent State during the Vietnam War shaped his belief that the power of this form of feedback was greatly underappreciated by economists and scholars.²² A recent wave of protests resulting in government and policy changes throughout the rest of the world should only serve to strengthen this view.²³

Feedback from exit provides an alternative to voice. Dissatisfied constituents can choose to "vote with their feet"²⁴ and move away. Less drastically, they can utilize private ordering to achieve an exit remedy, like enrolling their children in an independent school or relocating to a neighborhood within a homeowners association.²⁵ Ideally, exit achieves dual goals of signaling to authorities that their performance is unacceptable while improving the lives of exiting citizens.²⁶ However, a citizen must have access to a market of distinct choices for exit to have any meaning, which explains why its staunchest proponents tend to conceptualize our community borders as formal guarantees of policymaking independence.²⁷

II. VOICE, EXIT, AND FEDERALISM

By design, our system of federalism seeks to maximize political

21. See *Texas v. Johnson*, 491 U.S. 397 (1989) (invalidating a statute prohibiting flag burning).

22. See Albert O. Hirschman, *Exit, Voice, and Loyalty: Further Reflections and a Survey of Recent Contributions*, 13 *SOC. SCI. INFO.* 7, 7–26 (1974), reprinted in 58 *MILBANK MEM'L FUND Q. HEALTH & SOC'Y* 430, 430–56 (1980).

23. Voice's newest manifestation, social media, has provided a catalyst and device for global protests against injustice worldwide. Certain governments have come to fear its use and have pushed for bans that are easily circumvented. Terrance McCoy, *Turkey Bans Twitter—and Twitter Explodes*, *WASHINGTON POST* (Mar. 21, 2014), <http://www.washingtonpost.com/news/morning-mix/wp/2014/03/21/turkey-bans-twitter-and-twitter-explodes/>; see also Marie-Louise Gumuchian and Laura Smith-Spark, *Arab Spring Three Years On: Unsettled Waters or a Turning Tide*, *CNN* (Mar. 15, 2014), <http://www.cnn.com/2014/03/14/world/meast/arab-spring-three-years/>; Lorenzo Franceschi-Bicchieri, *In Venezuela, the Only Free Media is Twitter*, *MASHABLE* (Feb. 28, 2014), <http://mashable.com/2014/02/28/venezuela-twitter/>; Nick Robins-Early, *Ukraine Twitter Photos Show Brutal Aftermath of Kiev Clashes*, *HUFFINGTON POST* (Feb. 20, 2014), http://www.huffingtonpost.com/2014/02/20/ukraine-twitter-photos-kiev-clashes_n_4823693.html; *The March of Protest*, *THE ECONOMIST* (June 29, 2013), <http://www.economist.com/news/leaders/21580143-wave-anger-sweeping-cities-world-politicians-beware-march-protest/>.

24. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 *J. POL. ECON.* 416 (1956).

25. Somin, *supra* note 19, at 30–34.

26. HIRSCHMAN, *supra* note 15, at 15–16.

27. See generally Richard A. Epstein, *Exit Rights Under Federalism*, 55 *WTR LAW & CONTEMP. PROBS.* 147 (1992); see also Somin, *supra* note 19.

freedom of its citizens by affording the minority certain rights of participation. Academics and jurists argue over how to depict its structure to ensure the effectiveness of voice and exit feedback.²⁸ Originalists find guidance in the writings of the founders,²⁹ envisioning state borders as rigid demarcations of independent “sovereign bubbles,” designed to maximize the impact of exit for frustrated citizens. They can point to the “original exit”³⁰ that gave birth to the nation and romanticize the expansion west that gave birth to protective minority enclaves like Utah.³¹ Functionalists dismiss this formalism and the relative effectiveness of exit in the modern era, urging the adoption of a more fluid conception of power in our federalism to boost the impact of voice.

A. Formalism’s Feedback Failure

The seduction of formalism is its apparent ability to turn the art of untangling the web of government into a science through “deductive reasoning,” but this simplification occurs at the peril of the welfare of democracy.³² While formalists often turn to the Tenth Amendment³³ in a reflexive appeal to sovereignty,³⁴ the dirty secret is that there is little actual guidance in the text of the Constitution to support this kind of formalism,³⁵ which scholars argue leads to notorious unpredictability. In practice, this approach fails in its goals of maximizing political freedoms and protecting those with minority views. These dissenters can find themselves trapped in a sovereign state by high exit costs and deprived of any meaningful exercise of voice by its plenary powers. Their sole protection is the limited safety net of individual rights as interpreted by Supreme Court precedent.

Instead, the Supreme Court tersely implies that state sovereignty is

28. Gerken, *supra* note 8 (“[M]uch of constitutional theory is preoccupied with a single question: What does a democracy owe its minorities?”).

29. *See, e.g.*, THE FEDERALIST NO. 39 (James Madison) (“Each State, in ratifying the Constitution, is considered as a sovereign body, independent of all others, and only to be bound by its own voluntary act. In this relation, then, the new Constitution will, if established, be a *Federal*, and not a *National* constitution.”).

30. Notably, individuals choosing to escape religious oppression set the standard in their pilgrimage to Plymouth Plantation. WILLIAM BRADFORD, OF PLYMOUTH PLANTATION (1651). Years later, the American Revolution would mark a more collective exercise of exit, albeit at a tremendous cost.

31. *See* Somin, *supra* note 19, at 27.

32. Erwin Chemerinsky, *Formalism and Functionalism in Federalism Analysis*, 13 GA. ST. U.L. REV. 959 (1997).

33. U.S. CONST. amend. X.

34. Black’s Law Dictionary’s pertinent definition of sovereignty is “the supreme political authority of an independent state.” BLACK’S LAW DICTIONARY (9th ed. 2009).

35. Chemerinsky, *supra* note 32 (“A key problem with formalistic limits based on federalism has been their arbitrariness and the inability of the Court to identify principles that could be applied in future cases.”); *see also* Epstein, *supra* note 27, at 149.

an absolute,³⁶ issuing opinions that read like invitations for states to nullify federal laws on an at-will basis:

[W]e look to the States to defend their prerogatives by adopting “the simple expedient of not yielding” to federal blandishments when they do not want to embrace the federal policies as their own. *The States are separate and independent sovereigns*. Sometimes they have to act like it.³⁷

The Court’s recent depiction of the states as victims of federal “coercion”³⁸ by means of “a gun to the head”³⁹ might lead one to conclude it is serious about preserving sovereignty and the integrity of exit. However, the Court’s willingness to selectively strike down state and local laws emerging from the free market of minority community political voices⁴⁰ has occasionally rendered the results of voice *and* possibility of exit meaningless in one fell swoop with an unpredictability that hurts policymaking. Instead, the Court’s emphasis on sovereignty must be read as an expansive catchall (or perhaps a metaphor)⁴¹ for individual liberty to fill perceived holes in the Bill of Rights.⁴²

Formal federalism’s purported rigid boundaries have the effect of ballooning power at the state level.⁴³ Its proponents fetishize exit for those who disagree with statewide policies. But a major difficulty lies in

36. *New York v. United States*, 505 U.S. 144, 178 (1992) (“No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate.”).

37. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2603 (2012) (*emphasis added*) (striking down an expansion of Medicaid providing substantial additional funding to the states in exchange for covering the uninsured).

38. *Id.* at 2604; *New York v. United States*, 505 U.S. 144, 166 (1992); *see also* Charlton C. Copeland, *Beyond Separation in Federalism Enforcement: Medicaid Expansion, Coercion, and the Norm of Engagement*, 15 U. PA. J. CONST. L. 91, 160–63 (2012) (discussing the Court’s decision to turn the doctrine of coercion from a theoretical possibility into reality without a stable framework).

39. *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2604.

40. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *McDonald v. City of Chicago, Ill.*, 130 S. Ct. 3020, 3021 (2010); *but see Romer v. Evans*, 517 U.S. 620 (1996) (striking down a state statute invidiously targeting homosexuals).

41. The recent impartation of human qualities to states is a shift from former imagery accusing the federal government of “imposing on” or “commandeering” the state through coercion. *New York v. United States*, 505 U.S. 144, 175 (1992).

