BOOK REVIEWS

LANI GUINIER AND THE DILEMMAS OF AMERICAN DEMOCRACY

THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY. By Lani Guinier. New York: The Free Press, 1994. Pp. xx, 324. $24.95.

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Lani Guinier, an experienced voting rights litigator and a professor of law at the University of Pennsylvania Law School, first came to national attention in the spring of 1993 when President Clinton nominated her to be assistant attorney general for civil rights. Labelled a "quota queen" by the Wall Street Journal,[1] Guinier became the target of a fervent campaign to block her nomination.[2] For several weeks, Guinier's law review articles on voting rights were the focus of a fierce national debate. Politicians and pundits expounded on her publications and spread snippets from her scholarship across the front pages and opinion columns of America's media. Although her writings and ideas received a volume of attention that many academics would die for, the soundbite commentary generated far more heat than light, with selective quotation, tendentious analysis, and ideological[3] and partisan concerns typically crowding out balanced and dispassionate discussion.

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1. Clint Bolick, Clinton's Quota Queens, Wall St. J., Apr. 30, 1993, at A12. Bolick's article assailed two "quota queens," Guinier and Norma Cantu, the Southwestern Regional Counsel for the Mexican American Legal Defense and Educational Fund, who was nominated to be assistant secretary for civil rights in the Department of Education. See id.

2. See, e.g., Bill Gifford, Journal Fever, Wash. Monthly, Nov. 1993, at 36 (describing Wall Street Journal's "Borking" of Guinier); Linda R. Hirshman, If This Is the New Republic, Madam, Then You Can Keep It, Tikkun, Sept.–Oct. 1993, at 11, 13–14; Michael Isikoff, Power Behind the Thrown Nominee: Activist with Score to Settle, Wash. Post, June 6, 1993, at A11 (campaign against Guinier portrayed as right-wing revenge for successful liberal campaign to block nomination of Robert Bork to the United States Supreme Court and the unsuccessful attempt to block the Clarence Thomas nomination); Laurel Leff, From Legal Scholar to Quota Queen: What Happens When Politics Pulls the Press into the Groves of Academe, Colum. Journalism Rev., Sept.–Oct. 1993, at 36.

3. See Stuart Taylor, Jr., Did Paper Trail Obscure the Real Guinier?, Am. Law., July–Aug. 1993, at 29 (Guinier was "ideological symbol and thus a target" of right-wing opposition and victim of "gross caricaturing from impassioned opponents").

As the Wall Street Journal's insidious appellation took root,[4] so, too, did the perception of Guinier as an "extremist"[5] who held views that were "off the deep end,"[6] "out of the mainstream,"[7] and "alarmingly radical."[8] With a potentially explosive Senate confirmation hearing in the offing, President Clinton abruptly withdrew her nomination. In so doing, the President not only denied her a nationally televised forum in which she could respond to her attackers and defend her views, but added insult to injury by appearing to agree with her critics. Guinier, Clinton stated, "seem[s] to be arguing for principles . . . that I think inappropriate as general remedies and anti-democratic, [and] very difficult to defend."[9]

The Tyranny of the Majority: Fundamental Fairness in Representative Democracy is a collection of Lani Guinier's previously published law review articles—both the celebrated (or notorious) articles that figured so prominently in the nomination furor and others submitted prior to, but published after, the President withdrew her nomination[10]—edited for a nonacademic audience and supplemented with an introductory essay. With this book, Guinier endeavors to reopen the public debate cut short

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4. See, e.g., Bob Cohn, Crowning a 'Quota Queen'?, Newsweek, May 24, 1993, at 67.

5. See, e.g., Michael Isikoff, Confirmation Battle Looms over Guinier: Critics Target "Extreme" Views in Law Review Articles by Justice Dept. Civil Rights Nominee, Wash. Post, May 21, 1993, at A23; Jerry Seper, Guinier Backers, Foes Speak Out, Wash. Times, May 27, 1993, at A1 (discussing several groups' opposition to Guinier because of her "extreme" views).

6. Martin Schram, Nominee's Ideas Are Too Far off the Deep End, N.Y. Newsday, May 25, 1993, at 76.

7. W. John Moore, Why Guinier May Be a Hard Sell, 25 Nat'l J. 1297, 1297 (1993) (noting concern of many Democrats that Guinier was out of mainstream).

8. Stuart Taylor, Divide and Conquer as a Way to Racial Unity?, Recorder, May 18, 1993, at 9; see also American Survey: The Worst of Months, Economist, May 29, 1993, at 27 (Guinier's "writings on voting-rights are radical"); A Legal Extremist, San Diego Union-Trib., May 28, 1993, at B6; Abigail Thernstrom, Guinier Miss: Clinton's Civil Rights Blooper, New Republic, June 14, 1993, at 16 (Guinier's views "radical"); Lally Weymouth, Lani Guinier: Radical Justice, Wash. Post, May 25, 1993, at A19.

9. President's Reading of Nominee's Work, N.Y. Times, June 4, 1993, at A18.

10. The articles that were the focus of debate in 1993 were the following: Keeping the Faith: Black Voters in the Post-Reagan Era, 24 Harv. C.R.-C.L. L. Rev. 393 (1989) (ch. 2 of *Tyranny*); The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success, 89 Mich. L. Rev. 1077 (1991) (ch. 3 of *Tyranny*); No Two Seats: The Elusive Quest for Political Equality, 77 Va. L. Rev. 1413 (1991) (ch. 4 of *Tyranny*). Articles apparently written prior to Guinier's nomination but published after her withdrawal are the following: Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes, 71 Tex. L. Rev. 1589 (1993) (originally presented at Texas Law Review Symposium on Regulating the Electoral Process in Nov. 1992) (ch. 5 of *Tyranny*); The Representation of Minority Interests: The Question of Single-Member Districts, 14 Cardozo L. Rev. 1135 (1993) (presented at Symposium on Redistricting in the 1990s: The New York Example, held at Benjamin N. Cardozo School of Law, Apr. 1992) (incorporated into ch. 5 of *Tyranny*); Lines in the Sand, 72 Tex. L. Rev. 315 (1993) (presented at workshops in Mar. 1993) (ch. 6 of *Tyranny*).

The dust jacket of *The Tyranny of the Majority* states that until publication of this book, Guinier's legal writings "appeared in obscure academic law journals." Presumably the editors of those journals, and the academics who publish in them, will not be offended.

by the President's withdrawal of her nomination, and to present her analysis of the problematic place of majority rule in achieving "democracy in a heterogeneous society" (p. 19).

Are Lani Guinier's ideas "radical"? Are her proposals "anti-democratic," as the President suggested? They are certainly radical in some senses. She argues that legislative representatives ought to be elected through a system of cumulative voting from multi-member districts,[11] rather than by plurality voting from single-member districts. She also contends that in some states and localities, the standard voting procedure *within* legislatures—the requirement of a simple majority—ought to be replaced by rules that would give greater legislative power to minorities.

Beyond her specific proposals, Guinier puts forward a radical redefinition of majority rule. She argues that the majority—even one that prevails in a free and fair political process in which the unsuccessful minority had an unfettered opportunity to participate and to make its case to the voters—should not have plenary power over all matters that are subject to legislative decision.[12] Instead, she would require the majority to share power with the minority, with majority and minority "taking turns" with respect to particular issues (p. 5). Although the majority would enjoy the lion's share, the minority would also be assured some victories (p. 92). Given the long association of majority rule with democratic self-government,[13] it is easy to see how Guinier might be labelled anti-democratic.

Yet, in another sense, there is nothing anti-democratic about any of this; and Guinier's proposals seem radical only in a narrowly American context. Although relatively unknown in political elections in the United States,[14] semiproportional and proportional representation systems are

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11. See infra text accompanying notes 51–52 for an exploration of cumulative voting.

12. Guinier is not making the well-established claim that *fundamental* rights are not subject to majoritarian determination. Rather, she is seeking to limit the power of the majority to prevail with respect to the ordinary issues that come before a government (pp. 102–03).

13. See Philip Green, "Democracy" as a Contested Idea, *in* Democracy: Key Concepts in Critical Theory 2, 12 (Philip Green ed., 1993) ("[M]ost democratic theorists properly make majority rule the centerpiece of the democratic process.").

14. Members of the United States House of Representatives and most state legislators are elected by plurality voting in single-member districts. See generally Douglas J. Amy, Real Choices/New Voices: The Case for Proportional Representation Elections in the United States 1–20 (1993) (discussing failings of American single-member plurality system). Most local legislators are elected by plurality voting in either single-member districts, multi-member elections, at-large elections, or a mix of these systems. See Tari Renner, Municipal Election Processes: The Impact on Minority Representation, *in* The Municipal Year Book 1988, at 13, 15 (International City Management Association ed.) [hereinafter Year Book]. Cumulative voting has, however, played an important role in *corporate* governance in the United States. See Jeffrey N. Gordon, Institutions as Relational Investors: A New Look at Cumulative Voting, 94 Colum. L. Rev. 124, 142–46 (1994).

the rule in most other democracies.[15] Similarly, there are "consensus" democracies—democracies in which the majority limits itself, shares power, and acts only after it has obtained the consent of the minority—as well as majoritarian democracies.[16]

Moreover, Guinier's concern with the capacity of a majority to abuse its authority and oppress the minority resonates deeply with longstanding themes in democratic political theory and the American constitutional tradition. The concept of the "tyranny of the majority" was, John Stuart Mill suggested, already a cliché when he penned *On Liberty* in 1859.[17] As Robert Dahl has noted, a "preoccupation with the rights and wrongs of majority rule has run like a red thread through American political thought since 1789."[18] Madison's celebrated concern with "the mischiefs of faction" applied to majority, as well as minority, factions. The Framers struggled to construct a constitution that would render "the majority . . . unable to concert and carry into effect schemes of oppression."[19] Guinier's claim to a Madisonian pedigree is well-founded (pp. 3–4), even if her specific concern with the potential of majority rule to deny political equality to black Americans would have been beyond the ken of the slaveholders who gathered at the Philadelphia Convention two centuries ago.

Tyranny combines a theoretical exploration of the tension between majority rule and minority representation with a lawyerly examination of questions of liability and remedy under the Voting Rights Act. The theoretical and the lawyerly are closely intertwined. Guinier sees the Voting Rights Act as not just a set of technical rules to protect the right of blacks and other ethnic minorities to cast ballots but also as the embodiment of a vision of political equality and political empowerment. Her critique of the potential conflict between minority rights and majority rule infuses her discussion of rights and remedies under the Act, much as she sees in the Act a procedural road to "fundamental fairness in representative democracy." Her specific proposals concerning the election of representatives and legislative voting are intended both to cure what she considers to be the principal shortcomings in the current application of the Act

15. See, e.g., Robert A. Dahl, Democracy and Its Critics 157–59 (1989).

16. See Arend Lijphart, Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries 21–36, 60–66 (1984) (discussing practice in several Western parliamentary systems of creating "oversized cabinets," i.e., including in the government more parties than are strictly necessary to create a majority government, in order to share power with minorities).

Typically, these are countries marked by sharp religious, ethnic, or ideological division, in which consensus is necessary to maintain societal harmony. See Dahl, supra note 15, at 157, 161.

17. See John Stuart Mill, On Liberty 7 (Bobbs-Merrill 1956) ("[I]n political speculations 'the tyranny of the majority' is now generally included among the evils against which society requires to be on its guard.").

18. Robert A. Dahl, A Preface to Democratic Theory 4 (1956).

19. The Federalist No. 10, at 81 (James Madison) (Clinton Rossiter ed., 1961).

and to implement her broader goal of more proportionate representation of minority political concerns within a democratic framework.

This Review has three parts. Part I summarizes Guinier's critique of the traditional focus of Voting Rights Act jurisprudence: the election of minority officeholders from single-member districts. Guinier argues that the concentration on "black electoral success" (p. 42) has undermined the effectiveness of the Act in achieving political equality and political empowerment for minorities. Her attack on districting and her call for cumulative voting, examined in Part II, raise the important question of how to elect a truly democratic legislature. Guinier makes the case that cumulative voting would enhance the representation of minorities in legislatures with less of the divisiveness that districting entails. Although her analysis would have been enhanced by a discussion of other methods of electing representatives in addition to districting and cumulative voting, Guinier has contributed significantly to broadening the contemporary debate over the election of representatives.[20]

Guinier's effort to apply the Voting Rights Act to legislative voting rules, considered in Part III, is less successful. Her claim that her approach is a procedural reform, unconcerned with the substance of legislative outcomes, is not persuasive, and its implementation would risk a high degree of outside interference with the operations of legislatures. Nevertheless, her concern with the fairness of majority rule in a polarized legislature should not be summarily dismissed. As Guinier contends, the legitimacy of majority rule ultimately rests on the existence of an equal opportunity for all members of the electorate to be in the majority. If, due to a deep and lasting division between the majority and the minority, some members of the polity are effectively denied the opportunity ever to be in the majority, then majority rule can become majority tyranny. Thus, although Guinier's proposal is unsatisfactory, the problem she addresses is a central dilemma of democratic theory.

I. Guinier's Critique of "The Theory of Black Electoral Success"

The centerpiece of Guinier's Voting Rights Act analysis is her thoughtful, often devastating, criticism of the focus of voting rights jurisprudence on the election of minority candidates through single-member districts. Her attack is particularly striking, and her intellectual integrity impressive, in light of the extraordinary success voting rights litigators have had in applying the Act to enhance the ability of blacks and other minorities protected by the Act to elect the candidates they prefer. This point resonates even more fully given her own background as a leading

20. See, e.g., Peter Applebome, Fitting Designer Districts into Off-the-Rack Democracy, N.Y. Times, Sept. 25, 1994, § 4, at 4.

voting rights lawyer who had previously participated in the traditional approach she now appraises so critically.[21]

First enacted in 1965, and subsequently amended and extended in 1970, 1975, and 1982, the Voting Rights Act protects members of racial and language minorities from interference with the right to vote.[22] In the "first generation" of Voting Rights Act cases, both private litigation and government enforcement actions under the Act focused primarily on the elimination of formal barriers to electoral participation, such as literacy tests and discriminatory registration practices (p. 7). When "Southern states and local subdivisions responded to blacks in the electorate by switching the way elections were conducted to ensure that newly voting blacks could not wield any influence" (p. 7), Voting Rights Act litigation began to target such "vote dilution" practices. The Supreme Court determined that the Act applies to "vote dilution" as well as to restrictions affecting the ability to cast ballots,[23] and in 1982, Congress amended the Act to permit the use of an "effects" test to prove that certain electoral practices constituted dilution.[24]

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21. The sequence of chapters in *Tyranny* reflects to some extent Guinier's evolution from litigator to scholar and her development of the "theory of black electoral success." In chapter 2, an edited version of an article published in 1989 shortly after she left practice, she makes arguments in favor of the importance of the election of black officials (pp. 33–37) that she attacks in chapters 3, 4, and 5, which are based on articles published in 1991 and 1993.

22. Section 2 of the Act prohibits any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . which results in a denial or abridgement" of the right to vote on grounds of race or membership in a language minority. 42 U.S.C. § 1973(a) (1988).

Section 5 provides that certain states and political subdivisions can enforce changes in voting qualifications, standards, practices, or procedures only after they have obtained federal preclearance. See 42 U.S.C. § 1973c (1988). A public subdivision becomes a so-called covered jurisdiction subject to the preclearance requirement if (i) fewer than fifty percent of its voting age residents voted in the presidential elections of 1964, 1968, and 1972, and (ii) the jurisdiction utilized a forbidden "test or device" as a prerequisite to voting. See id. Covered jurisdictions may obtain preclearance by either (i) securing a declaratory judgment in the United States District Court for the District of Columbia that the changes "do[ ] not have the purpose and will not have the effect of denying or abridging the right to vote;" or (ii) submitting the changes to the Attorney General of the United States, who, utilizing the same criteria as the district court, can block the effectuation of the proposed change. See id. If the Attorney General does not act within a specified time period, the change may take effect. In practice, the vast majority of preclearances go through the Attorney General process.

23. See Allen v. State Bd. of Elections, 393 U.S. 544, 569 (1969).

24. As a result of the 1982 amendment, the Act provides that a violation is established "if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election . . . are not equally open to participation" by members of minority groups protected by the Act, and that "[t]he extent to which members" of the minority "have been elected to office . . . is one circumstance which may be considered" in determining whether a state or local standard, practice, or procedure violates the Act. 42 U.S.C. § 1973(b) (1988).

The 1982 amendment facilitated the mounting of vote dilution challenges not only to practices adopted in response to the enfranchisement of blacks but also to pre-existing practices that make it difficult for minority groups to succeed in the political process. At-large elections and multi-member districts—which enable one jurisdiction-wide majority to dominate the voting for each legislative seat, and thus, in a racially polarized setting, deny minority voters the ability to elect their own representatives—have been a frequent target of vote dilution suits. As a result of this "second generation" of Voting Rights Act claims, such electoral systems have been invalidated in many states and localities and have been replaced with single-member district systems in which racial minority voters constitute a political majority in some districts and, thus, are able to elect some representatives.[25] This shift has contributed to a significant increase in the number of minority elected officials.[26]

In Guinier's eyes, however, this success was purchased at a great price. Guinier argues that the Voting Rights Act was inspired by the "transformative and inclusionary vision" (p. 41) of the civil rights movement, which saw in the right to vote the key to political equality and political empowerment for blacks. The Act was intended to initiate a process of political mobilization, grass roots organization, articulation of a black social and economic agenda, and ultimately, achievement of "effective social change" (p. 44). But this broad vision of empowerment has been supplanted by a narrow definition of political equality in terms of the election of black officials—what Guinier dubs "the theory of black electoral success" (p. 42).