42. The argument over federalism may be a manifestation of a proxy debate between the ideologies of utilitarianism and individualism.

43. Nestor M. Davidson, *Vertical Learning: On Baker and Rodriguez’s Constitutional Home Rule and Judicial Scrutiny*, 86 DENV. U.L. REV. 1425, 1425 (2009) (“In one view of vertical federalism, the federal government is understood as constrained to enumerated powers, states retain plenary policy power, and local governments are traditionally creatures of the state. This view yields something of structural constitutional bell curve that situates the heart of sovereignty at the state level, leaving the federal government and local governments with forms of limited authority on either end.”).

the fact that exit is “bare” due to information asymmetry between the officials and the citizenry, which means elected leaders may never realize the consequences of specific policy choices, where voice would provide a much richer form of feedback.⁴⁴

Reliance on exit as a tenable democratic channel for feedback requires a naïve approach that severely discounts the costs of departure in both the corporate and personal context. For most small businesses, the scale of their enterprise often means that livelihood depends on relationships in the community, so the net costs of physically relocating, cultivating new clients, and researching a new destination for favorable business conditions can be prohibitive.⁴⁵ Small businesses are more likely to close their doors in unfavorable conditions than to engage in this incalculable risk.⁴⁶ From the opposite perspective, states targeting business prospects utilize their sovereignty to engage in a race to the bottom through legislative carve outs and executive-ordered administrative exemptions.⁴⁷ Larger corporations may benefit by capturing the ear of multiple state governments and threatening to exit, but this often triggers feuds between state executives, who actively attempt to interfere with the commerce of other states to benefit their own.⁴⁸ Governors haggle over tailor-made breaks to seduce companies behind closed doors, and when a deal is struck, a move from one state to another can result in the devastation of a state’s commerce⁴⁹ and the sudden unemployment of entire sectors of workers.

Individuals considering exit fare even worse. The fiscal costs of researching a new community, finding a new source of income, and moving to a new home are compounded by immeasurable emotional costs of leaving friends and family behind. A phenomenon known as

44. Hirschman, *supra* note 22, at 437.

45. Perhaps in the field of E-Commerce we can carve out an exception.

46. See Mildred Warner & Lingwen Zheng, *Business Incentive Adoption in the Recession*, 27 *ECON. DEV. Q.* 90 (2013) (noting that studies on results from local incentives to attract small businesses were inconclusive); Jinah Ahn, *Small Business Check-Up: Time to Close Your Business?*, NOLO, <http://www.nolo.com/legal-encyclopedia/business-closing-check-up-36240.html>.

47. See, e.g., Steven Dornfeld, *New Tax Bill Laced with Special Tax Breaks for Selected Businesses*, *MINN. POST* (May 28, 2013), <http://www.minnpost.com/politics-policy/2013/05/new-tax-bill-laced-special-tax-breaks-selected-businesses>.

48. Steve Bousquet, *Gov. Scott’s Efforts to Raid Out-of-State Jobs Ticks Off Governors*, *TAMPA BAY TIMES* (Jun. 7, 2013), <http://www.tampabay.com/news/business/gov-scotts-efforts-to-raid-out-of-state-jobs-ticks-off-other-governors/2125420>.

49. Jacob Dirr, *Source: NCR to Move Headquarters, 1,300 Jobs to Georgia*, *DAYTON BUS. J.* (Jun. 1, 2009), <http://www.bizjournals.com/dayton/stories/2009/06/01/daily15.html> (revealing that backdoor negotiations had resulted in the largest employer in Dayton being seduced to move out of state); Josh Sanburn, *Why is Texas Governor Rick Perry in Illinois?*, *TIME* (Apr. 24, 2013), <http://business.time.com/2013/04/24/why-is-texas-governor-rick-perry-in-illinois/>.

“exit fatigue”⁵⁰ usually prevents the individual from risking a second move if unfavorable state policies are adopted subsequent to relocation, or if the individual has misjudged what the state has to offer.⁵¹ Studies have shown that exit is a privilege afforded to those who are less dependent on the community services, which hurts poorer minorities who may be limited in their choice of communities.⁵² Perhaps the most sinister possibility implicit in absolute state sovereignty is the potential for a government to induce exit of groups of disfavored individuals⁵³ and businesses⁵⁴ when the Supreme Court determines the class falls outside the protections of the Bill of Rights.⁵⁵

B. *The Federalism Evolution*

Progressives warming to the notion of federalism⁵⁶ seek to transform the formalist approach in a way analogous to the evolution of horizontal interaction between the federal branches.⁵⁷ In that context, the strict normative division of power between the federal branches has

50. Hirschman, *supra* note 22, at 449.

51. Hirschman further suggests that an inflated sense of loyalty to the new location often results from the costs of migration, which can contribute to the unwillingness to risk a second exit. *Id.*

52. One survey conducted in Columbus, Ohio found that blacks who lacked the mobility of whites were more likely to stay and express their discontent—this was not simply because of the fiscal mobility costs, but the lack of mobility caused by the constraints of *de facto* segregation. John Orbell & Toru Uno, *A Theory of Neighborhood Problem Solving: Political Action vs. Residential Mobility*, 66 AMER. POL. SCI. REV. 471, 484 (1972).

53. Arizona has gained notoriety in its open attempts to induce “voluntary deportation” for non-citizens and legislation targeting gay and lesbian citizens. S.B. 1070, 49th Leg., Reg. Sess. (Ariz. 2010); Hadia Hakim, *Support for Arizona-Style Immigration Bills Spreads During Gubernatorial Elections Despite U.S. v. Arizona Ruling*, 25 GEO. IMMIGR. L.J. 237, 241 (2010); Ann Morse, *Arizona’s Immigration Enforcement Laws Introduction*, NAT’L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org?tabid=20263> (last visited Oct. 8, 2010); *see also* Sean Sullivan, *With Gay Discrimination Bill, Arizona Gov. Brewer Again Finds Self at Center of Standoff*, WASHINGTON POST (Feb. 27, 2014), http://www.washingtonpost.com/politics/with-gay-discrimination-bill-arizona-gov-brewer-again-finds-self-at-center-of-standoff/2014/02/27/d727bf0e-9fef-11e3-a050-dc3322a94fa7_story.html/.

54. Businesses that provide certain reproductive health services are the most obvious example of targets for exit. Adam Liptak, *Justices Reject Bid to Block Texas Law on Abortions*, N.Y. TIMES (Nov. 20, 2013), at A13.

55. *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986) (“Precedent aside, however, respondent would have us announce, as the Court of Appeals did, a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do.”), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

56. Gillian E. Metzger, *Federalism Under Obama*, 53 WM. & MARY L. REV. 567, 569 (2011) (“Federalism under the Obama Administration is federalism in service of progressive policy, not a general devolution of power and resources to the states.”).

57. Gerken, *supra* note 6, at 8 (“We don’t even have a name for its alternative, let alone a fully theorized cognate to the checks and balances approach.”); *see also* Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1071 (“Once we explicitly recognize that laissez-faire capitalism was *legitimately* repudiated by a process of structural amendment

thawed over time in favor of a “checks and balances”⁵⁸ approach. This theory of horizontal power establishes “multiple heads of authority in government” and pits them against one another in a continuous struggle to prevent the consolidation of power while allowing the government as a whole to carry forward their mutual interests.⁵⁹ If this game of tug-of-war explains an inclusive method of effective horizontal governance, can it be applied to the vertical distribution of power?⁶⁰

In practice, there is more flexibility in the relationship between states and the federal government. The process⁶¹ used in decision-making carries a greater weight than formal divisions in establishing legitimacy, and the courts are generally reluctant to police the boundaries of power. Our state and federal governments routinely work together to fund and administer complicated and pragmatic solutions to big problems⁶² without the concern of confusing the electorate that has justified selective Supreme Court interference in recent years.⁶³ The federal government has thrust itself into the administration of state election law through oversight when there is a compelling interest.⁶⁴ It has taken an even more direct role in state-run healthcare exchanges under the

culminating in the 1930s, we are no longer obliged to save the welfare state at the cost of trivializing the process of legal interpretation.”).

58. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (“While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.”); *THE FEDERALIST* No. 51, at 251–52 (James Madison) (Clinton Rossiter ed., 2003) (“Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature that such devices should be necessary to control the abuses of government.”); *but see* *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (striking down the jurisdiction of a legislatively created bankruptcy court under formalist principles).

59. Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 *COLUM. L. REV.* 573, 578 (1984).

60. A theory of vertical checks and balances is not wholly irreconcilable with recent Supreme Court precedent. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2604 (2012) (“The independent power of the States also serves as a check on the power of the Federal Government.”).

61. Calvin R. Massey, *Etiquette Tips: Some Implications of Process Federalism*, 18 *HARV. J.L. & PUB. POL’Y* 175 (1994).

62. We see this routinely with health services, emergency FEMA relief, transportation projects, and education programs.

63. *New York v. United States*, 505 U.S. 144, 169 (1992) (“Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.”).

64. The Supreme Court recently struck down part of the Voters Rights Act. *PUB. L. NO. 102-166*, 105 *STAT.* 1101 (1991) (codified as amended in scattered sections of 2, 16, 29 & 42 U.S.C.); *Shelby County, Ala. v. Holder*, 133 S. Ct. 2612, 2627–28 (2013) (“Racial disparity in those numbers was compelling evidence justifying the preclearance remedy and the coverage formula There is no longer such a disparity.”).

Affordable Care Act,⁶⁵ issuing substantive policy mandates on the recognition of same-sex marriages on the exchange and strongly encouraging states to recognize same-sex couples in the context of Medicaid.⁶⁶ And in the courts below, federal district court judges serve as mediators between “sovereigns” as members of both communities, empowered to “check” state laws that unbalance shared power.⁶⁷

The relationship between federal and state governments is more give-and-take, as states can flex their muscles and assert autonomy through influence in the federal political process or tweak the implementation or effect of federal law through state statute or cooperation with the administrative state.⁶⁸ Many new theories of federalism⁶⁹ attempt to describe this symbiotic matrimony between state and federal government; they are admittedly an improvement on formalism but share common weaknesses. First, weakening sovereignty among the states leads to greater uniformity that undermines the effectiveness of exit. Second, the relative weakness of local governments compared to the “quasi-sovereign”⁷⁰ state continues to minimize the importance of minority voices allowing plenary authority to override dissenter participation.

Concentration of power in the hands of the state allows plenary intrusions at the local level when a state majority disfavors policy or populations. The problem stems from the fact that municipalities are legally recognized as creations of the state that are inherently destructible at will.⁷¹ Should states be allowed to dismantle cities just because

65. Patient Protection and Affordable Care Act (“Affordable Care Act”), PUB. L. NO. 111-148, 124 STAT. 119 (to be codified in scattered sections of 42 U.S.C.).

66. *CMS Issues Guidance Concerning Same-Sex Marriages*, HEALTHREFORMGPS (Oct. 1, 2013), <http://www.healthreformgps.org/resources/cms-issues-guidance-concerning-same-sex-marriages/>.

67. See U.S. CONST. art. VI, cl. 2. Similar checks occur when federal judges invalidate local policies that violate individual rights. See, e.g., *Floyd v. City of New York*, 739 F. Supp. 2d 376 (S.D.N.Y. 2010) (striking down New York’s controversial Stop-and-Frisk policy).

68. Medicaid expansion and bankruptcy applications of state exemptions are two obvious examples. See, e.g., Samantha Artiga, *Kaiser Comm’n on Medicaid & The Uninsured, The Role of Section 1115 Waivers in Medicaid and CHIP: Looking Forward and Looking Back* 5 (2009), available at http://www.dhcs.ca.gov/provgovpart/Documents/Waiver%20Renewal/The%20Role%20of%20Section%201118%20Waivers_Mar2009.pdf (discussing different waiver programs under Medicaid); see also Gerken, *supra* note 6, at 8–9.

69. “Put simply, cooperative federalism involves the sharing of authority between federal and state agencies, often leaving state agencies with discretion to implement broad federal policy goals, binding criteria, or guidelines.” Phillip J. Weiser, *Cooperative Federalism and Its Challenges*, 2003 DET. C.L. MICH. ST. U. L. REV. 727, 728–729 (2003); see also Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663 (2001).

70. Harry N. Scheiber, *Redesigning the Architecture of Federalism—An American Tradition: Modern Devolution Policies in Perspective*, 14 YALE L. & POL’Y REV. 227, 230 (1996).

71. See generally *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907) (allowing the state legislature to pass a bill dissolving and merging two cities against the will of local constituents); see also *Koontz v. City of Winston-Salem*, 186 S.E.2d 897, 902 (1972) (deciding a municipality

they are not protected by home-rule⁷² in the state constitution? Imagine if the legislature of Texas voted to dissolve Houston, the fourth largest city in the United States.⁷³ Localists defiantly call for municipal sovereignty⁷⁴ as a parallel solution to federalism, but this pushes the problems of formalism down to intra-municipal communities.⁷⁵ Progressive federalist theorists take a different approach, having seen the merit in the diffusion of power. Its advocates have taken decentralization a step further, abandoning the sacrosanct idea of sovereignty altogether in favor of a free-market democracy where dissenters can exert more influence from the bottom up.⁷⁶

C. *Free Market Political Discourse: The Theory of Progressive Federalism*

By shedding the rigid constraints of sovereignty, progressive federalism strengthens the potential power of voice and exit for dissenters and their communities. The vertical system of checks and balances complements the horizontal, resulting in a squishy conception of power that flows in two dimensions.⁷⁷ Eliminating sovereignty enables dissention through participation by imagining vertical power as intricately connected along a continuum,⁷⁸ from the federal government at the very top, all the way down past the smallest special purpose sub-local institutions, where individual citizens administer policy.⁷⁹ This decentralization of

has only such powers as the legislature confers upon it). Dillon's Rule, observed by many state courts, traditionally has treated the powers of municipalities as extremely limited. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS, § 237 (5th ed. 1911) ("[A] municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation, not simply convenient, but indispensable.").

72. States can take affirmative steps to protect municipalities from their own intrusion through home rule. See, e.g., FLA. CONST. art. VIII, § 6 (providing substantial freedom to counties pursuant to home rule).

73. Admittedly, Houston is protected by Home-Rule. *Houston, (city) Texas*, U.S. CENSUS BUREAU, available at <http://quickfacts.census.gov/qfd/states/48/4835000.html>.

74. Gerken, *supra* note 6, at 23–28.

75. For a look at what selective local sovereignty can do to minority communities, see D. MARVIN JONES, *FEAR OF A HIP-HOP PLANET: AMERICA'S NEW DILEMMA* (2013).

76. Gerken, *supra* note 6, at 23–28.

77. See *id.* at 8.

78. This has in part been forged by the increased symbiotic relationship between all levels of government. States depend deeply on block grants and federal monies for their survival, just as the federal government depends on the state governments to administer these programs.

79. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2578 (2012) ("Because the police power is controlled by 50 different States instead of one national sovereign, the facets of governing that touch on citizens' daily lives are normally administered by smaller governments closer to the governed."); Gerken, *supra* note 6, at 27 ("Even substate and sublocal institutions that possess considerable direction are understood to be administrative units of the state

power allows us to envision groups with minority views or interests challenging policy directives through their role in administration by demonstrating their disloyalty to the system.⁸⁰

Empowerment through disloyalty is a “more muscular variant” of voice,⁸¹ which provides a direct opportunity to citizens from their role in civic administration and participation. As “insiders,” the strength of voice goes beyond voting or protest—it is buoyed by “the power to act—the ability to tweak, adjust, even resist federal policy” because of the interdependence inherent in government administration.⁸² In this way, progressive federalism assumes that dissenting communities and voices improve and increase the debate and discussion in our policymaking by giving minority views a platform.⁸³

Heather Gerken, perhaps the most avid proponent of progressive federalism, points to recent policy successes that can be better explained by this paradigm.⁸⁴ In California, community pressures on the San Francisco Mayor led him to order the issuance of marriage certificates to same-sex couples in violation of state law, unleashing a surge of debate, education, and eventual support for same-sex marriage.⁸⁵ Lower-profile county clerks throughout the country have followed suit, defiantly using their administrative positions to test state bans by issuing marriage certificates to same-sex couples.⁸⁶ Jury nullification⁸⁷ in places like Colorado affords an opportunity for dissenters to use voice in preventing the

These institutions can be quite powerful, but the power they wield is not their own Special purpose institutions, in short, provide minorities with a chance to exercise voice inside the system, not to set policy outside it.”).