Guinier places part of the blame for this development on the practical imperatives of litigation. As she notes, voting rights lawyers and sympathetic judges engaged in "the predictable search . . . for a justiciable formula, ostensibly structured around a central, measurable factor" (p. 50). She lucidly describes how voting rights litigation came to emphasize two "judicially manageable" questions: the existence of racially polarized voting and the electoral success of minority candidates (p. 52). Vote dilution litigation became largely statistical, with a focus on the existence of

25. The Voting Rights Act litigation has greatly reduced the use of multi-member districts in the election of state legislators. See Charles S. Bullock III & Ronald K. Gaddie, Changing from Multimember to Single-Member Districts: Partisan, Racial, and Gender Consequences, 25 State & Loc. Gov't Rev. 155, 155 (1993) ("Persistent attacks by the U.S. Attorney General and private plaintiffs . . . have made the MMD an endangered entity."). Vote dilution litigation has had a less sweeping effect on the structure of local governments, although it has significantly reduced the number of at-large elections, particularly in the South. See Renner, supra note 14, at 13, 16.

The Voting Rights Act also applies to single-member districting plans that deny or reduce the ability of minority voters to elect a fair number of representatives. See, e.g., Voinovich v. Quilter, 113 S. Ct. 1149, 1155 (1993).

26. See Bernard Grofman & Lisa Handley, The Impact of the Voting Rights Act on Black Representation in Southern State Legislatures, 16 Legis. Stud. Q. 111, 112 (1991) (attributing dramatic increase in number of black legislators in Southern states to use of Voting Rights Act to create more black-majority districts).

very sharp divisions in majority and minority voting patterns, the refusal of white voters to vote for minority candidates, and the effect of such polarized voting on the ability of minority voters to elect their preferred candidates.

Although Guinier is critical of this litigation strategy, the "quantifiable" approach did offer some benefits. It is likely to be cheaper and easier to litigate disparities in voting patterns than the "totality of the circumstances."[27] Racial polarization and the extent of minority electoral success are far more determinate issues than the "responsiveness" of a state or local government to minority electoral concerns.[28] But, in her view, the tendency to define political equality exclusively in terms of the election of black representatives, and the accompanying drive to achieve single-member districting as the preferred mode of election, "eclipsed the [civil rights] movement's wide-angled focus on transformative politics" (p. 43). More black officials have been elected, but "issues of voter participation, effective representation, and policy responsiveness [were] omitted from the calculus" (p. 49).

Indeed, Guinier suggests, the exclusive focus on "black electoral success" and the pursuit of single-member districting as the route to that success may, paradoxically, have undermined broader empowerment and equality goals (pp. 54–69). Not all "descriptively" black officials (p. 56) will seek to advance the political agenda supported by most black people. Black officials need not share the policy preferences held by most blacks.[29] Black candidates elected by predominantly white constituencies will not be accountable to the preferences of the black electorate. Even the election of black candidates from black communities may not empower black voters since black officeholders—like white officeholders—may place personal advancement ahead of the interests of their constituents (pp. 62, 67).

Nor does the election of black candidates necessarily increase the political participation of the black community. Although the excitement of an election campaign in which a black candidate is making the first serious bid to win an office previously held by whites can generate high levels of black grass-roots involvement and voter turnout, the mobilization rarely lasts past election day and political participation frequently

27. 42 U.S.C. § 1973(b).

28. Guinier acknowledges that the "unresponsiveness" of the local political process to black concerns "was elusive as an evidentiary tool and almost as difficult and divisive as proving discriminatory purpose" (p. 50). So, too, she agrees that the doctrinal focus on racial bloc voting "had theoretical appeal" (p. 51). Indeed, throughout her work racial polarization is the essential premise justifying closer examination of local political practices and procedures.

29. Cf. Carol M. Swain, Black Faces, Black Interests: The Representation of African Americans in Congress 212–13 (1993) (stating that Gary Franks, the only black Republican representative in Congress when Swain conducted her study, tends to vote with white Republicans rather than black Democrats on policy issues of significance to blacks).

drops once the black candidate has been transformed from a challenger to an incumbent (pp. 68, 85).

Moreover, the election of black candidates may fail to empower black voters if the racial polarization of the electorate is "reproduce[d]" in the legislature (p. 65). The "theory of black electoral success" assumes minority officials can be effective legislators despite the existence of racial polarization in the community. This presumes that white legislators are less prejudiced than white voters generally; that whatever their prejudices, elected officials will be "professional" and will work together; or that as white and black officials deal with each other their prejudices will abate and their relations will be marked by ordinary legislative norms of logrolling and reciprocity.

But, Guinier contends, prejudice may persist within the legislature. Black representatives may be "isolated" or "ignored" (pp. 63–64, 80), particularly when there is but a single minority representative, when the legislature is small, or when it lacks formal structures, such as the committee system and seniority, which give minority officials institutional clout. Polarization and the de facto isolation of racial minorities within the legislature are, thus, more likely to occur at the local level, where legislatures are small, informal, and less professionalized, than in Congress. In smaller, polarized localities, the election of a minority representative may merely "transfer[ ] the discrete and insular minority problem from the electorate to the legislative body" (p. 117).

Guinier is critical of "the theory of black electoral success," but she clearly supports the use of the Voting Rights Act to eliminate structural obstacles to the election of black officials.[30] Some critics have attacked the focus on the election of minority representatives as excessively race-conscious. And surely white elected officials can effectively champion minority concerns and attend to the needs and views of minority constituents.[31] Yet there is also a need to scrutinize rules that make it difficult for minorities to elect the candidates they prefer. The election of officials is a recognized step in the incorporation of historically excluded groups into political life and in the public recognition of the group's equal membership in a democratic society.[32] "Descriptive" representation may fall short of "substantive" representation, but the notion of the legislature as a mirror of the community—what John Adams referred to as "an exact portrait, in miniature, of the people at large"—has deep roots in our poli-

30. As she observes, the election of blacks "affirms the status of blacks as full citizens who can not only vote but can also hold elective office" (p. 217 n.96). The inability of blacks to elect their own candidates could be seen as both "the symptom and cause of black political inequality" (p. 52).

31. See, e.g., Holder v. Hall, 114 S. Ct. 2581, 2597–99 (1994) (Thomas, J., concurring); Abigail M. Thernstrom, Whose Votes Count? Affirmative Action and Minority Voting Rights 225–26 (1987).

32. See Charles R. Beitz, Political Equality: An Essay in Democratic Theory 109–10 (1989).

tics and in our definition of representation.[33] A legislature without representatives from a politically significant group is a cracked mirror and an inaccurate portrait.

Guinier's real targets are districting and the tendency to treat the election of black officials as the final goal rather than as just a step toward political equality and political empowerment. Guinier makes two proposals for overcoming the shortcomings of the "theory of black electoral success" and restoring the original "transformative vision" of the Act. First, she would abandon the pursuit of single-member districts and, instead, elect legislators by cumulative voting. Second, she would apply the Voting Rights Act to legislative voting rules, such as majority voting, that en-

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33. See Hanna Pitkin, The Concept of Representation 60–61, 142 (1967). In Pitkin's terminology, in "descriptive" representation the representative body "stands for" the people represented, "by virtue of a correspondence or connection between them, a resemblance or reflection. In political terms, what seems important is less what the legislature does than how it is composed." Id. at 61. The legitimacy of government by representatives, then, turns on the representatives being "like" the community represented. The concept of descriptive representation is at the root of the argument for proportional representation. See id. at 61–62. "Substantive" representation, in contrast, focuses on what the representative does—on the representative's "acting for" the constituency, not the representative's resemblance to the constituency. "In the realm of action, the representative's characteristics are relevant only insofar as they affect what he does." Id. at 142.

The relationship between "descriptive" and "substantive" representation is uncertain. The jurisprudence of the Voting Rights Act tends to treat the two concepts as closely linked, with greater "descriptive" representation of protected minorities seen as necessary if proper "substantive" representation of their interests is to be obtained. Some critics have argued that "descriptive" representation is not necessary for "substantive" representation, and indeed, may be counterproductive. As Justice Thomas recently contended, "it is certainly possible to construct a theory of effective political participation that would accord greater importance to voters' ability to influence, rather than control, elections." *Holder*, 114 S. Ct. at 2595–96. In this view, minority interests might win greater substantive representation if minority voters are a "potential 'swing' group," id. at 2596, able to influence the outcome in a number of electoral contests, rather than if they are given outright control over a smaller number of seats. The contest between the "influence" and "control" theories of representation turns on the nature and severity of the political divisions within a community and whether the minority is politically situated between different majority factions, so that it is plausible to assume that the minority could, in fact, function as a swing group. Moreover, this argument for greater "substantive" representation of minorities through "swing" or "influence" districts misses the independent significance of greater minority electoral success. "[T]o the extent that effective governing is directly related to the level of confidence that the governed have in the governors, the public interest is no doubt advanced when minorities can more closely and tangibly identify with their elected officials." Gary J. Jacobsohn, Political Incorporation and Democratic Theory, *in* Reconsidering the Democratic Public 417, 425 (George E. Marcus & Russell L. Hanson eds., 1993).

Guinier also questions the linkage between "descriptive" and "substantive" representation. Although she sees the Voting Rights Act as promoting both the "descriptive" and the "substantive" representation of protected minorities (pp. 33–35), she suggests that due to the theory of "black electoral success," the goal of descriptive representation has tended to overshadow if not supplant the goal of substantive representation (pp. 54–58).

able a legislative majority to ignore the representatives of the minorities protected by the Act.

II. The Election of a Democratic Legislature

Guinier's attack on districting opens up a question central for any representative democracy: how ought the legislature be elected? In the United States, federal law requires that members of the House of Representatives be elected from single-member districts.[34] Most state legislators and many local legislators are elected in single-member districts. The Supreme Court has held that when federal district courts impose redistricting plans they must prefer single-member districts over multi-member systems.[35] As one critic of single-member district elections recently observed, "[m]ost Americans consider this the most common and natural way to elect officials. We assume that this system is the epitome of democracy and a model for the rest of the free world."[36]

But single-member districts are not the only way to elect a democratic legislature. Most democratic countries, and virtually all non-English-speaking democracies, use some form of semi-proportional or proportional representation that requires multi-member districts.[37] Within the United States, a handful of jurisdictions have experimented with alternatives to single-member districts and plurality elections.[38] Recently, voting rights litigators have begun to look to alternatives to districting in places where minority voters are residentially dispersed and where, therefore, it is difficult to create districts that the minority can control.[39]

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34. See 2 U.S.C. § 2c (1988).

35. See Wise v. Lipscomb, 437 U.S. 535, 540 (1978); accord Connor v. Johnson, 402 U.S. 690, 692 (1971).

36. Amy, supra note 14, at 1.

The intuitive assumption that representative democracy entails the use of single-member districts and plurality elections no doubt contributed to the ability of the vote dilution doctrine to invalidate at-large elections and multi-member districts. "Dilution" suggests a watering down from full strength, and implicitly, the existence of a "benchmark" of undiluted representation against which the diluted vote can be compared. See *Holder*, 114 S. Ct. at 2585 (1994) (in a "vote dilution suit . . . a court must find a reasonable alternative practice as a benchmark against which to measure the existing voting practice"). The assumption that single-member districts are the democratic norm in legislative elections provided the benchmark in those cases. So, too, the absence of any generally accepted "benchmark" for the size of a legislative body doomed the vote dilution attack on a one-member county commission in *Holder v. Hall.* See id. at 2586.

37. See, e.g., Amy, supra note 14, at 2; Lijphart, supra note 16, at 152.

38. See Leon Weaver, The Rise, Decline, and Resurrection of Proportional Representation in Local Governments in the United States, *in* Electoral Laws and their Political Consequences 139, 139–53 (Bernard Grofman & Arend Lijphart eds., 1986) [hereinafter Grofman & Lijphart, Electoral Laws]; Leon Weaver, Semi-Proportional and Proportional Representation Systems in the United States, *in* Choosing an Electoral System: Issues and Alternatives 191, 191–206 (Arend Lijphart & Bernard Grofman eds., 1984) [hereinafter Lijphart & Grofman, Electoral System].

39. See Richard Engstrom, Modified Multi-Seat Election Systems as Remedies for Minority Vote Dilution, 21 Stetson L. Rev. 743, 752–57 (1992); Richard Engstrom et al.,

Guinier's proposal to replace districting is, thus, not entirely novel. Nevertheless, a signal accomplishment of Guinier's work—through both the uninvited controversy over her nomination and the intentional effort to reach a wider, nonacademic public with her views through the publication of *The Tyranny of the Majority*—may be to make more Americans aware that there is more than one way to elect a democratic legislature. Guinier, however, focuses her efforts on one particular alternative to districting—cumulative voting. Her analysis would have been enhanced by an examination of other methods of election that could also promote a more representative legislature.

This Part summarizes Guinier's critique of districting, examines her argument for cumulative voting, and then considers another alternative to districting. It concludes with a discussion of some of the general criteria that come into play in determining the method of election—which interests ought to be represented, and how the representativeness of the legislature affects its capacity to take decisive action—and an analysis of how those criteria ought to shape the debate over the selection of a democratic legislature.

A. *Districting and Its Discontents*

Guinier's indictment of districting has two counts: First, as a matter of minority representation, districting contributes to the divergence between electoral success and empowerment. Second, as a more general theoretical matter, districting empowers those who draw district lines to affect electoral outcomes and privileges territorial interests over other interests.

1. *Districting and Minority Representation.* — As Guinier notes, districting under the Voting Rights Act encourages the creation of minority "safe" seats and noncompetitive districts (p. 85).[40] By making representatives confident of reelection, noncompetitive districts may also make

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Cumulative Voting as a Remedy for Minority Vote Dilution: The Case of Alamogordo, New Mexico, 5 J.L. & Pol. 469, 472 (1989); Edward Still, Alternatives to Single-Member Districts, *in* Minority Vote Dilution 249, 249–67 (Chandler Davidson ed., 1984).

40. Current practice under the Voting Rights Act favors the creation of districts with supermajorities of black voters. This is due to the assumption of many courts and voting rights lawyers that to assure that a racial minority actually constitutes a voting majority within the district, the district's population must be at least 65% minority. See Ketchum v. Byrne, 740 F.2d 1398, 1415–16 (7th Cir. 1984) (explaining derivation of 65% as a standard for minority electoral effectiveness), cert. denied, 471 U.S. 1135 (1985). The concern that a supermajority is necessary for effective controls stems from differences in the proportion of white and minority populations old enough to vote and from traditional differences in registration and turnout. There is some evidence that the 65% rule overstates the percentage necessary to give the minority effective control. See Kimball Brace et al., Minority Voting Equality: The 65 Percent Rule in Theory and Practice, 10 Law & Pol'y 43, 48–53 (1988). Nevertheless, the 65% rule remains powerful and continues to favor the creation of overwhelmingly black districts. In these districts, black candidates may face little effective opposition from white challengers. As a result, at least in the House of Representatives, most black incumbents "almost always get reelected." Swain, supra note

those representatives less responsive to their constituents (p. 100),[41] and depress voter participation in the political process.[42]

Moreover, districting may contribute to the isolation of minority officials in the legislature. Districting plans that concentrate minority voters in one district to assure the election of a minority representative necessarily remove those voters from other districts. This reduces whatever influence the minority had on the representatives elected from those other districts and gives representatives from those districts less incentive to be attentive to minority concerns. Indeed, by pulling minority voters from those areas, districting can change the balance of power in non-minority districts and reduce the political prospects of white candidates sympathetic to minority concerns (p. 135).[43] In some places, the switch from multi-member to single-member districts has facilitated the election of conservative white Republicans as well as blacks.[44] Given that white Democrats are more likely than white Republicans to support black policy preferences,[45] districting could increase minority presence in state and local legislatures while undermining minority political effectiveness.

Apart from the tension Guinier has traced between "black electoral success" and effective political empowerment, districting is increasingly a problematic device for even the election of minority representatives. Districting will be effective only in areas where minority voters are residentially concentrated in homogeneous territories so that majority-minority districts can be created. Where minorities are residentially scattered or where different racial and ethnic groups are interspersed it will be difficult to create majority-minority districts. The Supreme Court's decision

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29, at 31, 66. But cf. id. at 73 ("no congressional district is truly safe" and some black incumbents in heavily black districts have been ousted by black challengers).

41. As Carol Swain has observed, representatives with such "electoral security" tend to "become complacent, not consulting their constituents as frequently as representatives from other kinds of districts do." They are more likely to view themselves as "trustees," capable of deciding by themselves what is in the best interests of their communities, rather than as "delegates" for "interests to be derived" from their constituents. Swain, supra note 29, at 72–73.

42. As a study of the impact of districting on Latino electoral participation found, the creation of majority-minority districts "may have the unintended effect of distancing all but the most committed voters from elections even while they assure that Latinos (and African Americans) are elected to office." Rodolfo de la Garza & Louis DeSipio, Save the Baby, Change the Bathwater, and Scrub the Tub: Latino Electoral Participation After Seventeen Years of Voting Rights Act Coverage, 71 Tex. L. Rev. 1479, 1516 (1993).

43. This is compounded by the 65% rule, see supra note 40, which tends to pack minority voters into overwhelmingly minority districts and minimizes the number of minority voters available to affect the outcomes in white districts.

44. See Bullock & Gaddie, supra note 25, at 155–56, 161–63; Michael Oreskes, Seeking Seats, Republicans Find Ally in Rights Act, N.Y. Times, Aug. 20, 1990, at A11. But see Steven A. Holmes, Civil Rights Group Disputes Election Analyses on Black Districts, N.Y. Times, Dec. 1, 1994, at A15 (NAACP Legal Defense Fund rebuts argument that creation of a significant number of black-majority congressional districts in South after 1990 was major contributing factor in Republican congressional victories in 1994).