80. Gerken, *supra* note 8.

81. Gerken, *supra* note 6, at 14.

82. *Id.* at 46.

83. Gerken describes the struggle as “the democratic churn necessary for an ossified national system to move forward.” *Id.* at 10. See also Richard Florida, *The Economic Geography of Talent*, 92 ANNALS ASS’N AM. GEOGRAPHERS, 743 (2002) (arguing that minority groups and economic diversity drive innovation and creativity in urban areas in business and government).

84. See Gerken, *supra* note 6, at 41–43.

85. In re Marriage Cases, 43 Cal. 4th 757, 183 P.3d 384 (2008); Gerken, *supra* note 6, at 62 (“Consider, for instance, how different San Francisco’s efforts to marry same-sex couples looked from the bread and butter activities of other proponents of gay marriage. The city made the case for same-sex marriage in a way that abstract debate could never achieve. Beamed into all of our television sets were pictures of happy families that looked utterly conventional save for the presence of two tuxedos or two wedding dresses.”).

86. Mark Scoloro, *Pennsylvania Judge Orders Clerk To Stop Issuing Gay Marriage Licenses*, HUFFINGTON POST (Sept. 12, 2013), http://www.huffingtonpost.com/2013/09/12/pennsylvania-judge-gay-marriage_n_3914587.html.

87. The doctrine of jury nullification is based on community dissent where juries can push back on the law through refusal to observe it. See Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L. J. 677 (1995) (arguing that jury nullification allows African-Americans to decide when African-Americans should be punished in the larger system of justice).

enforcement of federal laws on marijuana that are incongruous with community views. More generally, Gerken envisions PTA members, state bureaucrats, local prosecutors,⁸⁸ and police officers empowered by their positions as participants to vocalize dissent through delay or modification of policy directives in order to push back on the normative “center.”⁸⁹ If they can gain support, perhaps they can convince others to use their voices too. What decentralization catalyzes is a vigorous marketplace of ideas to foster public debate between minority groups.⁹⁰

The tug-of-war between smaller and smaller units unbound from sovereignty may also revitalize the potential usefulness of exit by promoting natural free-market variance driven by community standards.⁹¹ This effectively lowers the cost of “foot voting” in a number of ways. First, more ideas in practice mean more selection for the citizen/consumer, a concept directly stemming from the bolstering of the marketplace of ideas.⁹² Second, access to meaningful choices moves closer to home, decreasing the cost of physically moving if a state gives communities more autonomy. Third, the availability of choice promotes a greater flexibility in selection, allowing citizens to maintain the benefits of policies they agree with while leaving the ones they dislike across town. Finally, this free-market administrative approach paves the way for more choice through private ordering and non-government alternatives,⁹³ as diffusion of power allows greater penetration.

But these non-government organizations play a much greater role than providing an exit to hold officials accountable. Exogenous organizations can exercise voice to exert pressure on the system of governance. Left unchecked, private organizations can have a great impact on the delicate system of checks and balances along the vertical and horizontal planes of power. Progressive federalism’s failure to explore monied voices outside of government leaves a gaping hole in the paradigm. These non-government organizations often check and balance themselves using their voices to push on policy debate.

88. These actors use their powers to re-interpret law before enforcing it. A good example is prosecutorial discretion on the enforcement of marijuana laws in Washington State, which is still a violation of federal law. Judd Legum, *After Passage of Legalization Initiative, 220 Marijuana Cases Dismissed in Washington State*, THINK PROGRESS (Nov. 10, 2012), <http://thinkprogress.org/justice/2012/11/10/1176151/after-passage-of-legalization-initiative-220-marijuana-cases-dismissed-in-washington-state/>.

89. See Gerken, *supra* note 6, at 8–9.

90. *Id.* at 61–62.

91. See Somin, *supra* note 19.

92. *Id.*

93. *Id.* at 30.

III. WHY PROGRESSIVE FEDERALISM IS INCOMPLETE

Progressive federalism's primary failure is an economic one. Through decentralization, the theory purports to allow "local dissenters to join together and put policies into place."⁹⁴ From this minority rule, it hopes to provide opportunities to exercise voice in policymaking to foster political and economic participation. However, this "laissez-faire" approach to decision-making ignores the relative cost of the several forms of voice and ultimately perpetuates economic inequality. This results in a disparity between groups of dissenters—who require a certain degree of cohesion—in their attempts at consensus building, else their ideas fizzle and die. Such market failure can lead to a disproportionate influence in policymaking.

A. *The Measure of Voice*

Albert O. Hirschman conceded that part of the reason that voice was a challenging concept for economists was the inherent difficulty in evaluating it with metrics.⁹⁵ While exit allows us to take a head count to see how many supporters are left standing in our camp, voice has an illusory quality in the way it exerts pressure in the tangled web of governance.⁹⁶ Our democratic avenues for expressing disapproval of policy through voice—elections, freedom of speech, and civic participation in administration—each come at a price. It is easier to count the fiscal costs, where putting a dollar value on time, reputation, and risk makes analysis difficult.

Taking the pulse of each of these outlets is obscured by other factors. Hirschman posits that many who sit on the sidelines quietly do not do so from apathy and may share the sentiments of those already voicing displeasure, but the relative cost of participation trumps the benefits of jumping in and bolstering the presence and power of like-minded citizens.⁹⁷ While the nation has trended in the direction of meaningful⁹⁸ and increased participation⁹⁹ in the democratic process, the planned and peri-

94. Gerken, *supra* note 5, at 43.

95. In the context of the firm, we can measure the number of respondent's willing to review the product, but this is not available with the state. See Hirschman, *supra* note 22, at 431.

96. Hirschman, *supra* note 22, at 433.

97. *Id.* at 432–33. This might also explain Richard Nixon's appeal to the "silent majority" in his election.

98. See, e.g., U.S. CONST. Amend. XVII (requiring the direct election of United States Senators by a popular vote); U.S. CONST. Amend. XXIV (eliminating poll taxes); Eric Lipton & Ian Urbina, *In Five Year Effort, Scant Evidence of Voter Fraud*, N.Y. TIMES (Apr. 12, 2007), <http://www.nytimes.com/2007/04/12/washington/12fraud.html> (discussing a Department of Justice investigation under President George W. Bush turning up virtually no evidence of organized voter fraud in federal elections).

99. See, e.g., U.S. CONST. amend. XIX (granting female suffrage); U.S. CONST. amend. XV

odic nature of elections is not an organic snapshot. Voters may harbor strong or weak feelings about their choice, and they may or may not be casting their vote based on information.¹⁰⁰ It is even harder to quantify the impact and costs of dissent through administrative participation and noncommercial free speech, but common sense tells us that an individual's resources of time and reputation are generally not unlimited. We know that a disloyal administrator's power comes from his ability to convince others to join him, which makes his influence dependent on grassroots geographic support. But how do these grassroots resources stack up against fiscal resources?

Money and free speech share an awkward equivalency¹⁰¹ in an era where the rights to associate and assemble have been scaled back.¹⁰² Because political money has been interpreted as a manifestation of voice, it joins the list of feedback mechanisms to provide guidance to government. Political money is given to candidates or issue groups to pay for the costs of lobbying and advertising. Unlike the human capital expended in other forms of voice, money is measurable, fungible, and not path dependent. The result is a commoditized version of voice that meshes poorly with a paradigm where minority political power is supposed to originate in organic clusters of dissenters.

B. *Money Talks*

Progressive federalism is incomplete because it pits minority groups whose strength comes from their physical proximity against those who can intrude with cold hard cash. The Supreme Court has prioritized monetary speech over the rights to associate and assemble,¹⁰³ which hampers the exposure of non-monied minority groups seeking to build support from the bottom-up. Organized money can flow from non-governmental exogenous private entities or from within the government itself in order to shape policy. The fungible nature of money means that

(granting suffrage to persons of all race); U.S. CONST. amend. XXVI (enfranchising adults over the age of 18).

100. Proponents of exit tend to point to the futility of elections for the individual. They believe that the unlikelihood of casting the deciding vote disincentives a well-researched decision, breeding a "rational ignorance" and reducing elections to a sport between "political fans." See Somin, *supra* note 19, at 7-9.

101. *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) ("[R]estriction on the amount of money a person or group can spend on political communication during a campaign, necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.").

102. Ashutosh Bhagwat, *Associational Speech*, 120 *YALE L.J.* 978, 982, 1029 (2011) (proposing that assembly, petition, and association are at least as central to the process of self-governance as free speech and that the Supreme Court's tendency to treat them as subordinate is wrong).

103. *See id.*

geographically disconnected outsiders can assert a disproportionate influence by theoretically limitless expenditures.¹⁰⁴

Money is not constrained by geography or personhood. Private organizations¹⁰⁵ or state officials may target a community for policy change, and if left unchecked, their influence can quickly overwhelm the grassroots minority clusters that progressive federalism romanticizes. Their mission is buoyed by the perceived value in advocacy, because an actor's belief that their actions will lead to a greater social good breeds an increased willingness to exert voice.¹⁰⁶ If this principle applies to money as voice, it fosters evangelization of particular policies through injection of capital.

Members of these private groups can remain anonymous,¹⁰⁷ eliminating reputational cost from the equation. This frees them from public accountability for how they exert pressure and allows the unchecked and willful proliferation of misinformation.¹⁰⁸ They enjoy a further advantage in that they are unhindered in their mobility or dependence on a community. The nature of their "speech" means that, in terms of resources, their political money maintains a competitive advantage in the arena of voice.

Monied advocates can attempt to win the "hearts and minds" of a community through repetition of their message. These organizations are particularly efficient in the art of shifting public opinion, so a deluge of

104. In *Citizens United*, Justice Kennedy warned of a "chilling effect" on free speech if IE's had limitations to how much money they could raise. *Citizens United v. FEC*, 558 U.S. 320, 350 (2010) ("Limits on independent expenditures, such as §441b, have a chilling effect extending well beyond the Government's interest in preventing quid pro quo corruption. The anticorruption interest is not sufficient to displace the speech here in question.").

105. Through several decisions, the Supreme Court curbed limits on contributions to so-called "Independent Expenditure" political action committees, ruling that free speech (for corporations, organizations, and individuals) outweighed the governmental interest of stemming pay for play corruption. See *McConnell v. FEC*, 540 U.S. 93, 118 (2003) (defining political action committees as "separate segregated funds . . . for election-related contributions and expenditures"), *overruled on other grounds* by *Citizens United v. FEC*, 558 U.S. 310 (2010).

106. Hirschman, *supra* note 22, at 434 ("[D]eterioration in the taste of a firm's food product will give rise to exit; but the presence of a health hazard will lead to voice.").

107. See *Buckley v. Valeo*, 1 U.S. 42 (1976) (drawing a distinction between express advocacy for a particular candidate and issue advocacy, which was supposedly sufficiently attenuated from actual candidates to prevent direct corruption). For a primer on campaign-finance law and PAC corruption, see Richard Hansen, *Of Super PACs and Corruption*, POLITICO (Mar. 22, 2012), <http://www.politico.com/news/stories/0312/74336.html>. For more on how the Court has misjudged the possibility of corruption, see Esther Houseman, Note, *Citizens United v. FEC: Departure From Precedent Opens the Gate to "Phantom" Political Speakers*, 70 MD. L. REV. ENDNOTES 50 (2011).

108. This is especially true as economies of scale have continued to decimate accurate and legitimate local news coverage. See Tim Worstall, *Not the Solution to the Newspaper Industry Going Bankrupt*, FORBES (Sept. 25, 2012), <http://www.forbes.com/sites/timworstall/2012/09/25/not-the-solution-to-the-newspaper-industry-going-bankrupt/>.

cash can cripple the voices of community activists and dissenters.¹⁰⁹ They can bombard the airwaves and exploit an electorate in ways that make them seem dominant. This in turn can distort the marketplace for truth by biasing public opinion¹¹⁰ and destroying the effectiveness for grassroots dissent before it congeals into something viable. This concern extends to contributions made on behalf of candidates. While at the national level, competing monied voices might fight to a draw, the influence of monied minorities grows stronger the further down one looks. According to Professor David Parker:

Voters have far less information at these local elections. There's a lot less money that's being spent on these elections already, so if you have a big gorilla come into town and drop a lot of cash—lets say \$100,000, \$200,000 in that race—I think the effect there could be much more tremendous than at the federal level.¹¹¹

The relative cost of voice in administrative dissention, free expression, or even voting simply cannot compete with the fiscal intrusion. Using money, private groups can seek to sway opinions of the polity, and the actions of the elected.¹¹² But money from outside groups and minority voices are not the only sources that can endanger participatory voice. Analogous fiscal interference can come from inside the government and do as much damage to the expression of voice as money from non-government groups.

C. Money Listens

Money from within the government can compete with participatory forms of voice in ways that overwhelm or silence minority dissent. Heather Gerken describes the decision-making process for dissenting communities as independent and pragmatic: “They can pass a law the

109. Today's modern public relations campaign is a science where tested polling finds the right phrases where repetition will create credibility and drown out the established minority-positions that have flourished at the local level. See Hana Kim, *Repetition Effect of Positive and Negative Political Advertising with the Presence or Absence of Disclaimer: Recall, Attitude, and Voting Intention*, UNIV. OF GEORGIA (2005), available at http://athenaeum.libs.uga.edu/bitstream/handle/10724/8407/kim_hana_200508_ma.pdf; see also NAOMI ORESKES & ERIK M. CONWAY, *MERCHANTS OF DOUBT* (2011) (describing methods used for minority voices from the tobacco and energy lobby to change the mind of the public).

110. C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. Rev. 964, 974–78 (1978) (“Emotional or “irrational” appeals have great [impact]. . . the marketplace of ideas appears improperly bias in favor of presently dominant groups.”).

111. *Frontline*, *supra* note 12.

112. Lobbyists and major donors can exert pressures in how policy is implemented by threatening to finance a competitor in the next election. See Senator Al Franken, *If You Ever Wonder Whether We Really Need Public Financing of Elections in this Country*, HUFFINGTON POST (Jun. 4, 2007), http://www.huffingtonpost.com/al-franken/if-you-ever-wonder-whethe_b_50344.html (discussing the disproportionate amount of time politicians spend raising money rather than legislating).

federal government refused to pass, as did California in enforcing pollution mandates. Or they can refuse to implement law the federal government has passed, as states did with environmental enforcement mandates.”¹¹³ But the power of the purse can distort this simplicity. It is a trump card, carrot, and stick all at once.

Competitive grant programs sponsored by the federal government encourage state administrators to play politics with money, often at the expense of dissenters.¹¹⁴ On the national stage, states have been known to try using federal grants to lure businesses away from neighboring states.¹¹⁵ Closer to home, state politicians with “majority views” can strategize on the best ways to boost their chances of re-election by accepting or rejecting funds. Local administrators below who depend on these funds become more loyal to their superiors, trying their best not to get cut out of the loop. Governments can leverage these funds to exert a disproportionate voice on policy implementation at a very local level, firing or removing disloyal administrators from meaningful positions in the process.

When federal money is rejected,¹¹⁶ there is little recourse for minority communities. Rejection of funding usually disproportionately affects the dissenting or disadvantaged minority because it represents a means for the majority in power to maintain influence. On the other hand, if the money is accepted, the money is channeled to communities who have been the most loyal allies to the administration and withheld from those who have been difficult—even in an emergency situation.¹¹⁷ Once again, the disruptive voice of the non-monied dissenter can do little to get a piece of the action and is silenced by the competitive advantage of money. Dissenting voices are stuck in a catch-22, held hostage to loyalty due to fiscal dependence, and communities that are more dependent on funds inherently have less of a sway. But in situations where minority-rule is achieved and there is substantial autonomy, what happens when the community falls on hard times?

113. Gerken, *supra* note 6, at 65–66.

114. Dyson, *supra* note 11.

115. Conor Dougherty, *Are Incentives Smart Business or a Race to the Bottom?*, WALL ST. J. (July 13, 2009), <http://blogs.wsj.com/economics/2009/06/13/are-incentives-smart-business-or-race-to-the-bottom/> (detailing National Cash Register Company’s plan to move from Ohio to Atlanta for tax breaks, using stimulus money to finance their move and new headquarters).