45. See, e.g., Swain, supra note 29, at 13–19.

in *Shaw v. Reno*,[46] reflects and reinforces the difficulty of crafting black majority districts where the black population is relatively dispersed. *Shaw* considered a North Carolina congressional districting plan containing "boundary lines of dramatically irregular shape"[47] drawn to create a black majority district by linking up concentrations of black population from a number of different areas of the state. The Court held that such a plan would be subject to strict judicial scrutiny and could be invalidated as an "unconstitutional racial gerrymander."[48]

2. *Districting and the Theory of Representation.* — Districting affects electoral outcomes. As Guinier points out, districting empowers non-voters—incumbent politicians, a federal court, a districting commission—to determine which interests will count in the election of representatives (p. 121).[49] Moreover, the basic premise of districting is that the voters' principal interest is territorial—that voters from different areas have different and distinctive interests, and that those place-based interests are the ones that ought to be guaranteed representation in the legislature. With districting, the interests represented in the legislature are those that are sufficiently territorially concentrated that they can command an electoral majority in at least one district. An interest shared by a significant fraction of the voters may fail to win representation if those voters are dispersed throughout the jurisdiction but fail to constitute a majority in any one district.

Districting also assumes a significant commonality of interest within individual districts. A successful candidate can represent the losers who voted for her opponents only on the assumption that there is a sufficiently great community of interest within a district that the fact of shared district residence outweighs the other electoral factors that led the losing voters to vote for other candidates. But if there are deep political divisions in the district, the interests of losers may not be represented by their representatives. In a polity with many deeply divided districts—when, for example, a non-place-based interest cuts across many districts—a signifi-

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46. 113 S. Ct. 2816 (1993).

47. Id. at 2820.

48. Id. Relying on *Shaw*, federal three-judge courts have invalidated congressional redistricting plans in three states. See Johnson v. Miller, 864 F. Supp. 1354 (S.D. Ga. 1994), stay granted and juris. noted, 115 S. Ct. 713 (1995); Hays v. Louisiana, 862 F. Supp. 119 (W.D. La. 1994), stay granted and juris. noted, 115 S. Ct. 687 (1994); Vera v. Richards, 861 F. Supp. 1304 (S.D. Tex. 1994). A three-judge court sustained the redistricting plan at issue in *Shaw* itself, finding that the plan was narrowly tailored to meet the compelling interest of obtaining preclearance from the Department of Justice under section 5 of the Voting Rights Act. See Shaw v. Hunt, 861 F. Supp. 408 (E.D.N.C. 1994).

49. As Robert Dixon has explained, "all districting is gerrymandering." "Whether or not there is a gerrymander in design, there normally will be some gerrymander in result as a concomitant of all district systems of legislative election." Robert G. Dixon, Jr., Democratic Representation: Reapportionment in Law and Politics 462 (1968).

Guinier refers to electoral districts as "compulsory constituencies" to underscore her point that districts are constituencies forced on the voters by the authors of the districting plan and not electoral units chosen by the voters themselves (p. 129).

cant portion of the voters in each district, and, therefore, of the polity as a whole, may feel unrepresented by their representatives.[50]

B. *Alternatives to Districting*

1. *Guinier's Preferred Method of Election—Cumulative Voting.* — Cumulative voting entails multi-member districts but constrains the majoritarian tendency of multi-member elections by giving the voter the option either to cast one vote for each position to be filled or to cumulate her votes in support of the candidate she most intensely prefers. If there are three seats to be filled, a voter could cast one vote for each of three candidates, or three votes for the one candidate who is her first choice.[51] By lifting the constraint of one vote per candidate, cumulative voting enables a group of voters to concentrate their strength to increase their opportunity to elect their most preferred candidates. If a minority is large enough relative to the number of seats to be filled, then the minority's preferred candidate can win a seat even if that candidate receives no votes from the majority's voters. Thus, cumulative voting can provide a minority group with an opportunity to elect a candidate of its choice without setting aside a particular seat for the group.[52]

For Guinier, much of the strategic and theoretical appeal of cumulative voting derives from the fact that it dispenses with districts. Eliminating districts, by definition, eliminates the noncompetitive districts that, in Guinier's view, make representatives less responsive to their constituents and voters less interested in political participation (p. 96). Similarly, without districting, voters of different races cannot be separated into different districts. Candidates would have the opportunity to campaign ju-

50. In Guinier's view, when voters are "represented" in the legislature by candidates whom they opposed, that is "virtual representation," and not real representation (p. 130). For a discussion of the argument for territorially based districts, see infra text accompanying notes 76–81.

51. The voter could also, presumably, cast one vote for one candidate and two votes for another.

52. Cumulative voting relies on the concept of the threshold of exclusion, that is, the percentage of the vote a well-organized minority needs to win a seat even in the face of the unanimous opposition of the majority. The threshold of exclusion for cumulative voting is $1/(1+N) + 1$, where N is the number of seats to be filled. With a five-member city council, a minority group's candidate is assured of a seat in a cumulative voting election if the group casts one vote more than $1/(1+5)$, or one vote more than one-sixth, of the total vote.

For example, in a city with 1,000 votes, a minority with 167 votes can win one of the five council seats even if none of the other 833 voters cast a single vote for the minority's candidate, provided that all 167 minority voters cast all five of their votes for the minority's candidate. That candidate would receive 835 (167 x 5) votes. The 833 majority voters would cast 4165 (833 x 5) votes. If those votes were spread evenly over just five candidates, no one candidate backed by the majority would receive as many as the 835 votes of the minority-preferred candidate, and the minority-preferred candidate would squeeze by. If the majority group gave more of its votes to its top four candidates, those candidates would outpoll the minority's candidate, but there would be fewer votes of the majority group available for the majority's fifth candidate, thereby assuring that the minority-preferred candidate would outpoll the fifth-place majority-preferred candidate and win a seat.

risdiction-wide,[53] instead of being confined to ethnically homogeneous districts, and thus would have an incentive to appeal to different racial groups and build "cross-racial coalitions" (p. 16). By reducing political polarization, cumulative voting could also advance minority political effectiveness *within* the legislature.

More generally, without districts, there may be fewer voters who are electoral losers. Under cumulative voting, voters who might have been part of a small minority within one district would be able to join their votes to those of residents of other districts. This can be of particular benefit to minorities in *Shaw v. Reno* situations, where, due to residential dispersal, it might not be possible to create a majority-minority jurisdiction. With cumulative voting and a large enough group, the minority can win a seat. There will still be losers, of course, since some electoral interests will be too small to surmount the threshold of exclusion,[54] but cumulative voting lowers that threshold.

Moreover, without districting, no outside force picks winners and losers, determines which groups will be represented in the legislature, or decides which interests and issues will be the focus of local politics.[55]

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53. Guinier appears to assume that cumulative voting would be used on a jurisdiction-wide basis; that is, that all representatives would be elected in one jurisdiction-wide constituency. That has been the practice in the recent cases in which cumulative voting has been adopted as a remedy for illegal vote dilution, but these cases involved local governments and small legislatures. If cumulative voting were used in large city councils or in the election of state legislatures, it is unlikely that the entire city or state would be one voting district. More likely, the city or state would be divided into multi-member districts. Indeed, in the one major use of cumulative voting in American political history, the election of members of the lower house of the Illinois legislature between 1870 and 1980, the state was divided into 59 three-member districts. Nevertheless, cumulative voting would still increase the possibility of cross-racial alliances simply by virtue of larger, potentially more integrated, multi-member districts.

54. The degree to which cumulative voting—or, indeed, any semiproportional or proportional representation system—provides for the representation of minorities is strongly affected by the number of seats to be filled from the district. If, for example, a district has only three seats, it is unlikely to provide much representation for smaller minorities. Taagepera and Shugart refer to the number of seats filled from a district as "district magnitude" and claim it is a "decisive factor" in determining the representativeness of an electoral system. See Rein Taagepera & Matthew S. Shugart, Seats & Votes: The Effects & Determinants of Electoral Systems 112 (1989).

55. To be sure, those who design a cumulative voting system can seek to manipulate the outcome through the determination of the number of seats to be filled by election from a district or jurisdiction. See id. at 19–20, 112–25. The more seats to be filled, the more likely each party or electoral group is to win a share of seats proportionate to its share of votes, and the more likely smaller groups will win seats.

Similarly, cumulative voting is unlikely to dispense with some territorial districting completely, particularly in larger polities or in polities with large legislatures. A city with a five-, seven-, or nine-member council might choose to fill all the seats with a jurisdiction-wide cumulative vote. But if a city with a larger legislative body—such as New York City, which has a 51-member council—or a state were to adopt cumulative voting, it is likely that the cumulative voting would occur within territorial districts, albeit within districts that are larger than the current single-member districts. In such a system, there would remain

Rather than having a district map create constituencies, cumulative voting "permits voters to self-select their identities" (p. 16). In particular, cumulative voting does not presume that voters' principal interests are place-based. Instead, it permits the formation of "voluntary interest constituencies," that is, the interests that the voters themselves deem to be relevant for local politics (pp. 100–01).

Finally, cumulative voting is "emphatically not racially based" (p. 15). Any group of voters—feminists, environmentalists, the religious right—can use it, not just blacks. It will be particularly advantageous for minorities that are not geographically concentrated. Indeed, the principal beneficiaries may not be blacks—who, in many parts of the country, have had to contend with significant residential racial segregation[56]—but other, more residentially dispersed groups. Similarly, by eliminating race-conscious line-drawing and the attendant charges of "ugly" districts and "racial gerrymandering,"[57] cumulative voting avoids the assertion frequently levelled at race-conscious districting: that it reinforces a race-conscious approach to politics and inappropriately presumes that racial identity determines political perspective.

In light of the "quota queen" charges hurled at Guinier, it is worth noting that the one thing that cumulative voting does not do is set aside a quota of seats for blacks or any other ethnic group.[58] Indeed, districting—the system Guinier would supplant—is far more likely to function as a "quota" system, since those who draw district maps are well aware of demographic data and know which districts are dominated by which ethnic or partisan groups. If a map creates a district with a significant black majority, it is very likely that a black candidate will win the district's seat.[59] But cumulative voting does not assign any seat to any particular group. There will be a black seat only if black voters see their political identity primarily in terms of race—and do not divide themselves according to income, class, ideology or other factors—and only if they organize themselves to use cumulative voting in terms of their interest as a racial group. Cumulative voting makes it easier in general for jurisdiction-wide minorities to win seats, but it does not reserve any particular seat for any particular minority.

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opportunities for manipulation through both the mapping of districts and the determination of the number of seats to be filled by cumulative voting within districts.

56. See Douglas S. Massey & Nancy A. Denton, American Apartheid: Segregation and the Making of the Underclass 60–82 (1993).

57. See Daniel D. Polsby & Robert D. Popper, Ugly: An Inquiry into the Problem of Racial Gerrymandering under the Voting Rights Act, 92 Mich. L. Rev. 652, 652–53 (1993).

58. A particularly egregious mischaracterization of Guinier's views occurred in Carol M. Swain, Black-Majority Districts: A Bad Idea, N.Y. Times, June 3, 1993, at A23. Swain criticized Guinier for her "continued emphasis on segregating black voters in black-majority districts" even though at the heart of Guinier's argument is an unmistakable hostility to "segregating black voters in black-majority districts."

59. See Swain, supra note 29, at 170 (noting that as of 1991, all black majority congressional districts were represented by blacks).

2. *Beyond Cumulative Voting: Other Alternatives to Districting.* — Given her argument that "proportionate interest representation" is the touchstone of electoral fairness, it is surprising that Guinier does not mention any of the forms of proportional representation common in other Western countries and used in American cities earlier in this century. To be sure, the most common form of proportional representation used by Western democracies today—the party list system[60]—presumes a degree of party cohesion and partisanship alien to the American experience, and is particularly inapposite in American local elections, which are often nonpartisan or occur in localities dominated by one party. Party-list representation might do little to increase the representation of minorities not based on parties, such as racial and ethnic groups, and party-list representation could be criticized, as Guinier has criticized districting, as a form of "compulsory constituencies" that forces voters to organize their political participation and political identification around parties.

But there is another form of proportional representation, known as single transferable voting (STV), which is well-suited to a nonpartisan setting, and would enhance the proportionate representation of minority interests, would allow voters to form their own constituencies, and in general, would appear likely to perform at least as well as cumulative voting in achieving Guinier's goals.[61]

Like cumulative voting, STV dispenses with single-member districting and returns to multi-member districts or at-large elections. But instead of allowing voters to cumulate votes behind one candidate, STV provides a preference voting system. The voter casts one ballot but can rank candidates to reflect the voter's relative preferences among them. Ranking candidates in order of preference enables votes that would be "wasted" on one candidate to be transferred to another candidate. A vote can be "wasted" if it is "surplus"—that is, a vote cast for a candidate who

60. See Amy, supra note 14, at 15. In party list systems, voters vote for parties. In the most extreme version—a "closed list" system—each party determines the order in which its candidates are listed on the ballot. Voters may cast ballots only for the party as a whole. The party's share of the vote determines how many seats it obtains, and its ranking of candidates determines which of its candidates are elected. In "open list" systems, voters can indicate their preferences among candidates on the party's list. "Candidates who receive more individual votes are moved higher on the lists and thus have a better chance of being elected." Id. app. A at 227–28.

61. Approximately two dozen cities utilized STV in local elections between 1915 and about 1950, including New York City and Cincinnati, although only Cambridge, Massachusetts and the New York City community school board system use it today, see id. at 10–11, 18, 185. STV is used in some foreign countries, see id. at 18 (Ireland, Australia, and Malta), although, as previously noted, the principal form of proportional representation is the party-list system.

Although STV has only rarely been implemented, it has an illustrious pedigree. First proposed by Thomas Hare in 1859, it was embraced by John Stuart Mill in the latter's *Considerations on Representative Government* in 1862 as the ideal system for representative elections. See John Stuart Mill, Considerations on Representative Government 148–68 (Prometheus Books 1991) (1862); see also Taagepera & Shugart, supra note 54, at 47–48.

would win without it—or if it is cast for a losing candidate. STV saves "wasted" votes by providing for their transfer to the next ranked candidate on a voter's ballot. STV thus increases the proportion of voters who vote for a winning candidate, and increases the likelihood that the voter will be represented by a legislator of his or her choosing.

The vote-transfer feature of STV benefits electoral minorities, even in the face of the firm opposition of the majority.[62] In a jurisdiction with a five-seat legislature, a candidate with slightly more than one-sixth of the vote will be able to win a seat under either a cumulative voting or STV electoral system.[63] But STV would appear to be superior to cumulative voting in achieving many of Guinier's goals: (a) the representation of minority groups in proportion to their numbers; (b) the representation of the greatest diversity of viewpoints; (c) more competitive elections; and (d) the creation of cross-racial alliances.

(a) *STV and proportional representation.* — STV may be more likely than cumulative voting to assure a minority group representation in proportion to its votes. Cumulative voting works best when a group focuses its votes on one candidate. If there are two or more minority candidates, the minority risks the prospect of splitting its vote and failing to elect any

62. Like cumulative voting, STV relies on the concept of a threshold of exclusion. The threshold for winning a legislative seat in an STV election is V/(N+1) +1, where V is the total number of votes and N is the number of seats to be filled. In a jurisdiction with 10,000 voters and five seats, 1,667 votes will be sufficient to elect a candidate, and any candidate receiving that many first-place votes will be deemed elected (no more than five candidates can win 1,667 first-place votes). If one or more candidates (but fewer than five) cross the electoral threshold on first-place votes, their "surplus" votes—that is, the votes above the threshold which were unnecessary to elect them—will be redistributed to the second choices named by those voters, so that additional winners may be determined. If no candidate crosses the threshold on the initial count, the last-place candidate is dropped, and his or her votes are transferred to the candidates listed as the second preference on those ballots which listed the losing candidate as the first preference. If any candidate now has reached the threshold, that candidate is elected. If not, the next lowest candidate is dropped and the process of ballot transfers continues until all the seats are filled.

Transferring the votes of losing candidates is straightforward. All of the ballots of an eliminated candidate are simply transferred to the voters' next choices. The transfer of the surplus votes of winning candidates, however, is more complicated, and several methods are used. One is simply to declare a candidate elected once his or her vote crosses the threshold of exclusion and to treat all subsequently counted ballots as surplus, to be applied to the second choices listed on those ballots. A second method, used in Ireland where STV is the basic election system, is to select randomly among the winning candidate's ballots. A third method, probably the preferable one now that computers can be used to count votes, is to distribute a winning candidate's surplus votes according to the percentage of second choice preferences registered on the winning candidate's ballots. See generally Richard L. Engstrom, The Single Transferable Vote: An Alternative Remedy for Minority Vote Dilution, 27 U.S.F. L. Rev. 781, 790 (1993) (describing alternative versions of STV).

63. One vote more than one-sixth of the vote is enough to win a seat in a five-member legislature because only five candidates can each win one vote more than one-sixth of the vote.

of its choices.[64] If the minority constitutes a large proportion of the population and might reasonably seek two or more seats, cumulative voting might result in only one minority seat if minority voters do not divide their votes evenly between the candidates but, instead, give one candidate more votes than she needs for victory while failing to provide the other candidate with sufficient votes to win.

Guinier presents a scenario of a jurisdiction with 1,000 voters, 250 of whom are black, and a ten-member legislative body (pp. 96–97). If such a jurisdiction used cumulative voting, the minority would need only 91 votes to win a seat.[65] Guinier assumes that the black electorate would divide itself up into two groups of 91, with 68 voters left over. The two groups of 91 would each take a seat, and the group of 68 would be able to "join with 23 sympathetic whites to elect a third candidate who is also electorally accountable" (p. 97). In this manner, blacks would win their proportionate share of the legislative seats.