116. Timothy Williams, *Florida’s Governor Rejects High-Speed Rail Line, Fearing Cost to Taxpayers*, N.Y. TIMES (Feb. 17, 2011), at A20; Gary Stein, *Committee Chair May Stonewall Medicaid Expansion Bills Early in FL*, HUFFINGTON POST (Mar. 14, 2014), http://www.huffingtonpost.com/gary-stein/committee-chairs-medicaid-florida_b_4959259.html.

117. Rosalind S. Helderman, *Mayor of Hoboken, N.J.: Christie Aides Tied Sandy Fund Requests to Support for Project*, WASHINGTON POST (Jan. 18, 2014), http://www.washingtonpost.com/politics/hoboken-mayor-christie-aides-tied-sandy-fund-requests-to-support-for-project/2014/01/18/d6f63e86-805d-11e3-9556-4a4bf7bcbd84_story.html.

D. *Money Destroys: A Hostile Takeover in the Spartan State*

The last thing you want to do when you are an Emergency Manager is to have democratic participation in the process of governance.

—Michael Stampfler, Former Emergency Manager, Pontiac, Michigan¹¹⁸

A major hole in the theory of progressive federalism is the lack of protection for minority-run communities from hostile takeovers for economic gain. Michael Stampfler gave a refreshingly candid response when asked how much effect voices in the community had on the policymaking process under the state receivership law.¹¹⁹ State receivership allows the state government to intervene directly in the municipality's affairs with varying degrees of severity.¹²⁰ While dozens of municipalities have come in and out of receivership since the 1970s,¹²¹ the newest iteration of this type of law gives unprecedented discretion to governors and their appointed agents.

A disconcerting pattern has emerged in the execution of these policies. Communities deemed eligible for this sort of hostile takeover are generally under minority rule, politically out of step with the governor, and lack the economic power at the state level to defend themselves.¹²² The plenary powers¹²³ of the appointee go far beyond the local democratically elected officials they replace: "I always took it that the Emergency Manager could do whatever [he] wanted to get the numbers right."¹²⁴ These powers extend to the ability to sever contracts, sever existing collective bargaining agreements, contract out public services, sell public assets, and cancel local programs.¹²⁵ In short, the Emergency Manager is empowered to remove citizens from having an administra-

118. Michael Stampfler was one of several persons appointed to an Emergency Manager position when the state of Michigan used the recession of 2008 to grant unprecedented emergency powers through state receiverships to the executive branch. Telephone Interview with Michael L. Stampfler, Former Emergency Manager of Pontiac, Michigan (Feb. 6, 2013).

119. Local Government and School District Fiscal Accountability Act, Mich. Comp. Laws §§ 141.1501–31 (2011) (repealed by state referendum in 2012). While the law has since been repealed by referendum, the state legislature has quickly passed an alternative with only a slightly smaller changes, this time attached to a non-severable appropriations bill so it cannot be repealed. See Laura Clawson, *Michigan House Passes New Version of Emergency Manager Law Repealed by Voters*, DAILY KOS (Dec. 13, 2012), <http://www.dailykos.com/story/2012/12/13/1169517/-Michigan-House-passes-new-version-of-emergency-law-repealed-by-voters>.

120. See David R. Berman, *Takeovers of Local Governments: An Overview and Evaluation of State Policies*, 25 PUBLIUS J. FEDERALISM 55, 57–64 (1995).

121. Michelle Wilde Anderson, *Democratic Dissolution: Radical Experimentation in State Takeovers of Local Governments*, 39 FORDHAM URB. L.J. 577, 584 (2011).

122. *Id.* at 590.

123. MICH. COMP. LAWS § 141.1515(4) (2011) (subsequently overturned by popular referendum in 2012); Anderson, *supra* note 121, at 580.

124. Stampfler, *supra* note 118.

125. See Anderson, *supra* note 121, at 580.

tive stake in governance and handpick private corporations to profit in their place.

The majority that governs the state has the ability to use its voice and execute an economic “changing of the guard” in communities dominated by persons with dissenting views. They do so by empowering the governor to delegate a manager, who conducts a fire sale of the local assets and contracts without consequences, cloaked in a statute of immunity.¹²⁶ The plenary powers of the position mean that dissenting administrators or unions that otherwise might try to push back on the autocratic rule through disloyalty could quickly find themselves unemployed or losing their pension as punitive repercussions. A manager’s immunity means that a jury from the community will never get a chance to push back on perceived abuses.

After eliminating self-determination, the state does not provide any direct economic relief¹²⁷ or structure for long-term recovery. The usual state of affairs involves selling the city assets off piece-by-piece: “They abrogate the civic structure of the community for a period of years then return it virtually dismantled for the community to attempt to somehow make a go of it.”¹²⁸ The perverted motivation behind the law places blame for municipal economic issues almost solely on the municipality’s elected representatives,¹²⁹ reasoning that if the state can take the city out of the way, its strong-handed autocrat will garner more efficiency from the same budgetary resources.¹³⁰

This tool allows governments and private organizations to scapegoat and exploit a community for monetary gain. Economically, what makes minority-rule valuable for growth is a feedback loop where voices holding minority views empower leaders, who pass the power of voice back to their community in the form of contracts and opportunities for public employment. Progressive federalism agrees that economic progress in African-American communities has turned on business set-asides, affirmative action, and government employment.¹³¹ But it does

126. It should also be noted that the Emergency statutorily allowed immunity from suit for his actions in office. MICH. COMP. LAWS § 141.1515(4) (2011).

127. Anderson, *supra* note 121, at 588–89.

128. Michael Stampfer, an experienced town manager, continues to speak out about particular failures of emergency manager laws. Jason Alley, *Former Emergency Financial Manager Will Speak in Wyandotte; Says Emergency Manager Law ‘Is Failing’*, WYANDOTTE PATCH (Apr. 24, 2012), <http://wyandotte.patch.com/articles/former-emergency-financial-manager-will-speak-in-wyandotte-says-emergency-manager-law-is-failing>.

129. See Anderson, *supra* note 121, at 582.

130. *Id.* at 606 (“Centralization of power by the state on these terms does not ameliorate structural causes of financial distress, like concentrated poverty, the loss of middle-class jobs across a region, or local borders that fragment a single metropolitan area into socioeconomically segregated cities.”); see *id.* at 582.

131. Gerken, *supra* note 5, at 41.

not contemplate how economic voices and pressures can lead the majority to scapegoat, initiate a hostile takeover of, and loot the systems where minorities rule. The broadness and completeness with which it removes minority voices from participation resembles something bordering on imperialism. If we imagine money as voice, the logic would go something like this: you cannot be trusted with the voice you have amassed, so we will appoint a guardian to distribute it until you start over.

Political pressures on the Emergency Manager from the outside are unsurprisingly described as “enormous.”¹³² The overtly political nature of these appointments can be inferred from the fact that Emergency Managers like Michael Stampfler are often removed from duty when the gubernatorial responsibilities change hands.¹³³ Appointment serves to centralize power all the way up to the state level.¹³⁴ In Michigan, phone calls from the Deputy State Treasurer, whose boss is appointed by the Governor, are not uncommon to make powerful “suggestions” on how the Emergency Manager should do his job.¹³⁵ And sometimes, adding insult to financial injury, persons are appointed with no management experience at all.¹³⁶

The suspension of meaningful endogenous democratic participation means residents’ only remaining outlet for voice is to complain to an unsympathetic governor and legislature or take their battle to the courts. But the latter option is complicated further by financial issues because provisions in these laws often force the municipality to pay all legal defense fees out of their budget, further exacerbating the problem that led to state receivership in the first place.¹³⁷

Essentially, this process purports to serve the fiscal needs of the state and neighboring “majority” towns, but the selection is arbitrary, and when money is at stake, dissenting populations are the ones who lose. Michigan’s law is a tragic silencing of minority participation where outside economic interests undermine the power of voice. The assumption that non-minority Emergency Managers can perform better on the job than local elected officials lacks a rational explanation. What follows are short term political pressures to post good numbers, which in prac-

132. Stampfler, *supra* note 118.

133. *See id.*

134. Anderson, *supra* note 121, at 602.

135. Stampfler, *supra* note 118.

136. *See* Shaun Byron, *Three Financial Managers Later, Is Pontiac Better off Today?*, OAKLAND PRESS (Feb. 8, 2012), http://www.conwaymackenzie.com/documents/2-8-12_Oakland_Press_Pontiac.pdf (indicating rampant political changes in personnel in Pontiac, Michigan under the Emergency Manager Law).

137. MICH. COMP. LAWS § 141.1515(4) (2011).

tice lead to sales of assets that cripple the municipality in the long term. After all, “you don’t want the town to go bankrupt, so you try to prop it up however you can so the Emergency Manager can say everything is okay,”¹³⁸ and the governor can take credit for putting a Band-Aid on localities that are a “net drain,” fiscally speaking, on the state.

But there are winners in this situation. And where there are winners, there is an incentive to lobby for government receivership. Private corporations stand to gain enormously if they have been shut out of the bidding process by a minority-rule community for a number of years. Those who secure private contracts from the Emergency Manager get to “enter” the community as economic players, taking ownership without the hassle of dissenters in administrative roles. This kind of “economic raiding” forcibly inserts new players into “servant positions” of the polity through private contracts, and the animosity it leaves behind may never fade. One must wonder to what degree the lobbyists pressure the state to intervene, and if in turn, the governor pressures the Emergency Manager to use his power to cancel municipal contracts, negotiating new long-term ones that reward campaign donors and political allies for their loyalty. In this battle between money and organic voice, there is no question which side’s relative strength prevails.

Michael Stampfler summed it up best: a private corporation with the right financial incentives can rip off a town just as easily as public unions. When we measure the benefits of receivership to the community, there are usually none.¹³⁹ But the ease with which money conquers other forms of participatory voice in this case study shows us that when it comes to progressive federalism, there is room to improve the model.

IV. EXTENDING PROGRESSIVE FEDERALISM: FEDERALISM OF THE FUTURE?

Progressive federalism deserves praise for its bold willingness to collapse the formalist strictures of sovereignty. In our highly connected information age,¹⁴⁰ the relevance of borders continues to fade away in favor of participation, collaboration, and discussion. Surveys of American Millennials have revealed that the generation’s increased levels of diversity are accompanied by an ebbing of sympathies for nationalist

138. Stampfler, *supra* note 118.

139. “You go through all the motions, but most of the time it can’t be fixed.” *Id.*

140. Business theorist Peter Drucker theorized that the effect of computers and the Internet would be on the same scale as the railroad or printing press when it came to how we conduct business. Peter F. Drucker, *Beyond the Information Revolution*, THE ATLANTIC (Oct. 1999), <http://www.theatlantic.com/magazine/archive/1999/10/beyond-the-information-revolution/304658/>.

policies.¹⁴¹ In the context of globalism, there may be a way to push federalism all the way up¹⁴² by softening the formalist embrace of international sovereignty to empower dissenters in the global citizenry.¹⁴³ Exit is already a real choice for residents of neighboring countries with open borders who can “vote with their feet.” But how can dissenters use voice on a global scale once we cast rigid national identities aside?

Federalism of the future could go even further, breaking down the connection between voices and geography entirely. Those who lack financial means should not be bound by physical proximity and can turn to cyberspace to find collaborators who share dissenting views. In the new public square online, search costs in the market of ideas are greatly minimized, embracing and promoting free speech across international borders. Money’s purchasing power generally cannot overshadow other organic forms of free speech in cyberspace, and the consumer is far less vulnerable to persuasion through bombardment and repetition—even the most sophisticated advertising campaign cannot replicate the value and voice of virality. Our democratic participation through the Internet is paradoxical, serving three roles at once: 1) an external tool for private ordering, 2) an integrated channel within our existing democratic structure, and perhaps 3) a revolutionary and independent transnational system¹⁴⁴ allowing global participation in decision-making by anyone with access.

At the time of this writing, the United States is in the process of taking a monumental step towards empowering new transnational voices in democracy as it transfers its overseer role on the Internet to an international body by 2015.¹⁴⁵ Since the Internet’s conception, the United States has been responsible for assigning and administering numerical addresses that form the basis for .com, .net, .gov, and other shortcuts that users commonly utilize online. While it is easy to take the stability of the web for granted, this could be a watershed moment towards decen-

141. Scott Keeter and Paul Taylor, *The Millennials*, PEW RESEARCH CENTER (Dec. 10, 2009), <http://www.pewresearch.org/2009/12/10/the-millennials/>.

142. See Somin, *supra* note 19, at 29 (discussing federalism all the way up in the context of exit).

143. Judith Resnik has already written about communities ratifying and implementing treaties without the backing the national government. See Judith Resnik, *Ratifying Kyoto at the Local Level: Sovereignty, Federalism, and Translocal Organizations of Government Actors (TOGAS)*, 50 *Ariz. L. Rev.* 709 (2008) (highlighting bottom-up adoption of an international treaty despite national abstention).

144. The inventor of the Internet is actively calling for an Internet Bill of Rights. Klint Finley, *Inventor of Web is Right: We Need an Internet Bill of Rights*, WIRED (Mar. 12, 2014), <http://www.wired.com/wiredenterprise/2014/03/web25/>.

145. Edward Wyatt, *U.S. to Cede Its Oversight of Addresses on Internet*, N.Y. TIMES (Mar. 15, 2014), at B1.

tralization and cooperation.¹⁴⁶

A. *New Forms of Voice*

The lack of natural sovereign borders in cyberspace ensures that it will remain a soapbox where speech and ideas are exchanged, and where disloyal administrators can take action to spark international debate. Global governance in the administration of the Internet is unlikely to be a repeat of the brokenness we see in the United Nations Security Council because the users all have a relatively equal voice in the generation of content. However, to maintain this equality and the efficacy of the medium, the preservation of net neutrality is paramount.¹⁴⁷ This principle is analogous to breaking down sovereignty in its effect—it disburses the concentration of power and gives minority views a chance to compete in persuading the majority. It protects the relative costs of speech while ensuring that even users with dissenting content on the fringe are afforded a voice that can be accessed for the same price as mainstream content.

Having grown up “online,” Millennials hold a normative demand for freedom of information that sees any attempt to regulate the Internet as a direct affront to their livelihood.¹⁴⁸ Federalism of the future can inherit the muscular form of voice described in progressive federalism, but administrators pushing back on the normative center do so with even bigger international implications. Access to information by the public can multiply the impact of disloyalty in the context of administration on a far greater scale.

Two huge expressions of disloyalty have profoundly affected and catalyzed international discourse in recent years. Pfc. Bradley Manning used his administrative role in the military to publicly release documents and spark a debate, and while this resulted in accusations of treason and ultimate conviction of lesser charges,¹⁴⁹ it led to serious discussion

146. However, we must not rule out the possibility that censor-states like China and Russia attempt to grab influence and reshape the global Internet in their own image.

147. Net neutrality guarantees free speech on the Internet by leveling the playing field as a public good with a relatively flat rate. Telecom giants are attempting to alter the system to exert “tiered” control over the speed and access different classes of users get in accessing sites. See Jason D. O’Grady, *Apple in Talks with Comcast for Streaming TV, RIP Net Neutrality?* ZDNET (Mar. 24, 2014), <http://www.zdnet.com/apple-in-talks-with-comcast-for-streaming-tv-rip-net-neutrality-7000027606/>.

148. Robbie Fordyce, *Snowden and Berners-Lee’s Campaign for an Open Internet*, THE CONVERSATION (Mar. 13, 2014), <http://theconversation.com/snowden-and-berners-lees-campaign-for-an-open-internet-24329>.