But Guinier's example appears to rest on an unduly optimistic appraisal of the ability of a large group of ordinary voters to organize itself and to assign different specific voters to different candidates. It also makes the rosy assumption that an individual black candidate will be content to win just 91 votes and will direct potential supporters to the other black candidate in order to enhance the number of blacks elected. Few candidates are so confident of election or so committed to the advancement of their group in addition to their own success that they believe there are "surplus" votes that can be given to a potential competitor. Thus, although cumulative voting makes it easier to elect one minority candidate, it is unlikely to produce "full proportional representation" for the minority.[66] That is why political scientists refer to it as a *semi*proportional system.[67]

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64. See Amy, supra note 14, at 186–87.

65. Applying the formula of 1/(1+N) +1, with N=10, in a jurisdiction of 1000 voters, the minimum number of votes necessary to win a seat is 1/(1 + 10) or 1/11 of 1000, or 90, plus 1, which is 91.

66. See Amy, supra note 14, at 186.

67. See id.

In addition to omitting discussion of proportional representation systems, Guinier also fails to consider an alternative form of semiproportional representation: limited voting. Like cumulative voting, limited voting avoids districting. But instead of allowing voters to cumulate their votes, limited voting limits the number of votes a voter can cast to fewer than the number of seats to be filled in the election. This can prevent the same majority from dominating the election for every seat and can enable a sufficiently large and cohesive minority to win a seat.

Like cumulative voting, limited voting relies on the "threshold of exclusion" concept. The formula for threshold of exclusion is V/(V+N) + 1, where V is the number of votes a voter may cast and N is the number of seats to be filled. See Engstrom, supra note 62, at 786. Where V is 1—that is, each voter is limited to just one vote—the threshold of exclusion for limited voting is the same as that for cumulative voting. In a locality that elects a five-member legislature, if each voter is limited to one vote, then the threshold of exclusion is 1/(1+5) + 1, so that a minority that casts one-sixth of the vote will be able to win one seat even if the minority's candidate receives no nonminority votes.

STV's vote transfer mechanism may be more likely to produce a proportionate result. Where a group has more than two candidates, and one receives enough first-place votes to be elected, STV would transfer her "surplus" ballots to the next choices on those ballots. If the second-choices are the candidates of the minority group, then the group may elect a second candidate. Moreover, if no minority candidate wins on first-place votes, the vote transfer mechanism could reallocate votes from the weaker minority candidate to the stronger, thus reducing the possibility that competition among minority candidates would deny the minority a seat.[68]

Between 1963 and 1982, ten seats on the City Council of the City of New York were elected on a two-per-borough basis through borough-wide limited voting. This system limited both the number of votes a voter could cast and the number of candidates a party could nominate to one in each borough. It guaranteed the election of at least five non-Democrats at a time when nearly all the councilmembers elected from single-member districts were Democrats. See Blaikie v. Power, 193 N.E.2d 55, 56 (N.Y. 1963). Limited voting has been used for local elections in Pennsylvania, Connecticut, and New York, see Bernard Grofman et al., Minority Representation and the Quest for Equality 125 (1992), and in elections to the national legislatures in Japan and Spain. See Arend Lijphart et al., The Limited Vote and the Single Nontransferable Vote: Lessons from the Japanese and Spanish Examples, *in* Grofman and Lijphart, Electoral Laws, supra note 38, at 154, 163–68.

Limited voting has been used as a remedy in a handful of vote dilution cases in which the minority population was geographically dispersed so that it was difficult to create compact predominantly minority districts. See Engstrom, supra note 39, at 758–60.

Limited voting deprives voters of the opportunity to vote for a separate candidate for each seat to be filled. Cumulative voting, by contrast, gives voters options. The voter can vote for each seat to be filled, or the voter can vote strategically to maximize the chances of success of her most intensely preferred candidate. On the other hand, limited voting is simpler. With cumulative voting, voters would have to be instructed that they may cast multiple votes for the same candidate, and voting machines would have to be modified accordingly.

68. For example, assume an election with 1000 voters, 300 minority voters and 700 majority voters; three seats to be filled; two minority-preferred candidates, and three majority-preferred candidates. Assume that the majority votes only for majority-preferred candidates; that it spreads its first-place votes evenly across its candidates (233 or 234 per candidate); and that majority voters' subsequent preferences are also only for majority candidates. Assume that minority voters split, 170 first-place votes for candidate A and 130 first-place votes for candidate B, and that voters for candidate B list candidate A as their second choice.

In order to win, a candidate needs 1000/(3+1) + 1, or 251, votes. On the first count, candidate B would be eliminated. But B's voters would have listed A as their second choice, and on the second round B's votes would go to A, giving him 300 votes and a seat. Subsequently, the weakest majority candidate would be eliminated and the other two elected.

If this scenario had been played out in a cumulative voting election, all three majority candidates might have been elected if minority voters had split their cumulated votes among two candidates. Alternatively, only one minority candidate might have run, thereby denying the supporters of the other minority candidate the opportunity to express their strongest preference and the opportunity to identify themselves as a political group, and denying the community useful information concerning the existence and strength of candidate B's supporters.

(b) *STV and diversity of representation.* — STV may increase the prospects for minority representation without suppressing divergent points of view within the minority group. With STV, there could be multiple candidates from a group, and the concomitant expression of a variety of viewpoints, without undermining the group's opportunity to elect a candidate of its choice. A conservative black voter, for example, could give her first-place vote to a conservative black candidate and then, if race dominates ideology in her political priorities, give her second-place vote to a more liberal black candidate. In this way, STV could function as both a primary election and a general election in a single ballot, with minority voters participating in an intragroup election without jeopardizing their chances for electoral success in the intergroup election.

Similarly, STV may better advance Guinier's agenda of representing "voluntary constituencies that self-identify their interests" (p. 97) than would cumulative voting. Like districting, cumulative voting rewards only first-place votes. This discourages voters from voting for those candidates who may best represent their views but who, the voters think, are unlikely to garner enough votes to win election. As a result, the ballots cast may understate the real level of support for those candidates among the electorate. This, in turn, serves to discourage candidates who represent groups that do not approach a plurality in a single-member district system or the threshold of exclusion in a cumulative voting jurisdiction from even running. This denies their potential supporters the opportunity to vote for them and denies the community the awareness of the existence and size of such a political group.[69] In practice, much as districting favors local majorities, cumulative voting is likely to help only the largest minority and "not the full range of minority political groups."[70] Like districting, cumulative voting tends to hold down the number of parties or groups that can win representation, even if cumulative voting is less restrictive.

STV can remove this disincentive to vote for candidates perceived to have less chance of winning, since the voter can give her first-choice vote to the long-shot who is her most preferred candidate, while choosing among the perceived front-runners for her second-place selection. If the first-choice candidate fails to win election, and the front-runners have not won enough votes to fill all the seats at issue, the ballot can be counted in the contest among the front-runners. Moreover, if enough voters are no longer discouraged from voting for the long-shot by the fear that their ballots will be wasted, then the long-shot might actually win. Alternatively, the voter could list the long-shot in second place. If the first-place winner wins easily, and a sufficient number of other voters also list the

69. This is one of the explanations for "Duverger's Law," the proposition expressed by French political scientist Maurice Duverger, that plurality voting without a runoff favors the two-party system. See William H. Riker, Duverger's Law Revisited, *in* Grofman & Lijphart, Electoral Laws, supra note 38, at 19, 29.

70. Amy, supra note 14, at 186.

long-shot as a second choice, then the transfer of "surplus" votes could also transform the long-shot into a winner. Even if the long-shot is unable to capture a legislative seat, the existence of the group, and the extent of its political support, will be more clearly known, and the long-shot, and the long-shot's constituency, may become more of a factor in local politics.

(c) *STV and competitive elections.* — For these reasons, STV may also be more likely than cumulative voting to promote competitive elections. Cumulative voting requires group solidarity, discourages intragroup competition, and may lead to de facto deals among the major groups to allocate seats. In the major American political experience with cumulative voting[71]—in three-member districts in elections for the lower house of the Illinois legislature—"party leaders frequently agree[d] in advance on the number of nominees so that often there [were] only three—two for the dominant party, one for the minority party."[72] Like districting, cumulative voting can produce "safe seats" and uncontested elections. With its built-in incentive to vote for more candidates, STV may be more likely to increase electoral competitiveness.

(d) *STV and cross-racial alliances.* — Finally, STV would appear to be better than cumulative voting in achieving Guinier's other goal—reducing racial polarization in the legislature. By eliminating racially homogeneous black and white districts and using jurisdiction-wide electoral units, both cumulative voting and STV at least make it possible for some candidates to achieve electoral success by putting together a platform that appeals to some blacks and some whites. STV's preferential voting mechanism, however, offers an additional incentive for reducing racial polarization.

Cumulative voting enables minorities to cumulate their votes for one candidate so that the intensity of the group's preference overcomes the group's minority status. Cumulative voting's structural incentive in racially polarized jurisdictions for cumulating votes behind the most intensely preferred candidate is, thus, in deep tension with cumulative voting's potential for cross-racial voting. STV could mute that tension, although not eliminate it, by enabling voters to register several degrees of preference, thus giving them an opportunity to support their own

71. The most significant use of cumulative voting in American political elections was in Illinois where, from 1870 to 1980, the members of the lower house of the state legislature were elected by cumulative voting from three-member districts. In 1970, Illinois voters voted to retain cumulative voting in a separate ballot question presented as part of a referendum on a new state constitution, but they voted to abolish cumulative voting in 1980 when they approved a cost-cutting ballot measure that reduced the size of the legislature. See Leon Weaver, Semi-Proportional and Proportional Representation Systems in the United States, *in* Lijphart & Grofman, Electoral System, supra note 38, at 197.

72. Dixon, supra note 49, at 523; see also Weaver, supra note 71, at 198 ("The principal reason why CV lasted so long in Illinois was that it was based on a bargain between the major parties and was an expression of a 'live-and-let-live' approach to political competition.").

group's candidate and the most attractive candidates of other groups without undermining the prospects of their own-group's first choice. This, in turn, gives candidates an even stronger incentive to campaign across group lines. With STV, candidates might appeal to the voters of groups who would be unlikely to give them first-place votes but might provide them crucial second-place votes. For example, black voters could give their highest preferences to black candidates and their lower-ranked preferences to the white candidates most attractive to them. If the successful black candidate or candidates win more votes than they need to be assured of their seats, their "surplus" would be transferred to the black-preferred white candidates. This could induce some white candidates to campaign for black votes, and ultimately increase the legislature's attention to black political concerns.

It is not clear why Guinier gave no attention to STV and instead focused exclusively on cumulative voting. STV is a more complicated system than cumulative voting,[73] and it works a greater departure from districting. There is relatively little experience with STV in the United States and it could be that its theoretical advantages will fail to materialize in practice.[74] Perhaps Guinier feared that STV is so different from districting that it is, as a practical matter, a nonstarter. On the other hand, STV may have greater potential than cumulative voting to advance Guinier's goals of *proportionate* minority interest representation, the representation of smaller groups and dissidents within existing groups, and appeals across group lines. Certainly, whatever the strengths and weaknesses of STV, any consideration of the process of electing a democratic legislature ought to examine the full range of options, not just cumulative voting.

C. *Legislative Elections and the Nature of Legislative Representation*

Cumulative voting is not the antithesis of districting, but rather more of a half-way house between districting and proportional representation.[75] Notwithstanding the "radical" and "way out" charges levelled against her, Guinier has proffered a relatively moderate alternative to the existing American system of representation. But even though cumulative

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73. As two leading scholars of electoral laws have properly observed, "complexity introduces an elitist inequity of its own, even if the purpose is increased 'fairness': the more complex a system becomes, the fewer people can comprehend it in order to make use of its opportunities." Taagepera & Shugart, supra note 54, at 228.

74. As Taagepera and Shugart note, "STV is attractive . . . theoretically . . . but it has been used in so few countries that possible problem areas may remain untested." Id. at 237; see also id. at 27–28, 48–49 (noting extent of support for STV among political scientists). For a brief version of the argument for STV from a longstanding American proponent, see George H. Hallett, Jr., Proportional Representation with the Single Transferable Vote: A Basic Requirement for Legislative Elections, *in* Lijphart & Grofman, Electoral System, supra note 38, at 113–25.

75. See, e.g., Dixon, supra note 49, at 524 (cumulative voting "is in a sense an American two-party version" of proportional representation).

voting is only half-way down the road from districting to proportionality, why should Americans take any steps down that road at all?

The move from districting to proportionality has two critical features: (1) a shift in the basis of representation from territory, which allows different geographic areas in a jurisdiction to hold seats in the legislature, to voter-identified, non-place-based interests; and (2) the likely inclusion of more conflicting interests in the legislature, which can make it more difficult to assemble a legislative majority and to govern.

1. *What Interests Should a Legislature Represent?* — In framing an electoral system with the goal of creating a legislature that represents descriptively its polity—a portrait of the people in miniature—different methods will serve to highlight particular descriptions of the polity while potentially obscuring others. Moreover, no legislature of reasonable size can assure representation of all the salient divisions in a society. Thus, the selection of an electoral system is inevitably a selection among different ways of describing a polity, a decision to prefer one description over another. Although Guinier overstates the case against territorial districts, there is considerable force to her argument that voter-selected interests, rather than territory, is an appropriate way of organizing a system of representation.

As Elaine Spitz notes, "[g]eographic boundaries have served traditionally, and perhaps intuitively, as the most common basis" for representation.[76] Geography serves this purpose not because, as Guinier suggests, proponents of territorial representation think "that mere geographical subdivisions have interests distinct from those of the people who inhabit them," (p. 133) but because "there is a spatial dimension to human organization."[77] Many of the most important interests and concerns people have relate to their homes, their neighbors, and their immediate surroundings. People may choose to settle in territories in which, they believe, the current residents share their views and concerns, so that territorial and interest representation may be closely linked.[78] Even when the choice of residence is constrained by income or discriminatory practices,[79] neighbors will have common experiences. These common experiences may lead to a shared perspective on public affairs and political values. Territory, thus, can be an important determinant of interests. Moreover, physical proximity facilitates the discussion, debate, and deliberative interaction desirable in a democracy.

The extent to which districts are an appropriate form of election also turns on what the government in question does and on the size of the

76. Elaine Spitz, Majority Rule 56 (1984).

77. Id.

78. See, e.g., Charles M. Tiebout, A Pure Theory of Local Expenditures, 64 J. Pol. Econ. 416, 418 (1956) (consumer-voter may be viewed as picking community which best satisfies person's preference for public goods).

79. As Guinier notes, many people do not exercise real choice in deciding their place of residence (pp. 136, 141).

jurisdiction. Where the principal role of the government is to supply services to residents—schools, garbage collection, street repair, crime control—then representation by place of residence is a reasonable form of legislative organization. Services like fixing a pothole, installing a traffic light, cracking down on a nuisance, maintaining a firehouse, and patrolling the streets are intensely local, and a system of election that assures that there will be one representative to whom residents may look for the place-based problems that affect their neighborhood is not unreasonable.[80] Moreover, place-specific problems are an important focal point of popular protest and provide incentives to grass-roots political action. In a state or a large city, the use of territorial subdivisions to organize politics and to elect representatives may thus be desirable. In a smaller jurisdiction, districts may not be needed to satisfy these place-based interests.

Finally, depending on the size of the jurisdiction, eliminating or reducing territorial subdivisions could dramatically increase the cost of election campaigns. This could skew the results in favor of incumbents, those who receive the most media attention, and those with the largest campaign war chests.

Nevertheless, as Guinier contends, territory is only a rough approximation of interest. Some interests are not place-based. Some politically salient groups may be dispersed throughout a community and may have trouble obtaining representation in a purely territorial system. Many significant governmental tasks have a minimal relationship to territory, and important policy questions may be better deliberated by the representatives of all the politically salient interests than by territorial representatives. Moreover, as Guinier astutely notes, due to the "one person, one vote" doctrine, territorial districts can no longer map onto pre-existing neighborhoods (p. 137).[81] Today, district lines are often arbitrary. They can fragment neighborhoods and combine different communities into heterogeneous units for legislative elections, thus compounding the possibility that many people within a territorial constituency will feel unrepresented by the person elected from the district.

Under these circumstances, while some values in representation might be lost in a switch from districting to cumulative voting, others could be gained. The balance of costs and benefits would be affected by the functions of the government, the size of the jurisdiction, and the na-

80. See Nancy L. Schwartz, The Blue Guitar: Political Representation and Community 31–32 (1988) (service responsiveness requires single-member districts).

Without territorial districting, it is possible that some areas of a jurisdiction will be overrepresented (relative to population) in the legislature and other areas underrepresented. For example, although the borough of Manhattan constitutes just one-fifth of the population of New York City, the City has been governed by Mayors who are Manhattan residents for 36 out of the last 40 years. This may be one element of "outer borough" disaffection with "the City."

81. See generally Richard Briffault, Who Rules at Home?: One Person/One Vote and Local Governments, 60 U. Chi. L. Rev. 339 (1993) (examining difficulties of equally weighted vote requirements to American local governments).

ture of the political divisions within it. As Guinier contends, for some types of governments and in some communities, cumulative voting would create a more representative legislature. Particularly where race and ethnicity are politically salient but the minority groups are residentially dispersed, cumulative voting could enhance the representativeness of the legislature, and moreover, it could do so without resort to the race-conscious line-drawing that has offended many observers.

2. *How Representative Should a Legislature Be?* — It might be thought that a too-representative legislature—like a too-thin or too-rich person—is an impossibility, but some political scientists suggest that there is a tradeoff between representation and governance, with greater representativeness purchased at the cost of reducing the legislature's ability to govern.[82]

As Elaine Spitz has observed, "[v]oting is not intended only to represent all shades of opinion. Voting also takes place in order to settle disputes" and to "make joint social endeavor possible."[83] The more conflicting interests there are, the more difficult it will be to reach a decision. Districting provides one form of dispute resolution. By limiting legislative seats to those who win a majority of votes within a given territory, single-member districts tend to limit the range of interests represented in the legislature and to promote the two-party system.[84] In this way, "a substantial reduction of alternatives occurs before the election,"[85] and the "integrative process of compromise and adjustment" occurs within the minds of the voters.[86] Voters are presented with just a small number of electoral choices. The one that garners the votes of a majority of voters generally wins control of the legislature and governs, while another becomes the focus of opposition. Even if no one party wins a majority, the small number of parties facilitates the formation of a legislative majority.