149. Julie Tate, *Judge Sentences Bradley Manning to 35 Years*, WASHINGTON POST (Aug. 21, 2013), http://www.washingtonpost.com/world/national-security/judge-to-sentence-bradley-manning-today/2013/08/20/85bee184-09d0-11e3-b87c-476db8ac34cd_story.html.

about military policy changes that were not without effect.¹⁵⁰ Similarly, Edward Snowden's disloyalty as an administrator for a government contractor launched a debate over the National Security Agency's eavesdropping that had not before made its way into the public square in a serious way. Some international outlets have credited his leaks with generating the international pressure responsible for the United States ceding control over the Internet.¹⁵¹ Moreover, the discussion has revealed a unique generational gap in polling, where 18–29 year olds overwhelmingly feel Snowden has served the public interest, and persons over fifty overwhelmingly believe his actions have been harmful.¹⁵² This divide in popular opinion originates from interactions in cyberspace and transcends geography. There is no reason to believe that the new demand for openness and debate does not also transcend international boundaries. The digital medium has the potential to prompt dissenters worldwide to put pressure on governments for transparency and openness, leveling the playing field and allowing relatively equal participants to play a role in decision-making.

By eliminating geography from the construction of voice in policymaking, new organic communities that in the past would have been isolated from one another can come together online and build consensus to turn minority opinions into normative goals. Communities online provide new opportunities for voice through social media and interactive platforms to organize in both the physical and digital world. Frustrated dissenters can coalesce to strengthen their message or beliefs. Much of Arab Spring was coordinated through social media,¹⁵³ but the effect has extended to other identifiable organizations "born" in cyberspace, maturing to assemble in the physical world to fight perceived social

150. Matt Sledge, *Bradley Manning Uncovered U.S. Torture, Abuse, Soldiers Laughing As They Killed Innocent Civilians*, HUFFINGTON POST (Aug. 21, 2013), http://www.huffingtonpost.com/2013/08/21/bradley-manning-leaks_n_3788126.html; but see *Bradley Manning Leak Has Had Chilling Effect on US Foreign Policy, Court Hears*, THE GUARDIAN (Aug. 5, 2013), http://www.huffingtonpost.com/2013/08/21/bradley-manning-leaks_n_3788126.html.

151. Charlie Savage, *Obama to Call for End to N.S.A.'s Bulk Data Collection*, N.Y. TIMES (Mar. 25, 2014), at A1 (highlighting the President's call for a change in policy for a program that was revealed by the Edward Snowden leaks); Tim Walker, *Edward Snowden: NSA Whistleblower's Leaks Prompt US to Make Control of Internet Truly Worldwide*, THE INDEPENDENT (Mar. 19, 2014), <http://www.independent.co.uk/life-style/gadgets-and-tech/news/edward-snowden-nsa-whistleblowers-leaks-prompt-us-to-make-control-of-internet-truly-worldwide-9200578.html>.

152. Drew Desilver, *Most Young Americans Say Snowden Has Served the Public Interest*, PEW RESEARCH CENTER (Jan. 22, 2014), <http://www.pewresearch.org/fact-tank/2014/01/22/most-young-americans-say-snowden-has-served-the-public-interest/>.

153. Saleem Kassim, *Twitter Revolution: How the Arab Spring Was Helped By Social Media*, POLICYMIC (July 3, 2012), <http://www.policymic.com/articles/10642/twitter-revolution-how-the-arab-spring-was-helped-by-social-media>.

injustice perpetuated by monied interest groups.¹⁵⁴ This type of energy on the “periphery” might be just what it takes to stem the crushing tide of monied-voices. But while one clear strength of the social network is the ability for any individual to take to a global platform to attract like-minded citizens, the Internet may provide even more disruptive modes of exit that could be embraced to safeguard dissenting communities.

B. *New Forms of Exit*

While the invention of the Internet still exists in relative infancy, it already has numerous applications in assisting dissatisfied citizens with escaping poor public policy. First, the ease in accessing information means that exit through relocation does not carry as much risk as in the past. One can easily search for a new home, a new job, or for the truly exasperated citizen, a new country, with just a few keystrokes. Similarly, persons dissatisfied with the performance of government authorities can use the Internet to cheaply find private institutions like schools or hospitals. In theory, the diligent dissenter could most effectively shop around for a new hometown by comparing the political actors and sets of laws the location provides.

More directly, the inexpensive ability to exit continues to fundamentally reshape commerce. Shoppers can connect with businesses in peer-to-peer marketplaces, from Amazon and Craigslist to Etsy, in order to avoid sales taxes and access greater selections of products from across the globe at more competitive prices. Less legitimate forms of exit involve piracy, as peer-to-peer networks have also sprung up as avenues for dissenters to escape traditional copyright regimes. However, these methods of circumventing public policy, while usually effective, remain subject to government intervention.¹⁵⁵ Banks may attach assets upon government directive. Payment processors like Paypal can be pressured to stop receiving payment on behalf of questionable websites in the same way.¹⁵⁶ Abroad, dictators can nationalize businesses and seize the assets of political enemies with little consequence.

154. Members of the group Anonymous have been referred to as “Internet vigilantes” in their willingness to target and harass individuals ranging from Neo-Nazi’s to pedophiles. Displeasure over the Church of Scientology’s active copyright enforcement of an indoctrination video featuring Tom Cruise led to relatively large protests by Anonymous members across the globe. The video is available at https://www.youtube.com/watch?v=UFBZ_uAbxS0. See William Sager, *Anonymous, Lulzsec, 4Chan & Tom Cruise’s Scientology*, MEDIUM.COM (Apr. 20, 2013), <https://medium.com/the-underbelly-of-the-web/1e240ac70a21>.

155. This intervention may be legitimate, like in the case of piracy, or illegitimate, like in the case of targeting political enemies.

156. *PayPal Statement Regarding Wikileaks*, PAYPAL BLOG (Dec. 3, 2010), <https://www.thepaypalblog.com/2010/12/paypal-statement-regarding-wikileaks/> (halting payments to Wikileaks for “illegal activity”).

A new application of peer-to-peer networking and data storage has the potential to revolutionize exit and private ordering options to safeguard dissenting groups. Such a technique would have been helpful in Pontiac, Michigan in making outsider access to the town's contracts and banking impossible. Referred to as the "block chain," this private ordering system of record-keeping technology allows individuals, groups, and communities of dissenters to operate outside of the existing state-sanctioned financial and legal systems in order to avoid monetary interference and maintain autonomy.¹⁵⁷ While the public is most familiar with its prototype form as Bitcoin,¹⁵⁸ the real allure of the protocol is the ability to create self-executing "smart-contracts"¹⁵⁹ that exist on the peer-to-peer network and cannot be reversed without the digital signatures of multiple parties. Public communities could turn this private system into their own by setting up accounts using mathematics to safeguard their assets from intrusions by the authorities above. In the framework of a minority-ruled community, this would ensure that pensions for workers cannot be withdrawn without express approval from the beneficiary, the chain of title for publically owned land remained secure from autocratic alienation, and the community's bank funds would be safe from a hostile takeover. While this method of "community exit" may seem like science fiction today, it may only be decades away. This nearly costless revitalization of exit has the potential to revolutionize how we think about minority governance through the democratic embrace of self-executing contracts.

CONCLUSION

I have attempted to critique and expand upon an emerging theory of flexible federalism that pushes power all the way down to the citizen in its role as an administrator where both the vertical and horizontal power struggle are imperative for democracy. The commoditization of speech through its doctrinal equivalence with money serves to discount other methods of voice feedback essential to a theory of progressive federalism. As a result, monied interests can overwhelm the more organic and participatory forms of speech through its lower comparative cost. This can lead to the furtherance of inequality. For this reason, I have tried to highlight technology's critical role in preserving meaningful participa-

157. Fundamentally, the peer-to-peer network contains several thousand peers that share and update identical copies of a record-keeping book.

158. SATOSHI NAKAMOTO, BITCOIN: A PEER-TO-PEER ELECTRONIC CASH SYSTEM, available at <https://bitcoin.org/bitcoin.pdf>.

159. See ETHEREUM WHITE PAPER: NEXT-GENERATION SMART CONTRACT AND DECENTRALIZED APPLICATION PLATFORM, available at <https://github.com/ethereum/wiki/wiki/%5BEnglish%5D-White-Paper>.

tion for those dissatisfied with authorities in governance and how it can level the playing field. Like dissents in the law, minority views are often vindicated by the future and trigger a new way of thinking. We should value these views for the possibility of future innovation, so it is crucial that their voices are not overwhelmed. This is important because, in the democratic process when exit options are limited, voice is often the only tool dissenters have.