In proportional and semiproportional systems, by contrast, many more parties or interests can win legislative seats. "[C]ompromise takes place in the legislature . . . after the election" rather than in the minds of the voters before the election.[87] With a large number of parties contending, no party may win a majority and legislative deadlock can result. After the election, many possible coalitions of various small legislative groupings could form a governing majority. Thus, the election itself has an attenuated effect in deciding who will form a government and determine policies. One of the lessons of the Italian "first Republic" is that legisla-

82. See, e.g., Kenneth A. Shepsle, Representation and Governance: The Great Legislative Trade-Off, 103 Pol. Sci. Q. 461, 482 (1988).

83. Spitz, supra note 76, at 26, 30.

84. See discussion of Duverger's Law, supra note 69. Single-member districts necessarily entail plurality voting within a district. Of course, jurisdiction-wide at-large or multi-member elections without cumulative voting or any proportionality rule, would favor the two-party system, or the largest interests, even more strongly.

85. Spitz, supra note 76, at 26.

86. Dixon, supra note 49, at 56–57.

87. Spitz, supra note 76, at 26.

tive proportionality may lead to frequent changes in government but few changes in governance and that a highly representative legislature may be sclerotic rather than responsive to the people.[88]

In short, an electoral system that makes the legislature a more accurate barometer of voter preferences may make it more difficult for the legislature to convert preferences into policies. Maurice Duverger contrasts proportionality's "representation of opinions" with districting's "representation of wills," in which "the decisive act of choosing the governing team may be accomplished by the voters themselves instead of being left to" their representatives.[89] Democracy entails both the representation of opinions and the representation of wills, but in Duverger's view there is "an unresolvable contradiction" between the two.[90]

Cumulative voting would shift the representation/governance tradeoff in the direction of representation. Would there be too great a cost in terms of governance? As with the consideration of the choice between territorial and non-territorial forms of representation, much depends on context, including the structure of the government in question, the role of representatives in the government, and the range and nature of the divisions within the jurisdiction.

In settings with relatively powerful and independent executives and relatively weak legislatures (such as many state governments and "strong mayor/weak council" cities) a more diverse legislative body would not impede decisive government action. An independently elected executive generally mutes the political fragmentation and instability often associated with proportional representation. Moreover, the broader range of opinions reflected in the legislature could make the government more attentive to diverse constituencies. On the other hand, in those localities with strong legislative councils or commissions and weak executives (or no independently elected executive at all), a more representative legislature might reduce the ability of government to take decisive action. Still, the absence of separation of powers and bicameralism in those localities means that the legislature is currently far more capable of action on local matters than is the norm in the federal and state governments. A more representative body might be less decisive but not below levels acceptable in the American political tradition—although the rising concern about "gridlock" in the national government in recent decades hints at the degree of loss of confidence in a government that fails to address pressing

88. See id. at 38 ("the overall fluctuations" in proportional systems are "weaker" than in plurality systems).

89. Maurice Duverger, Which Is the Best Electoral System?, *in* Lijphart & Grofman, Electoral System, supra note 38, at 32–33.

90. See id. at 33. Not all political scientists agree that there is a tension between proportionality of representation and effective governance. See, e.g., Arend Lijphart, Constitutional Choices for New Democracies, 2 J. Democracy 72, 76 (1991) (arguing that proportional representation is more effective than plurality at maintaining unity and peace).

public problems. We need to know more about the effectiveness of proportional and semiproportional systems in those jurisdictions that have used them.

The number of interests and the size of the legislature are also important. Cumulative voting is less representative than proportional systems. In many jurisdictions, cumulative voting will benefit just one large minority. This might enhance representativeness without crippling governance. Similarly, in a smaller legislature fewer interests will be represented than in a larger body, so that greater proportionality might be achieved without harm to governance.

Nor is decisive action the only measure of successful governance. A government's actions must also be acceptable to its people and responsive to their concerns. As Guinier notes, "political stability depends on the perception that the system is fair" (p. 9). That perception is undercut when the government ignores the interests and concerns of a significant portion of its citizenry. Representation of the minority in the legislature contributes to the perception of fairness, and thus enhances the stability of the polity. To that extent, representation is a component of governance as well as a constraint on it.[91]

As Hanna Pitkin has noted, there is a correlation between a society's interest in proportionality as the focus of representation and the intensity of divisions within that society.[92] Even though proportionality "introduces into the legislature the irreconcilable antagonisms that pervade the society," people in a divided society "insist on it because they feel that only a member chosen from the particular group can act in its interest. And they may sometimes be right."[93] Without deciding whether racial polarization is an "irreconcilable antagonism[]," greater proportionality may be imperative for effective governance in a polarized polity if it is necessary to give minorities the assurance that their interests are considered in the course of government policy formation.

3. *Summary.* — There is no one best—or most "representative" or most "democratic"—electoral system. Context counts. Different electoral rules may be appropriate in different places, much as different systems will have different consequences for different interests and different functions of government. Given the scarcity of experience in the United States with cumulative voting and other alternatives to single-member districting, we cannot be sure how those alternatives would perform in American states and localities. Although the loss of territorial representa-

91. Cf. Taagepera & Shugart, supra note 54, at 63 ("[L]ong-range stability depends on semiregular alternation of parties in power, so that no major group feels permanently excluded and the ruling party leaders do not grow stale. If the same party always gets to rule, the system may be unstable in the long run.").

92. See Pitkin, supra note 33, at 213–14.

93. Id. at 214; see also Lijphart, supra note 90, at 75 (proportional representation typically adopted to provide representation for ethnic and religious minorities "and thereby to counteract potential threats to national unity and political stability").

tion and the potential for greater fragmentation and conflict counsel against any precipitous or general move to a more proportional system, neither concern should preclude serious attention to alternatives in specific settings.[94] Courts should not assume that single-member districting is the only appropriate remedy for vote dilution nor the only fair method of electing representatives.[95] Congress should amend the federal law that requires members of the House of Representatives to be elected from single-member districts[96] and permit states to consider the adoption of multi-member districts, provided that cumulative voting, STV, or some other mechanism that assures minority representation is used.

The critical issue is that alternative modes of representation be considered in light of the circumstances of particular communities. States and localities should be aware of the broad range of options for electing a democratic legislature and should give fresh attention to the various possibilities. Guinier's book provides an important beginning to this process of public education and to the evaluation of alternatives. Indeed, due to the combined effect of the new hurdle to race-conscious districting raised by *Shaw v. Reno*, discontent with so-called "racial gerrymandering,"[97] and the attention drawn to Guinier's views during the furor over her nomina-

94. Nor are cumulative voting and territorial districts mutually exclusive. Electoral systems can combine territorial districts, with some jurisdiction-wide proportional or semiproportional representation. Under the "additional member" plan used in Germany, half the seats in the Bundestag are filled by the winners of district elections, and half are filled by party proportionality. The voters vote for district representatives and for the party of their choice (which may differ from the party of their candidate for a district seat). After the district winners are elected and the party preferences tabulated, members of the parties are added from regional party lists until each party has seats equivalent to its proportion of the party preferences. See Amy, supra note 14, at 15–17, 228–30.

95. See McGhee v. Granville County, 860 F.2d 110, 118 (4th Cir. 1988) ("If a vote dilution violation is established, the appropriate remedy is to restructure the districting system to eradicate, to the maximum extent possible *by that means*, the dilution proximately caused by that system . . . .").

In *McGhee*, the trial court had ordered the implementation of a limited voting plan as a remedy for vote dilution in the at-large election of a seven-member board of county commissioners. See id. at 113–14. Blacks made up 44% of the county's total population, 41% of its voting age population, and 39.5% of its registered voters, but no black had ever been elected to the board. See id. at 113. The county had proposed a single-member district plan, but, due to residential dispersal of minority population, the "very best" districting plan would create just one black-majority district and another district in which blacks had "no better than a fighting chance," whereas a limited voting plan would have given blacks "a fair chance" of winning three of the seven seats. Id. at 113–14. The court of appeals reversed, finding that the district court was required to defer to the county's remedy, so long as it was the best districting plan that could be adopted, even if the limited voting plan would have provided more proportional representation. See id. at 118–21.

96. See 2 U.S.C. § 2c (1988).

97. See, e.g., Jim Wooten, Racial Electoral Districts Create Division, Atlanta J. & Const., Apr. 23, 1994, at G7.

tion,[98] cumulative voting is now on the American political agenda as never before.[99]

Recently, a federal district court opted for cumulative voting over a districting plan as a remedy in a vote dilution case in an opinion that echoed many of Guinier's arguments. Judge Joseph H. Young preferred cumulative voting to districting because it "will allow the voters, by the way they exercise their votes, to 'district' themselves based on what they think rather than where they live," and because it "is less likely to increase polarization between different interests since no group receives special treatment at the expense of others as would occur in a single-member district with one black majority district."[100] Although Judge Young was subsequently reversed by the court of appeals, his views—and Guinier's—are increasingly central to contemporary thinking about fair representation.[101]

With respect to cumulative voting at least, "Lani Guinier's revenge" may be at hand.[102]

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98. See, e.g., A New Shape for Democracy, St. Louis Post-Dispatch, Apr. 16, 1994, at 14B.

99. See, e.g., Cumulative Voting Captures Imagination of Electoral Reformers, 82 Nat'l Civic Rev. 72, 72, 74 (1993) (Cincinnati, Ohio and Davidson County, North Carolina considering cumulative voting); Michael Kenney, State Mulls Voting Change, Boston Globe, June 12, 1994, City Weekly Section, at 9 (Massachusetts legislature considering cumulative voting for elections to Boston City Council); Don Noel, An Alternative to Racial Gerrymandering, Hartford Courant, June 30, 1993, at D13 ("The discarded Lani Guinier may yet earn a respectful hearing from mainstream politicians.").

100. Cane v. Worcester County, 847 F. Supp. 369, 373 (D. Md. 1994) aff'd in part, rev'd in part, 35 F.3d 921 (4th Cir. 1994). *Cane* differs from earlier vote dilution cases in which semiproportional remedies were approved because in those cases the dispersal of the minority population precluded the creation of majority-minority single-member districts. In *Cane* a black majority district could have been created. See id. at 372. But cf. Neil A. Lewis, Maryland County Embroiled in Voting Rights Suit, N.Y. Times, Dec. 2, 1994, at B8 (black majority district would cut "across the county, picking up black neighborhoods in three towns"; it "would resemble a skinny dinosaur on its hind legs").

101. The court of appeals determined that the district court "failed to give due deference" to the county's preference for a districting system "that would ensure that the Board members were knowledgeable of and responsive to the diverse interests of the various regions of the County." Cane v. Worcester County, 35 F.3d 921, 928 (4th Cir. 1994). *Cane*, thus, nicely presents the conflict between a territorial and interest-based vision of representation. According to the court of appeals, the district court must defer "to the greatest extent possible," id., to the affected local government in choosing among alternative acceptable remedies. In this case the local government preferred a representation scheme based on territory. The fourth circuit left open "whether facts and circumstances might justify the imposition of a cumulative voting plan" where there was no clearly expressed preference for territorial representation. Id.

102. Unfortunately, but understandably in light of the controversy that surrounded Guinier's nomination, many politicians who are interested in the substance of Guinier's ideas have sought to distance themselves from any association with Guinier. Thus, when Boston Mayor Ray Flynn proposed the use of cumulative voting, with voters able to cumulate up to four votes for one candidate, to elect that city's School Committee, his supporters insisted that " 'Flynn's position isn't Lani Guinier's position . . . . Under this proposal, each person gets the same four votes to do with what they wish.' " Peter S.

III. Majority Rule and Racial Polarization Within a Democratically Elected Legislature

Although the adoption of cumulative voting would effect a dramatic change in the way Americans elect legislators, from a Voting Rights Act perspective the pursuit of cumulative voting would really be only a tactical shift in remedies to provide a more effective way than districting of securing the current goal of enabling minority voters to elect representatives. Moreover, the notion that political groups ought to be represented in the legislature in rough proportion to their relative presence in the electorate is not a radical one, but rather has a longstanding pedigree in democratic theory. Guinier's proposal to apply the Voting Rights Act to voting rules *within* legislatures is much bolder. It would work a major expansion in the scope of liability under the Act, and it relies on a theory that democracy entails not simply proportionality in the *election* of representatives but proportionality in *legislative outcomes.*

This Part first examines Guinier's proposal to apply the Voting Rights Act to the inner workings of a representative but racially polarized legislature and her underlying theoretical endeavor to apply a proportionality constraint to majority rule. It then presents objections to her interpretation of the Act and considers the practicality of Guinier's more general project of reconceiving majority rule as a matter of "taking turns." Finally, it suggests that although Guinier's solution is not persuasive, racial division raises a troubling question for the fairness of majority rule. The significance of that question, and perhaps its solution, requires further consideration of just how divided we are.

A. *Attacking Majority Rule Within a Representative but Polarized Legislature*

1. *Extending The Voting Rights Act to Vote Dilution Within the Legislature.* — At the heart of Guinier's critique of the "black electoral success theory" is the argument that black electoral success alone is insufficient to realize "the civil rights movement's transformative vision of politics." For her, "the purpose of political equal opportunity" is not simply "fairness in the struggle for a seat at the bargaining table," but "fairness in the competition for favorable policy outcomes" (p. 69). Not only must minorities be represented in the legislature, but also they must "have a *fair chance* to have their policy preferences *satisfied*" (p. 70).

Guinier argues that racial polarization and minority isolation *within* the legislature is a serious obstacle to the opportunity of blacks to obtain satisfaction of their policy preferences. In a legislature that operates under majority rule, a hostile majority may simply refuse to deal with minority legislators or to consider their proposals. Thus, the pattern of racial polarization among the electorate can be "reproduce[d]" within the legislature (p. 65). Minority representatives may be "marginalized" (p.

Canellos, School Board Voting Proposal Finds Backers, Questioners, Boston Globe, July 9, 1993, at 13, 20. But, of course, that was exactly Guinier's proposal.

61) or "isolated and ignored" (p. 64) within the legislature so that they have "technical access" (p. 69) but no impact on deliberations or policy determinations.

To attack "resegregation within the walls of a formally integrated legislature" (p. 104), Guinier would foster a "third[ ] generation" (p. 104) of voting rights litigation directed at legislative decisional rules, particularly simple majority voting, that have the effect of denying the minority the fair satisfaction of its policy preferences. In a "second generation" (p. 8) case an otherwise lawful electoral practice, like an at-large election, can be challenged as a "standard, practice, or procedure" that denies or abridges the right to vote in violation of the Act when, due to racial polarization in the electorate, racial minorities are unable to elect their preferred candidates. So, too, in a "third-generation" case an ordinarily lawful legislative rule, like simple majority voting, could be challenged as a "standard, practice, or procedure" that denies or abridges the right to vote, when, due to racial polarization in the legislature, racial minorities are unable to have their policy preferences satisfied (p. 105).

It is a little unclear exactly when Guinier would subject legislative rules to a "third-generation" claim. The cases she cites involving vote dilution in legislatures fall into two categories: (1) the arrival of the first black or Hispanic representative in a legislature, which precipitated internal changes that made it more difficult for an individual legislator to affect legislative decisions, or (2) the adoption of unusual procedures (or the violation of official procedures) to circumvent minority participation (pp. 8–9, 75–77, 179–81). Typically, the election of the first minority representative was itself the consequence of a successful vote dilution case or the settlement of a claim that the prior electoral structure violated the Voting Rights Act. A longstanding focus of the Act has been on state and local evasion of federal orders to end discriminatory practices. As the Supreme Court observed, Congress knew that some jurisdictions had "resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees" and "had reason to suppose" that these jurisdictions "might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself."[103] Thus, a special concern of the Act has been with new voting rules or changes in rules, and there may be a good argument that the Act ought to apply to rule changes that reallocate political power from newly-won minority-held offices. The Department of Justice adhered to this position and a handful of lower courts accepted it[104]—although the Supreme Court recently rejected this reading of the Act.[105]

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103. South Carolina v. Katzenbach, 383 U.S. 301, 335 (1966).

104. See Robinson v. Alabama State Dep't of Educ., 652 F. Supp. 484 (M.D. Ala. 1987); Hardy v. Wallace, 603 F. Supp. 174 (N.D. Ala. 1985); Horry County v. United States, 449 F. Supp. 990 (D.D.C. 1978).

105. See Presley v. Etowah County Comm'n, 112 S. Ct. 820, 829–32 (1992).

But Guinier's theory would apply far beyond the scenarios of new rules or changes in rules. Her theory sweeps within its ambit longstanding rules and procedures lacking indicia of invidious intent, so long as the effect of the rules, in the context of a legislature marked by racial bloc voting, is to deny the minority a proportionate share of legislative successes (pp. 77–80, 101–09). This is much bolder than the argument that the Act can be used to attack unusual procedures or changes in the rules upon the entry of the first minority members, and would work a considerable expansion in the scope of the Act. Indeed, as I will suggest below, it is inconsistent with the procedural spirit of the Act because it rests on the implicit assumption that groups in society are substantively entitled to a proportionate share of legislative outcomes.

Moreover, although Guinier insists that she is not attacking majority voting per se and that a legislative vote dilution case would require proof of "consistent and deeply engrained [sic]" racial polarization within the legislature (p. 17), her sweeping rhetorical references to blacks as "the pariah group: systematic losers in the political marketplace" (p. 37), to "a racially divided society"(p. 3) and a society "deeply cleaved" by issues of race (p. 175), and her treatment of a range of economic and social issues over which blacks and whites tend to disagree as markers of racial polarization suggest that she believes legislative vote dilution claims might be alleged in many jurisdictions.

Guinier proposes several remedies for legislative vote dilution. She would avoid "judicial monitoring" of the legislative process—which she calls "arguably not desirable" (p. 109)—and focus on restructuring the legislative process on "the model of jury deliberations" (p. 107) through the use of rules that promote compromise and consensus by forcing the majority to deal with the minority. Specifically, she presents the following remedial options: legislative cumulative voting or "a supermajority vote on issues of importance to the majority or its equivalent, a minority veto on critical minority issues" (pp. 108, 116). As I discuss below, there are problems with each of these remedies.

2. *Reconceptualizing the "Rule" in Majority Rule.* — Although the primary focus of Guinier's articles is the Voting Rights Act, her work often sounds a broader, more theoretical note. Running through Guinier's analysis is a critique of the principle of majority rule and of the assumption that majority rule is the essence of democracy. "[T]here is *nothing inherent in democracy*," Guinier declares, "*that requires majority rule*" (p. 17). Instead, she insists "we ought to question the inherent legitimacy" of majority rule (p. 102).

Guinier's critique of majority rule has two components. First, she asserts that the fairness of majority rule is contingent on the fluidity of the majority, that is, on the possibility that different groups will be in the majority for different issues so that there is no one majority but "shifting majorities, as the losers at one time or on one issue join with others and become part of the governing coalition at another time or on another

issue" (p. 4). If the majority is "fixed and permanent," with a concomitant fixed and permanent minority, then the members of the minority have no chance ever to be in the majority. In such a situation majority rule can become majority tyranny (p. 4).

Second, the essence of that tyranny is not that the majority prevails on any particular issue, but rather that the majority can prevail on *every* issue. It is the "winner-take-all" feature of majority rule that draws her fire, especially the disparity between the percentage of the polity that composes the majority, and the majority's share of political victories. Under "winner-take-all" majority rule, a 51% majority can have 100% of the power (p. 5). At least in a polity marked by a "fixed and permanent" separation between the majority and the minority, then, "winner-take-all" majority rule can amount to tyranny.[106] Guinier would replace "winner-take-all" majority rule with a requirement of power-sharing and a principle of "taking turns" (p. 5). The majority would enjoy most of the power and prevail on a majority of the issues, but it would be required to "take turns" with the minority and allow the minority to prevail on some issues. Given her characterization of her theory as one of "proportionate" interest representation, the minority would presumably be entitled to a percentage of "turns" roughly comparable to its proportion of the population.

Guinier's focus on the "winner-take-all" aspect of majority rule, and her proffered alternative of a "taking turns" principle, puts an interesting new spin on a centuries-old problem. Although opponents of Guinier's nomination treated her criticism of majority rule as a kind of political sacrilege—a profaning of a basic precept of our secular faith—in fact the concern about the potential for majority rule to turn into majority tyranny is virtually coextensive with the history of majority rule itself. The most celebrated exposition of the theory of the American Constitution, "Federalist No. 10," records the efforts of the Framers to combine majority rule with institutional constraints on the "mischiefs" of majority fac-

106. The scope of Guinier's claim for the unfairness of "winner-take-all" majority rule is ambiguous. As David M. Estlund has noted, "Guinier is not sufficiently clear about whether the illegitimacy of the decisions produced by existing white majorities is rooted in the *permanence* of this particular majority, the *bigoted* nature of white voting patterns, or the very idea of rule in the *interests* of a majority." David M. Estlund, Who's Afraid of Deliberative Democracy? On the Strategic/Deliberative Dichotomy in Recent Constitutional Jurisprudence, 71 Tex. L. Rev. 1437, 1475 (1993) (footnotes omitted).

At its narrowest, Guinier's claim is that majority rule is unfair when the majority/minority divide is racial, and the majority is "racially prejudiced against the minority" (p. 103). At times the claim is somewhat broader, treating "racial bloc voting" as the source of unfairness without the need to show that the majority is racially prejudiced (p. 102). (Racial bloc voting might occur without racial bias if there is a strong congruence between race and economic status, or race and views on the proper scope of government taxation and social welfare spending.) At its broadest, her claim seems to be that winner-take-all majority rule is problematic in a "pluralist society" (p. 82) or a "multi-racial society" (p. 5) per se, apparently presuming that political differences among races are "fixed and permanent" (p. 4).

tions.[107] And the American political system is replete with structures and institutions—separation of powers, bicameralism, the Senate,[108] federalism, the indirect election of the president—intended to check majority tyranny.[109]

As Guinier notes, the threat of majority tyranny is often associated with the existence of a fixed political separation between the majority and minority (p. 9). The fairness of majority voting as the rule of collective decisionmaking is based on the assumption that it gives each voter an equal opportunity to influence the outcome of the decisionmaking process.[110] But while majority rule may be the only system that, in the abstract, assures each voter an equal opportunity to influence the out-

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107. See The Federalist No. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961).

108. The United States Senate is surely one of the most anti-majoritarian institutions of any democracy. Indeed, one of the ironies of the Guinier nomination was that the notorious critic of majority rule was to be judged by a body in which the representatives of a little less than one-fifth of the people of the United States constitute a majority: With the Senate composed of two senators from each state regardless of population, a majority of senators can be assembled from the 26 states that have an aggregate population of 44 million people, or less than one-fifth of the more than 250 million people in the United States. See The 1994 Information Please Almanac 833 (Otto Johnson et al. eds., 47th ed. 1994) (state-by-state population data from 1990 census).

Particularly incongruous was Senate Republican Leader Bob Dole's denunciation of Guinier as " 'consistently hostile to majority rule.' " Michael Isikoff, Confirmation Battle Looms Over Guinier: Critics Target 'Extreme' Views in Law Review Articles by Justice Dept. Civil Rights Nominee, Wash. Post, May 21, 1993, at A23. In the 1993–1994 Congress, when they were the minority party, Senate Republicans repeatedly thwarted the democratic majority through their successful deployment of Senate Rule XXII, which requires a three-fifths vote of the full membership of that body to end debate, so that for many bills the effective Senate voting rule was a supermajority of sixty, rather than a simple majority of fifty-one. See Arthur S. Flemming & Ray Marshall, Tyranny of the Minority, N.Y. Times, May 30, 1994, at A15; Hendrik Hertzberg, Catch-XXII, New Yorker, Aug. 22 & 29, 1994, at 9.

The Senate's requirement of sixty votes to cut off debate means that it is theoretically possible that senators from the 21 states representing just 28 million people, or a little more than one-eighth of the United States, could prevent Congress from enacting legislation supported by senators representing the other seven-eighths of the population. See The 1994 Information Please Almanac, supra. Of course, Senate votes rarely if ever divide larger from smaller states with such mathematical precision, but due to the combined effect of the Constitution and the Senate's own rules, the potential for the representatives of a tiny minority of the population to block the representatives of the vast majority is there.

109. See, e.g., Jonathan Riley, American Democracy and Majority Rule, *in* Majorities and Minorities: NOMOS XXXII 267 (John W. Chapman & Alan Wertheimer eds., 1990) [hereinafter Chapman & Wertheimer]; see also Dahl, supra note 18, at 14–15; Dixon, supra note 49, at 10.

110. See Kenneth O. May, A Set of Independent Necessary and Sufficient Conditions for Simple Majority Decision, 20 Econometrica 680, 681 (1952) (stating that "[t]he second condition is that each individual be treated the same as far as his influence on the outcome is concerned"; this is the condition of equality); see also Spitz, supra note 76, at 151, 204–05.

come,[111] majority rule will fail to respect the equality of voters in a polity divided into a permanent majority and a permanent minority. In such a divided society, the members of the minority may, as a practical matter, have no opportunity to influence collective outcomes. In effect, they are governed by others—like an internal colony—rather than self-governing. As Brian Barry has observed, "the more closely a society approximates to the model of a monolithic majority bloc facing a minority which is always on the losing side,"[112] the more majority rule will tend "to produce outcomes that are highly prejudicial to the interests of the minority group."[113]

The United States Constitution contains a variety of responses to the threat of majority tyranny. One—the strategy emblematized by the Bill of Rights—is to protect the most vital interests of the minority by declaring them to be "fundamental rights," beyond the proper sphere of legislative infringement, entrenched in a constitution and secured from majoritarian abuse by judicial review. A second is federalism, which limits the issues that a majority of the entire society will determine, and, instead, allocates some issues to distinctive autonomous communities within the broader society. A third strategy is the use of institutions and structures that slow down the formation of a majority and make it more difficult to act. Separation of powers and bicameralism work to retard the ability of the majority to act. Finally, some institutions or procedures, like equal votes for each state regardless of population in the Senate, simply empower a minority to block the majority.[114]

Guinier's solution to the "tyranny of the majority" is something different. Rather than limit the majority, she would directly empower the minority. The principle of "taking turns" implies that for some issues—presumably a percentage of issues that in number and significance mirror the minority's share of the population—the minority would have power to make a binding decision. Much as proportional representation assures the election of some minority-preferred legislators despite the minority's minority status in the jurisdiction as a whole, "taking turns" would

111. A rule that would permit decisions by less than a majority would necessarily be either: (a) indecisive, since in any vote or election there could be more than one winner, or (b) unequal, since to overcome the indecisiveness problem and have a clear winner, it would have to give greater weight to the choice of one set of voters over another. A rule that would require a supermajority for a decision would also be unequal since it gives more voting power to members of the blocking minority.

112. Brian Barry, Is Democracy Special?, *in* Philosophy, Politics, and Society 155, 179 (Peter Laslett & James Fishkin eds., 1979).

113. Id. at 188.

114. As previously noted, see supra note 108, the Senate has enhanced its fundamentally anti-majoritarian posture through its adoption of a supermajority voting rule for cutting off debate. In a more recent instance of an explicitly anti-majoritarian voting rule, the Republican-controlled House of Representatives in the 104th Congress amended the House's rules to require the approval of three-fifths of the House for passage of any bill that would raise personal or corporate income taxes. See For the Record: New House Rules, N.Y. Times, Jan. 6, 1995, at A20.

assure the enactment of some minority-sponsored legislation even though the minority is a minority in the legislature.

Guinier makes the case for the "taking turns" principle in "civic Republican" terms. In a polarized polity, the majority fears neither defeat nor defections. It, thus, has no reason to listen to the minority, to consult with it, or to take its interests into account. Requiring the majority to share power with the minority will create an incentive for the majority to deal with the minority across a broader range of issues. The majority is more likely to confer with the minority, consider its preferences, and make compromises to win its support. By promoting deliberation, consensus, and compromise (p. 9), over the raw power of the majority, "taking turns" would thus affect not only the identity of the winners and losers of particular battles, but also the nature of the political process. "Taking turns" would make the legislature more deliberative and more representative of the entire polity. In short, although Guinier would limit majority rule, her purpose is not anti-democratic, but pro-democratic—to perfect democracy by enabling the minority to join the majority in engaging in democratic self-government.

The "taking turns" principle also has implications for the substance and scope of government action. "Taking turns" could provide a way to reconcile protection of the interests of the minority with an activist, progressive government. The classic concerns about majority tyranny have been that the majority would oppress the minority by taking things *from* it—that the propertyless mass might tax or take the wealth of the propertied; that a racial, ethnic, or religious majority might deny the minority basic liberties; that the Northern states might strip the Southerners of their property in slaves. Thus, the traditional safeguards against majority tyranny involved limitations on majority action, by either ruling some topics off-limits to the government or making it more difficult for a majority to make policy. But Guinier's concern, and her definition of oppression, is not with coerced redistribution *from* the minority to the majority, but rather with the failure of the white majority to redistribute *to* the black minority to meet its pressing needs.

In Guinier's view, the "social and economic agenda" (p. 45) of the civil rights movement, and the "black interest agenda" (p. 98) today is activist and redistributive. It includes attacks on poverty, support for social welfare spending, affirmative action, and a broader role for government in general (pp. 45, 252–53 n.82). The traditional restrictions on the tyranny of the majority can curb active oppression but they do nothing to satisfy the social and economic needs of blacks. Limited government is no solution for a group looking to government for vigorous action. But replacement of "winner-take-all" with the principle of "taking turns," and the attendant notion that the minority is entitled to a proportionate share of legislative victories, could enable the minority to stake its claim to a share of public resources.

Ironically, as I will suggest in the next section, the very substantive implications that make the model attractive for those seeking to make government more redistributive to minorities doom its prospects under the Voting Rights Act. Moreover, it is difficult to see how the model of "taking turns" can be made operational without risking either legislative deadlock or the kind of close monitoring by external agencies that is inconsistent with local self-government.

B. *The Theoretical and Practical Difficulties of Using the Voting Rights Act To Attack Legislative Voting*

1. *Does the Act Apply to Legislative Voting?* — The threshold requirement for a "third-generation" attack on legislative voting rules, such as simple majority voting, is that such a rule be a "standard, practice, or procedure" that affects the right to vote within the meaning of the Voting Rights Act.[115] Ordinarily, voting refers to the casting of ballots by members of the electorate. When the question presented to voters on those ballots is the election of representatives, the rules and procedures that affect the choices presented to voters and the method of aggregating the ballots—where different methods of aggregation can yield different results—directly affect voting. But decisionmaking within the legislature occurs at one level removed from the voters' voting. Internal legislative rules have no effect on who votes in the election of representatives or how those votes determine who is elected.

The argument that legislative voting rules affect the popular right to vote is particularly vulnerable when there is no claim that the legislative voting rule was adopted in response to the outcome of a popular election, or would have the effect of undoing the result of a popular election. As previously noted, the legislative vote dilution cases that Guinier cites involved either deviations from proper legislative procedure or new rules adopted after the election of the first minority members (pp. 8–9, 178–81). Such action could be seen as having a more direct impact on the popular right to vote since it would undo the popular vote—and would be seen by the local community as clearly intended to do so.[116] Guinier's theory of legislative vote dilution is, however, not limited to new rules, unusual rules, or rules intended to negate the results of a popular election. It would instead apply to standard legislative rules, particularly simple majority voting, that deny a minority its proportionate share of political success.[117]

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115. Voting Rights Act of 1965 §§ 2, 5, 42 U.S.C. §§ 1973, 1973c (1988); see supra note 22.

116. The Supreme Court recently indicated that the intersection of race and representation is "one area in which appearances do matter." Shaw v. Reno, 113 S. Ct. 2816, 2827 (1993).

117. The suggestion in the text that the Voting Rights Act might apply to changes in legislative rules or procedures adopted after the election of a minority member was rejected by the Supreme Court in Presley v. Etowah County Comm'n, 112 S. Ct. 820

Guinier attempts to provide a legal foundation for the argument that legislative rules can affect the popular right to vote by invoking the "transformative vision" of the civil rights movement. The civil rights movement, she argues, saw a direct connection between the right to vote and legislative outcomes. Protection of the vote was not an end in itself but a strategy for "political action, effective social change, and . . . the advancement of a progressive agenda in general" (p. 44). In this view, rules and procedures that thwart the advancement of that agenda abridge the right to vote.

But it is not at all clear what role ought to be given to the vision of the civil rights movement in interpreting the Act. The Voting Rights Act

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(1992). *Presley* considered whether section 5 of the Act—which provides that certain states and political subdivisions can enforce a new "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting," only if they obtain federal approval, see supra note 22—applies to changes in the decisionmaking authority of the elected members of two different county commissions. See Voting Rights Act of 1965, § 5, 42 U.S.C. § 1973c (1988). Each commission had acted to transfer powers from individual commissioners to the commission as a whole after a "second generation" suit led to the replacement of at-large elections with single-member districts and the election of the first black commissioners. The Court held that even though the changes reduced the power of minority elected officials, and hence, the power of the voters who elected them, they were not subject to preclearance because section 5 does not apply to changes that affect the allocation of power among government officials. Although Guinier is sharply critical of *Presley* (pp. 178–81), she does not address its implications for her legislative vote dilution theory.

If section 5 does not apply to changes that reduce the power of newly-elected minority officials then it would seem, *a fortiori*, that section 2 of the Act, which reaches pre-existing standards, practices, and procedures, would not apply to pre-existing internal legislative rules. The Supreme Court has generally found that the definition of a covered voting practice or procedure is the same for both sections 2 and 5 of the Act. See, e.g., Chisom v. Roemer, 501 U.S. 380, 401–02 (1991). Although the presumptive congruence of the section 2 and section 5 definitions of voting was undermined by a fragmented Court in Holder v. Hall, 114 S. Ct. 2581 (1994), it appears that even if the sections differ in scope, section 5 covers a wider range of electoral practices than section 2.

In *Holder*, only four Justices—Justices Blackmun, Stevens, Souter, and Ginsburg, in a dissenting opinion by Justice Blackmun—clearly adhered to the traditional congruence of sections 2 and 5. They found the size of a legislature, which had previously been held to be a "standard, practice, or procedure" related to voting under section 5, was a covered voting practice under section 2. See id. at 2620. Justice Kennedy and Chief Justice Rehnquist, in an opinion by Justice Kennedy, found section 2 to be narrower than section 5 when they determined that although section 5 applied to *changes* in legislative size, the size of a legislature is not a "standard, practice, or procedure" for purposes of voting under section 2. See id. at 2585–88. Justice O'Connor agreed with the Blackmun group that sections 2 and 5 apply the same definition of voting "standard, practice, or procedure," and that legislative size is, thus, a practice affecting voting, but she concluded that a vote dilution suit could not be brought against legislative size under section 2 because of the lack of a suitable benchmark for the assessment of dilution. See id. at 2588, 2590–91. Justices Scalia and Thomas, in an opinion by Justice Thomas, concluded that section 2 does not support any vote dilution claims. Although Justice Thomas suggested that the theory of vote dilution is also "in tension with the text of § 5 itself," he limited his repudiation of vote dilution to section 2, saving "for another day" the status of vote dilution under section 5. Id. at 2611 & n.27.

would never have become law without the heroic efforts of the civil rights movement, and the views of those who struggled for federal action to secure the right to vote are surely relevant to thinking about the meaning of the right to vote. But questions of statutory interpretation are ordinarily resolved through examination of the text of the statute and its legislative history. Guinier never actually connects the theories of the civil rights movement with the actions or intent of Congress. She does not discuss the extent to which Congress shared the movement's expansive definition of the meaning of voting or intended to enact it when it adopted the Act and its amendments.[118] Surely, there was opposition to the movement's vision in Congress, and Congress might have given the movement much less than it sought. For the movement's vision to determine the meaning of the Act, Guinier would have to show that Congress intended to codify it in the Act, and she has not done so.[119] At times Guinier treats the Act not as a matter of positive law but as a metaphor for a perfected democracy for minorities.

Even if the civil rights movement's vision informs our interpretation of the Act, the connection between the right to vote and the advancement of a substantive political agenda remains ambiguous, with at least three possible meanings.[120] First, it could be that proponents of the Act saw the right to vote as a foot in the door, an essential prerequisite to the pursuit of a political agenda, a "foundational" right that made subsequent political action possible, but not that the right to vote carries with it an entitlement to political success. Second, it could be that the proponents assumed, as a predictive matter, that the right to vote would lead to political empowerment and the enactment of a political agenda.[121] But the presumption of political success does not engender an entitlement to suc-

118. One proviso, added in 1982, states that "nothing" in section 2 "establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973(b) (1988). If Congress inserted into the Act an express rejection of a right to proportional representation in elections, it is doubtful that Congress intended to embrace a right to proportionate legislative outcomes.

119. It is not clear whether Guinier believes her analysis of the Act and her specific proposals follow from the actions of Congress, or rather, whether she is seeking to read broader normative concerns into the Act. At one point Guinier flatly declares that her "focus and basic remedial approach . . . has been mandated by *Congress*" (p. 115). Elsewhere, she states that her proposals are not mandated by Congress at all, but rather "borrow[ ] from the themes that have been the subject of the debate surrounding the 1965 Act and especially its 1982 Amendments" (p. 279 n.79) (see also p. 109 "nor do I argue that these proposals are statutorily or constitutionally required").

120. As Samuel Issacharoff has noted, "[t]he normative outcomes of full political equality have been uncertain since the founding strokes of the modern civil rights movement." Samuel Issacharoff, Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence, 90 Mich. L. Rev. 1833, 1870 (1992).

121. See Allen v. State Bd. of Elections, 393 U.S. 544, 582, 585 (1969) ("[T]he action taken by Congress . . . proceeded on the premise that once Negroes had gained free access to the ballot box, state governments would then be suitably responsive to their voice, and federal intervention would not be justified.") (Harlan, J., concurring in part and dissenting in part).

cess; it could simply mean the Act's supporters underestimated the political obstacles that lay ahead. Third, it could be that the right to vote was, indeed, understood to include all the political steps necessary to the effectuation of a political agenda, so that simple majority voting in the legislature ought to be treated as a practice that abridges the right to vote when it prevents the implementation of the minority's political agenda. This interpretation of the Act is surely in tension with principles of federalism recently invoked by the Supreme Court in interpreting the Act.[122] Moreover, this reading comes close to treating the Act as the source of an entitlement to substantive outcomes, and Guinier has insisted that her vision of the Act is procedural and not substantive.

Indeed, the latter point may be the nub of the matter. The Voting Rights Act is essentially about process. As Samuel Issacharoff has noted, "[v]oting rights law can be defined by its strong element of process correction . . . . That element of process correction separates voting rights claims from the purely outcome-driven civil rights claims against the distribution of goods and opportunities in this society."[123] The successes of voting rights litigation in enfranchising minorities and reforming the rules for electing representatives reflects the appeal of process-based arguments in our legal culture. As Issacharoff points out, "voting rights claims gather force to the extent that process-based claims can relieve a conservative judiciary of any obligation to police the substantive distributional outcomes of the policy decisions of elected political bodies."[124]

Guinier attempts to conform her proposal to the process-correction focus of the Act by arguing that legislative vote dilution litigation would be "procedural and not substantive," and have "nothing to do with the substance of state and local deliberative processes" (p. 115). The focus in a legislative vote dilution case would be "on discrimination in the distribution of procedural resources such as votes, not on the specific outcomes of public policy debates" (p. 104). Indeed, she insists her approach differs from traditional forms of judicial review of legislative action, which "typically focused on the need to monitor and constrain the substantive outputs of the decisionmaking process" (p. 103). Instead, for Guinier, "[t]he issue here is one of procedure and process, not substantive justice" (p. 187).

This insistence that legislative vote dilution is a matter of process not substance and concerned with rules not outcomes, however, is not persuasive. Legislative vote dilution litigation would require close scrutiny of legislative outcomes—of "policy outputs" (p. 14)—since outcomes would be "relevant . . . as evidence whether the decisionmaking process is fair" (p. 249 n.64). The evaluation of legislative outcomes would, inevitably, entail substantive assessments of legislative decisions. Whereas in "second

122. See Presley v. Etowah County Comm'n, 112 S. Ct. 820, 832 (1992).

123. Issacharoff, supra note 120, at 1865.

124. Id. at 1869.

generation" litigation, the determination of the success of the minority in electing representatives relative to the minority's share of the population and the size of the legislature requires a relatively straightforward numerical calculation, the assessment of minority success in the enactment of legislation is likely to be more difficult and entail "unbridled normative assessments of politics."[125] Courts or the Department of Justice would have to decide which issues were of "importance to the minority"—a complicated enterprise when the issues are not clearly racial but intertwined with social welfare programs, the distribution of jobs, and the quality of public services. At least as difficult would be the determination of the relative weight to be given to different bills, since not all legislative victories are of equal importance. Indeed, there would, no doubt, be difficulties in determining whether a particular bill ought to be counted as a success or failure for the minority since many bills are the product of compromise and can simultaneously provide a benefit and limit that benefit.

Legislative vote dilution cases would place the local legislative process on the witness stand. The assessment of legislative outcomes would require a close examination of the content of the bills, the preferences of the minority representatives, the extent to which those bills advanced the minority's agenda, and the relative success of the minority compared to what the minority should have obtained based on the sense of some outside reviewer—a federal court or the Department of Justice—of what the minority would have obtained in a fair political process. Scrutiny of the outcomes as evidence of the process could become scrutiny of the outcomes for their substantive fairness—as measured by the outside reviewer's sense of fairness. At this point, substance and process would be deeply entangled.

Beyond the technical difficulties of assessing the outcomes "evidence," the underlying theory of legislative vote dilution litigation has a strong substantive cast. As Guinier puts it, her "conceptual claim" is that each group protected by the Act "has a right to have its interests *satisfied* a fair proportion of the time" (p. 104) (emphasis added). A legislative vote dilution case would "measure deviations from an ideal proportional power share to determine gross interest representation disparities" (p. 106). But a right to the satisfaction of interests and the standard of a proportionate share of victories (not just proportionate share of representatives) are substantive principles. They are entirely focused on outcomes and are concerned not with how decisions are made, but with their content. They address not how collective preferences ought to be calculated but which preferences ought to be enacted. Even if not concerned with the outcomes of specific bills, these principles are focused on legislative outcomes in the aggregate. The underlying conceptual and legal

125. Samuel Issacharoff, The Elusive Quest for Judicial Review of Political Fairness, 71 Tex. L. Rev. 1643, 1677 (1993).

claim is not a matter of process and procedure, but of substantive justice. Legislative vote dilution litigation would be inextricably intertwined with the substance of legislative decisionmaking. It would mix substance and process, inviting close judicial or Justice Department review of the fairness of the outcomes, as well as the voting rules, of state and local legislative activity. It does not fit easily within the ambit of the Voting Rights Act or, more generally, within a theory of process-based reform of state and local government.

Indeed, the primary effect of legislative vote dilution litigation would be the circumvention of the Supreme Court's decision to apply an "intent" rather than an "effects" test in racial discrimination cases under the equal protection clause.[126] Given the pervasive interaction of race with economic and social differences, an "effects" test could have led to strict judicial scrutiny of many government spending and regulatory programs that, as a statistical matter, differentially benefit or burden people of different races. The "effects" test thus could have promoted the greater proportionality of government action. Fearing just this close judicial oversight of the vast array of state and local decisions, the Court rejected the effort to graft the "effects" test into substantive equal protection law. Through the theory of legislative vote dilution, Guinier would resurrect the "effects" test, only this time as a matter of fair process. But whatever the wisdom of the Supreme Court's reading of the Equal Protection Clause and its rejection of the "effects" test, surely the notion of proportionality of legislative outcomes is more one of fair substance than of fair process.

2. *Do Guinier's Remedies for Legislative Vote Dilution Work?* — Even if legislative majority rule is treated as a "standard, practice, or procedure" within the Voting Rights Act,[127] it is not clear there is a procedural solution that would remedy legislative vote dilution and promote what Guinier describes as the black political agenda, without the sort of close outside monitoring that is in sharp tension with the notion of local self-government.

Consistent with the analogy to electoral vote dilution, Guinier's principal remedy for legislative vote dilution is cumulative voting—in the legislature. "[O]ver a period of time and a series of legislative proposals, votes on multiple bills would be aggregated or linked. . . . [B]lack representatives could . . . participate in the legislative process [by] plumping votes to express the intensity of constituent preferences on some issues and trading votes on issues of constituent indifference" (p. 108). Like electoral cumulative voting, then, legislative cumulative voting would allow the minority to prevail on some percentage of legislative votes even in the face of unified majority opposition.

126. See, e.g., Washington v. Davis, 426 U.S. 229, 238–39 (1976); Jefferson v. Hackney, 406 U.S. 535, 547–49 (1972).

127. Voting Rights Act of 1965 §§ 2, 5, 42 U.S.C. §§ 1973, 1973c (1988).

Legislative cumulative voting, however, is of doubtful workability. Cumulative voting for the election of representatives relies on a determinate number—known in advance—of seats to be filled. In an election for a five-member body, there are five seats, voters have five votes per person, and each voter can cumulate up to five votes for one candidate. In the legislature, however, there is no determinate number of bills or legislative votes known at the outset of a legislative session. Many bills can have an almost infinite number of permutations, as amendments are added, clauses dropped, modifications made, exceptions inserted, exclusions then made from the exceptions, provisions carved out and placed in separate bills, and previously separate bills combined into an omnibus bill. Similarly, there can be an almost infinite number of votes—on the amendments, on the rules governing debate, on motions to cut off debate, on motions to table, on motions to recommit to committee, on motions to move the previous question, or on motions to reconsider. There is no way of knowing in advance how many votes will be cast during a legislative session as a whole, on any topic, or for any group of bills. Cumulative voting requires a fixed number of votes to cumulate, but in legislative deliberations there will not be a fixed number of votes. Thus, legislative cumulative voting is not feasible without some outside monitor regularly selecting and linking specific issues or votes for cumulation. But that would entail the considerable ongoing external involvement in legislative decisionmaking which Guinier is seeking to avoid.

The problems with legislative supermajority voting are somewhat different. Guinier presents two versions of a possible supermajority remedy—one focused "on issues of importance to the majority or its equivalent, a minority veto on critical minority issues" (p. 108),[128] and

128. Actually, these are not equivalents. The minority veto would give the minority far more power. With a supermajority rule, the majority group in the legislature could pass its legislation by combining a unanimous majority group with a fraction of the minority. In a nine-member council, with five whites and four blacks, and a two-thirds voting rule, five whites and one black could pass legislation over the opposition of the other three blacks. But a minority veto implies that the consent of a majority of the minority would be necessary for enactment, so that as few as two negative votes of the black members would be sufficient to block enactment of a measure supported by five whites and two blacks.

A minority veto would resemble the rule of concurrent majorities made famous (or notorious) by John C. Calhoun in *A Disquisition on Government*. See John C. Calhoun, A Disquisition on Government and a Discourse on the Constitution and Government of the United States (Columbia, S.C., Richard K. Cralle ed. 1851). Like Guinier, Calhoun saw a community "as made up of different and conflicting interests," id. at 28, and was concerned about the consequent danger of the tyranny of the majority. To prevent such majoritarian abuse, he would "require the consent of each interest," id. at 25, as a condition for government action. This would make it "impossible for any one interest or combination of interests or class, or order, or portion of the community, to obtain exclusive control." Id. at 25–26. The concurrent majority would "give to each interest or portion of the community a negative on the others." Id. at 35. That, in turn, would require the majority to take the interests of the minority into account and would promote the spirit of compromise within the community. See id. at 36, 66, 69; see also George Kateb, The Majority Principle: Calhoun and His Antecedents, 84 Pol. Sci. Q. 583, 595–97

the other a "uniform decisional rule," "race-neutral," which would give bargaining power "to all numerically inferior or less powerful groups, be they black, female or Republican" (pp. 16–17). Special voting rules based on the "race" of the issue are also of doubtful workability. First, it will be difficult to determine in advance what issues are of importance to particular racial groups. Some of the issues Guinier cites—assistance to the poor, social welfare spending, a broader role for government in general—are not racial per se, but are intertwined with questions of economics, class, ideology, and morality. Without an obvious racial marker, it is not clear which issues will require a supermajority voting rule and which can be decided by a simple majority. This difficulty might be overcome by an outside agency—a court or the Department of Justice—requiring special votes on particular issues, but again that would involve considerable ongoing external involvement in the inner workings of a legislature.

Second, the use of special decisional rules for issues associated with a racial minority would raise a constitutional question. The Supreme Court has indicated concern "when the State allocates governmental power nonneutrally, by explicitly using the *racial* nature of a decision to determine the decision making process."[129] To be sure, this concern with allocating political power according to the racial nature of the issue has, until now, only arisen when the majority adopted special rules that made it more—not less—difficult for minorities to achieve favorable legislation.[130] But the Court's current close scrutiny of race-conscious measures intended to advance the representation of minorities[131] suggests that even a special voting rule specifically intended to make it easier to pass legislation supported by racial minorities would be an inviting target for a constitutional challenge.

By contrast, a *general* supermajority vote is quite feasible. Supermajority requirements are common in democratic legislatures, although they are usually reserved for issues of unusual importance, such as amending the Constitution, ratifying a treaty, or overriding an executive veto.[132] But a supermajority requirement may be of limited help to a minority seeking government assistance. By making it harder for a legis-

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(1969) (describing Calhoun's use of the concurrent majority requirement to protect minorities from injustice).

Unlike Guinier, Calhoun also recognized that the concurrent majority requirement, in departing from simple majority rule, would promote limited government (which he desired) since it would make it more difficult for government to act. See Calhoun, supra, at 59.

129. Washington v. Seattle School Dist. No. 1, 458 U.S. 457, 470 (1982). See also Hunter v. Erickson, 393 U.S. 385, 391–93 (1969) (holding that racial classifications bear heavier burden of justification than other classifications).

130. See *Washington*, 458 U.S. at 457; Lee v. Nyquist, 402 U.S. 935 (1971) (holding unconstitutional New York statute prohibiting state officials from assigning students for purposes of achieving racial equality); *Hunter*, 393 U.S. at 385.

131. See, e.g., Shaw v. Reno, 113 S. Ct. 2816, 2817 (1993).

132. See, e.g., Joseph Jaconelli, Majority Rule and Special Majorities, 1989 Pub. L. 587, 603–06.

lature to take action, supermajority voting rules can operate to protect the interests of a minority if the minority's principal goal is to prevent legislative action and preserve the status quo.[133] But Guinier is seeking legislative action on a broad economic and social agenda. A rule that promotes inaction may not be a particularly effective remedy for obtaining action.

To be sure, the power to block action is the power to win concessions. A supermajority requirement could give minority voters a bargaining chip in negotiations with the majority's representatives over something the majority wants. Indeed, Guinier likens her "remedial ideal" to "the model of jury deliberations," where the requirement of unanimity means not that any individual juror is able to secure a verdict based on his or her personal preference but rather that each juror must be listened to and each gets an effective opportunity to influence the outcome (pp. 107–08).[134] But this assumes that the majority in a presumptively polarized legislature wants something strongly enough that it is willing to overcome its prejudices and make concessions to the minority. In the jury setting, each panel is uniquely focused on just one case, and the institutional pressure to resolve that case creates incentives to compromise—and even in the jury settings deadlocks occur. The legislative setting is quite different. Accepting Guinier's postulate that the principal policy clash between blacks and whites in many states and localities will be over social welfare spending, aiding the poor, the scope of government involvement, and the taxes that go with an activist government, then a majority presumably content with the status quo and predisposed against new government spending would in many cases actually prefer deadlock to enactment of a progressive agenda. To be sure, there will be cases where the polarized majority really wants something out of its state or local government and might be willing to trade with the minority to achieve it. But, in general, a supermajority voting requirement is an uncertain instrument for extracting action out of a majority that is happier with the status quo than the minority.

3. *Implications for the Principle of "Taking Turns."* — These objections to Guinier's proposed remedies for legislative vote dilution also raise doubts about the implementation of her more general goal of replacing "winner-take-all" majority rule with the principle of "taking turns." For her, the purpose of the "taking turns" principle is not just to give the minority a few victories but, rather, to create an institutional setting in

133. The decision of the Republican-controlled House of Representatives in the 104th Congress to amend the House's rules to require a supermajority of three-fifths of the House in order to pass any bill that would increase personal or corporate income taxes was obviously intended to make it more difficult for Congress to raise taxes. See supra note 114.

134. Interestingly, Calhoun also embraces the jury as his model for legislative decision making. However, he notes that despite the unanimity requirement jurors do reach a verdict because they are empaneled under circumstances in which "something *must* be done." Calhoun, supra note 128, at 65–66.

which the majority is willing to listen to the minority and to seek its cooperation. "Taking turns" could make government more deliberative, more attentive to the entire constituency, and, thus, more democratic.

But apart from her discussion of potential remedies under the Voting Rights Act for legislative vote dilution, Guinier does not attend to the practical problems of implementing the principle of "taking turns." The only one of Guinier's remedies that was framed to promote "taking turns" directly—legislative cumulative voting—is probably unworkable. The other remedies resemble the traditional political devices that protect the minority by limiting the majority; they do not provide the minority with any specific power to pass legislation, or "take a turn." Supermajority voting will empower the minority only when the majority wants something enough that it is willing to deal with the minority, but Guinier's underlying assumptions of racial polarization and differences in preferences with respect to government activism suggest that a supermajority rule is likely to result less in "taking turns" and more in deadlock—or no turns at all.

Thus, implementing "taking turns" by litigation or by imposed changes in legislative decisional rules risks either deadlock or the kind of close outside monitoring by external agencies that is deeply at odds with self-government. That does not mean that a "taking turns" version of majority rule is necessarily a utopian dream—although it very well may be—but merely that litigation under the Voting Rights Act may not be the way to do it.

We need to engage in more comparative research, and especially, to give closer study to "consensus democracies" in which "the guiding principle . . . is to achieve the explicit consent of the major social groups in the country."[135] A particularly interesting phenomenon, noted by political scientist Arend Lijphart, is the pattern in a number of democratic countries of "oversized cabinets," that is, coalition governments containing more parties than are strictly necessary to form a majority and thereby providing representation to significant minorities.[136] "Oversized cabinets," he notes, "are more typical of the consensus model, and they are particularly suitable for governing plural societies."[137] We need to know more about how democracies become "consensus" oriented rather than "majoritarian," how decisionmaking in such countries actually proceeds and just what "consensus" means in these countries, whether deadlock is a problem, and whether practices designed to promote consensus are the product of legal rules or broader social and political agreements.

I suspect that any implementation of the principle of "taking turns" that would also respect traditions of state and local self-government and legislative autonomy can only come from within the political process and cannot be imposed from outside or through litigation. This may be the

135. Dahl, supra note 15, at 156.
136. See Lijphart, supra note 16, at 46–66.
137. Id. at 62.

real lesson to be drawn from the model of collective action that appears to have inspired Guinier's principle of shared decisionmaking: the family (p. 5). According to Guinier,

> family decision making . . . utilizes a taking-turns approach. When parents sit around the kitchen table deciding on a vacation destination or activities for a rainy day, often they do not simply rely on a show of hands, especially if that means that the older children always prevail or if affinity groups among the children . . . never get to play their activity of choice. Instead of allowing the majority simply to rule, the parents may propose that everyone take turns, going to the movies one night and playing video games the next. (Pp. 5–6.)

But, of course, "taking turns" in a family is not imposed by law from without but emerges from within, both reflecting and reinforcing norms of trust, reciprocity, and mutual commitment to overarching shared ends. Translated to the public arena, the principle of "taking turns" would, thus, be less a cure for the pathology of polarized legislatures, and more the healthy end-state of a polity that has taught itself to deal with its internal differences. This, of course, tells us nothing about how to get to a polity marked by consensus and power-sharing rather than winner-take-all majority rule. Indeed, it suggests that the rules that would implement the principle of taking turns are likely to be useless without a broader political commitment to the principle in the first place.

Still, the comparative research that may help us to determine whether "taking turns" majority rule works, how societies come to adopt it, and the role of legal rules in promoting such an approach to legislative decisionmaking has yet to be done, and could shed light on how to promote greater majority-minority power-sharing without either excessive external interference or deadlock.

C. *Majority Rule and Racial Polarization*

Although I am not persuaded by Guinier's effort to read a theory of legislative vote dilution into the Voting Rights Act, she has, nonetheless, made a valuable point in emphasizing the nexus between the right to vote and legislative outcomes. Although in a representative system, legislative outputs do not fall within the ambit of the right to vote, the two are connected. Voting is not simply a matter of idiosyncratic political expression unrelated to government decisionmaking. The purpose of the right to vote, indeed, the meaning of the vote, is to give people an opportunity to affect the substance of government.[138] The right to vote is "a fundamental matter in a free and democratic society"[139] because it is the key way

138. Cf. Burdick v. Takushi, 112 S. Ct. 2059 (1992) (rejecting claim of constitutional right to cast write-in ballot where write-in could not affect outcome of election).

139. Reynolds v. Sims, 377 U.S. 533, 561–62 (1964).

most people can participate in governance.[140] If, due to other features of the political process, the votes of some people never have any impact on government, then it is difficult to say they are self-governing. The consistent denial of the political preferences of a historically subordinated minority raises a profound problem for the legitimacy of a polity that claims to be democratic.

Democracy assumes that all people have an equal right to participate in their own governance. Guinier would use the Voting Rights Act to reform racially polarized state and local legislatures, to bring them into compliance with the underlying norm of political equality that legitimates, and, indeed, defines democratic self-government. In that sense, she is not anti-democratic, as some of her critics have contended, but rather the "democratic idealist" (p. 14) that she claims to be. In seeking to reform state and local governments, however, her legal theory and her remedies would entail close review of the outputs of state and local legislatures by federal judges and administrators according to an indeterminate and inevitably subjective standard of proportionality of outcomes. A polarized and exclusionary legislature is inconsistent with democratic self-government, but close oversight and correction by federal monitors to implement an external definition of substantively fair outcomes is not self-government at the state and local level either.

Guinier thus points us to a disquieting dilemma: how to reconcile majority rule with substantive fairness in the presence of racial division? The magnitude of that dilemma and the nature of the response require consideration of the nature and scope of racial polarization in American legislatures.

The concept of racial polarization does an enormous amount of work in her analysis—and in voting rights jurisprudence generally—but Guinier does not develop what racial polarization means within a legislative setting. Race is one of the fundamental divisions in our society, and it affects political preferences and attitudes much as it affects so many other things.[141] Racially polarized voting within the electorate—defined as the tendency for blacks and whites to vote for different candidates particularly in elections when candidates of different races are pitted against each other—is a widespread and well-documented phenomenon.[142] In the electoral context, polarization is defined in terms of the correlation

140. See Pamela S. Karlan, The Rights to Vote: Some Pessimism About Formalism, 71 Tex. L. Rev. 1705, 1708 (1993).

141. See, e.g., Andrew Hacker, Two Nations: Black and White, Separate, Hostile, Unequal 199–219 (1992); see also Edward G. Carmines & James A. Stimson, Issue Evolution: Race and the Transformation of American Politics 27–88 (1989) (describing how divisions over race have shaped national competition between two major parties and voters' perceptions of parties); Thomas B. Edsall & Mary D. Edsall, Chain Reaction: The Impact of Race, Rights, and Taxes on American Politics (1991) (same).

142. See Issacharoff, supra note 120, at 1871.

of race of voters with the votes for candidates, particularly in elections when the leading candidates are of different races.

But how do we decide whether a legislature is racially polarized? Two important issues will have to be addressed in transferring the analysis of polarization from the electorate to the legislature. First, within the legislative setting, what is the equivalent of the race of the candidate? Guinier does not limit the analysis of legislative racial polarization to classic civil rights issues like anti-discrimination legislation, but would extend it to a range of economic and social questions. She tends to assume, without proving, that there are "white" or "black" positions on a range of public questions not directly linked to questions traditionally defined as racial. But the question is more difficult than that.

It is a sad truth that in many black-versus-white elections, a high proportion of voters simply rally around the candidate of their own race. The race of the candidate can take on enormous symbolic significance, dominating the issues, overwhelming economic or ideological differences among people of the same race, and simplifying the question of for whom to vote.[143] But when the voting concerns issues not candidates, and when the issues lack a clear racial marker, how are we to decide which issues indicate whether racially polarized voting is occurring? It is not clear that we can rely on any correlation of the racial division among legislators with votes on particular bills. As Guinier herself has pointed out, particular legislators may not vote the preferences or the interests of people of their own race (pp. 13, 48). Nor is it clear that people of one race will line up decisively on one side or the other of a particular bill the way they tend to in elections between candidates of different races.

Intraracial differences, growing out of differences in class, sex, or personal philosophy, and affecting such issues as levels of taxation, the role of the government in regulating business or helping the needy, policies on crime, and questions of public morality, may be submerged in the name of racial unity to elect a candidate of a particular race but may then re-emerge when the issues themselves are expressly presented.[144] Although there tend to be general differences of opinion between blacks and whites over a range of public issues,[145] the cleavages are not as sharp and the nature of the disagreement is more nuanced than in black-versus-

143. See Nayda Terkildsen, When White Voters Evaluate Black Candidates: The Processing Implications of Candidate Skin Color, Prejudice, and Self-Monitoring, 37 Am. J. Pol. Sci. 1032 (1993).

144. Cf. Swain, supra note 29, at 11–13 (noting differences in opinion between black leadership organizations and "the rank-and-file black population" on range of questions, especially issues of criminal justice); see also Randall Kennedy, The State, Criminal Law, and Racial Discrimination: A Comment, 107 Harv. L. Rev. 1255, 1258–61 (1994) (noting disagreements among African-Americans concerning criminal law enforcement policy).

145. See, e.g., Swain, supra note 29, at 10–11; Jennifer L. Hochschild & Monica Herk, "Yes, But . . .": Principles and Caveats in American Racial Attitudes, *in* Chapman & Wertheimer, supra note 109, at 308–25.

white candidate elections. Nor is it clear how general differences on questions of public policy map on specific legislative votes.[146]

Second, in the study of electoral polarization, no effort is made to attribute a causal role to race in voter decisionmaking. The correlation of the race of the voter with electoral outcomes is enough to establish polarization. Should polarization be defined the same way within the legislature, despite the differences in popular and legislative voting, and the far greater role that party affiliation, ideology, constituent and contributor demands—not to mention cravings for power and recognition[147]—play in the voting decisions of legislators relative to those of the general electorate? In a legislature where the black and white representatives also tend to belong to different parties or embrace different ideologies should differences in votes be explained solely in terms of race without taking into account party or ideology?

As previously noted, Guinier sends out conflicting signals concerning her sense of the extent of legislative polarization. In emphasizing that "third generation" voting rights litigation could be mounted only in cases of proven polarization, she implies that such litigation would be limited to a relative handful of pathological settings. If so, the Voting Rights Act—amended to establish its application to legislative decisionmaking—might be an appropriate tool for placing these polarized and exclusionary legislatures into a sort of federal receivership. Intrusive remedies might be justified for a handful of highly diseased local polities. But if, instead, as she sometimes states, the United States as a whole is "a racially divided society" (p. 5), with legislative polarization,[148] then federal intervention in state and local governments could become the norm and state and local self-government largely displaced. This ambiguity may have been a source of concern to President Clinton when he expressed misgivings about Guinier's proposals as "*general* remedies."[149]

This, then, is the great conundrum at the heart of Guinier's argument. Racial polarization within state and local legislatures can nullify the Voting Rights Act's proscription of racial discrimination in voting;

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146. See Paul M. Sniderman & Thomas Piazza, The Scar of Race 8–12 (1993) (contending that there are three sets of racial issues in contemporary politics—a "social welfare agenda," an "equal treatment agenda," and a "race-conscious agenda"—and that different groups of whites have different views on each cluster of racial issues).

147. See, e.g., Daniel Shaviro, Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s, 139 U. Pa. L. Rev. 1, 80–106 (1990).

148. For example, Guinier speaks of "the documented persistence of racial polarization," and of how "racism excludes minorities from ever becoming part of the governing coalition" (p. 103). She continues, "[T]he primary accomplishment" of the second generation of voting rights litigation "has been to effect cosmetic changes in the composition of state and local decisionmaking bodies . . . [which] has simply transferred the discrete and insular minority problem from the electorate to the legislative body" (p. 117).

149. See supra text accompanying note 9.

moreover, a polarization that consistently denies blacks a fair opportunity to satisfy their political preferences strips those polities of their democratic pretensions. In such a setting, majority rule may be majority tyranny, and a commitment to the values that legitimate democracy would support intervention to rewrite local legislative voting rules on behalf of the minority. Federal law could deal with state and local legislative polarization if it occurred in only a relative handful of places. But if polarization is widespread, then external scrutiny of the legislative outputs and procedures of large numbers of states and localities is ultimately inconsistent with principles of state and local self-government.

To resolve this dilemma we need to know more about how state and local legislatures work and to think more about the meaning of racial polarization within the legislature. Paradoxically, the less pervasive racial polarization is found to be, the more persuasive is Guinier's call for some federal intervention to reform the inner workings of the most pathological jurisdictions and to bring them into compliance with the basic criteria of democratic self-governance. But if polarization is epidemic in American state and local legislatures, as her rhetoric sometimes suggests, then her solution would result in a widespread federalization of state and local legislatures and arguably destroy local self-government in order to save it. Indeed, if the problem is as severe as she suggests, it is not clear that there is any procedural remedy or institutional reform likely to be adopted that can make much difference.

CONCLUSION

In this Essay, I have considered *The Tyranny of the Majority* primarily from the perspective of democratic political theory. Despite the charge of "anti-democratic" flung at her during the battle over her nomination, Guinier's concern with majority tyranny reflects a longstanding theme in democratic theory, much as she draws on the Madisonian strain in American thought in searching for procedural cures for political problems. But democratic theory rarely makes headlines or the evening news. As the firestorm of controversy that engulfed Guinier's nomination indicates, for many people the real issue raised by Guinier's work is the question of, and the discomfort with, the role of race in contemporary American politics.

Guinier's work is literally "race-conscious": A basic premise of the articles collected in *The Tyranny of the Majority* is that race is a highly salient factor in American politics, and that race ought to be taken into account in the design of American political institutions. She assumes that Americans frequently divide along racial lines in their views about public policy, in the voting booth, and in state and local legislatures. I suspect that her candor about the role of race in politics explains much of the opposition that she drew, even though there is considerable support for her premise with respect to electoral behavior and public opinion.

Nearly three decades of voting rights litigation have demonstrated that there is a significant correlation between race and popular voting.[150] So, too, public opinion research indicates a nexus between race and attitudes on a range of political and social issues.[151] This is not to embrace the view, recently denounced by Justice Thomas, "that members of the racial group must think alike and that their interests are so distinct that the group must be provided a separate body of representatives in the legislature to voice its unique point of view."[152] Race does not mechanically determine political viewpoint, and many individuals certainly cross "racial lines" and vote for candidates of another race. But over the course of numerous elections over several decades, when individual decisions are aggregated together it turns out that race consistently has had a powerful role in explaining political outcomes.[153] Some racial division is, thus, a basic fact of American political life, although, as I have indicated, the definition, scope, and significance of racial polarization within legislatures is far more uncertain.

Can racial division be taken into account in the design of our political institutions without thereby hardening and perpetuating such racial division? Ironically, given the opposition that greeted her nomination, the most striking aspect of Guinier's work is her effort to develop remedies that can address racial division without formally building race into the structure of politics.

The centerpiece of Guinier's political reform agenda is the use of cumulative voting to elect legislative representatives. Part of the appeal of cumulative voting is that although it would enhance the capacity of racial minorities to elect candidates of their choice, cumulative voting is formally race-neutral. It can facilitate the election of minority representatives if, in fact, voters cast their ballots on racial lines. But cumulative voting does not assume that voting is race-based, it does not assure the election of racial minority representatives, and it does not lock in race, or, indeed, any other factor, as the principal political dividing line in a community. Cumulative voting and other alternatives to single-member districts vindicate the representation of minorities in general, not racial minorities in particular.

Even in her critique of legislative voting, Guinier struggled to recharacterize the issue in terms not of racial conflict but of the general unfairness of "winner-take-all" majority rule, and of the ability of the "tak-

150. See, e.g., Laughlin McDonald et al., Georgia, *in* Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965–1990, at 84–86 (Chandler Davidson & Bernard Grofman, eds. 1994) (discussing polarized voting in Georgia); Orville V. Burton et al., South Carolina *in* Quiet Revolution, supra, 212–13 (discussing racial bloc voting in South Carolina).

151. See, e.g., Swain, supra note 29, at 10–11; Hochschild & Herk, supra note 145, 308–325.

152. Holder v. Hall, 114 S. Ct. 2581, 2599 (1994).

153. See Issacharoff, supra note 120, at 1871.

ing turns" principle to empower all minorities. But in seeking to implement remedies for legislative vote dilution, Guinier turned to solutions that entail either a highly race-conscious approach to legislative decision-making or a general supermajority rule with the attendant risk of legislative stalemate. It was just these proposals that provoked the most heated opposition during the storm over her nomination. Indeed, in her more recent work, Guinier appears to have dropped her call for a "third generation" of Voting Rights Act litigation and, instead, to have narrowed her focus to promoting cumulative voting as the alternative to race-conscious districting.[154]

As this book demonstrates, Lani Guinier is a creative, thoughtful, and articulate voice in the ongoing national argument over race and representation. Her search for electoral systems and voting rules that will widen the scope for effective participation by the many contending groups within our society without either sharpening lines of division or blocking the potential for political action on a range of pressing economic and social concerns is of central importance, even if not all of her proposals are persuasive. Given the range of ideas she has already presented, Guinier is certain to be a significant contributor to the evolving debate about the nature and design of democracy in a demographically diverse polity for years to come.

Indeed, the ideological and partisan furor that blocked her nomination in the spring of 1993 appears to have had a significant, if unintended, consequence. In losing her bid to be assistant attorney general for civil rights, Guinier gained national attention and a broader, more public audience for work that had been written primarily for academics. F. Scott Fitzgerald famously observed, "there are no second acts in American lives."[155] With the publication of this book, Lani Guinier may prove him wrong.

154. See Lani Guinier, [E]racing Democracy: The Voting Rights Cases, 108 Harv. L. Rev. 109 (1994).

155. F. Scott Fitzgerald, The Last Tycoon 189 (1941).