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## How Radical Is Lani Guinier?

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# BOOK REVIEW

## HOW RADICAL IS LANI GUINIER?

THE TYRANNY OF THE MAJORITY:  
FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY

By Lani Guinier.

The Free Press, New York, 1994.

Pp. xx, 324. \$24.95.

*Reviewed by Michael E. Lewyn\**

### INTRODUCTION

On April 29, 1993, President Clinton nominated Lani Guinier, a professor at the University of Pennsylvania Law School, to head the Justice Department's Civil Rights Division.<sup>1</sup>

Because the Civil Rights Division is responsible for enforcing the Voting Rights Act of 1965,<sup>2</sup> the central topic of debate surrounding Guinier's nomination quickly became her assertions in numerous law review articles that even if racial minorities achieve proportional representation in state and local legislatures, they still may be inadequately represented if their legislators are consistently outvoted by whites.<sup>3</sup> To remedy the problem of ineffective minority representation, Guinier had suggested in her writings that under certain circumstances, minorities receive veto

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<sup>1</sup> Michael Isikoff, *Clinton Nominates 7 to Justice*, WASH. POST, April 30, 1993, at A20.

<sup>2</sup> 42 U.S.C. §§ 1971, 1973, 1973a to 1973bb-4 (1988 & Supp. IV 1992).

<sup>3</sup> See Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEX. L. REV. 1589 (1993); Lani Guinier, *Keeping the Faith: Black Voters in the Post-Reagan Era*, 24 HARV. C.R.-C.L. L. REV. 393 (1989); Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413 (1991); Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077 (1991). Because Guinier's book incorporates the substance of all these articles in some form, for convenience all future cites will be to the book rather than the articles.

power over "critical minority issues,"<sup>4</sup> and that minority legislators be granted additional voting power through a "cumulative voting" system, which would give them extra votes on issues that they care about.<sup>5</sup>

Guinier's views touched off a blizzard of protest from political conservatives and moderates. A *Wall Street Journal* headline called Guinier one of "Clinton's Quota Queens,"<sup>6</sup> while Senate Minority Leader Robert Dole described Guinier as a "consistent supporter, not only of quotas, but of vote-rigging schemes that make quotas look mild."<sup>7</sup> Faced with enormous public and congressional opposition, President Clinton withdrew Guinier's nomination on June 3, 1993.<sup>8</sup>

In order to "spark the debate that was denied"<sup>9</sup> when President Clinton withdrew her nomination, as well as to prove that her ideas "are not undemocratic or out of the mainstream,"<sup>10</sup> Guinier has published her articles in book form. This Review examines Guinier's ideas about election law, with a particular emphasis on her proposals for reforming rules governing legislative elections and rules governing legislative decisionmaking.

## I. BACKGROUND, OR WHAT THE FUSS WAS ABOUT

### A. *The Three Generations of Voting Rights Law*

According to Guinier, voting rights law has passed through "three generations."<sup>11</sup> The first generation "focused directly on access to the ballot on the assumption [that] the right to vote by itself is 'preservative of other rights,'"<sup>12</sup> and included the Voting Rights Act of 1965 (the "1965 Act"). The 1965 Act "outlawed literacy tests, brought federal registrars to troubled districts to ensure safe access to polls, and targeted for federal administrative review many local registration procedures."<sup>13</sup> As a result, "[t]he number of blacks registered to vote rose dramatically within five

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<sup>4</sup> LANI GUINIER, *THE TYRANNY OF THE MAJORITY* 108 (1994).

<sup>5</sup> *Id.* Guinier also supports cumulative voting in legislative elections. *Id.* at 14-16. By most accounts, cumulative voting in elections is far less controversial than cumulative voting within a legislature. *See id.* at 15 (noting that the Reagan and Bush Administrations both approved cumulative voting in local elections).

<sup>6</sup> Clint Bolick, *Clinton's Quota Queens*, *WALL ST. J.*, Apr. 30, 1993, at A12.

<sup>7</sup> Michael Isikoff, *Confirmation Battle Looms Over Guinier*, *WASH. POST*, May 21, 1993, at A23.

<sup>8</sup> Ruth Marcus, *Clinton Withdraws Nomination of Guinier*, *WASH. POST*, June 4, 1993, at A1 (reporting that President Clinton decided to withdraw Guinier's nomination after "[h]aving studied her articles in detail for the first time" the day before).

<sup>9</sup> GUINIER, *supra* note 4, at 19.

<sup>10</sup> *Id.* at 9.

<sup>11</sup> *Id.* at 7.

<sup>12</sup> *Id.* at 19.

<sup>13</sup> *Id.*; *see* 42 U.S.C. §§ 1971, 1973, 1973a to 1973bb-4.

years after passage.”<sup>14</sup>

Despite the early success of the 1965 Act, Guinier argues that the rights that it bestowed failed to give blacks equal access to political power. After Congress passed the 1965 Act, many southern states simply altered election rules in order to limit black influence. Guinier states that “[b]y changing, for example, from neighborhood-based districts to jurisdiction-wide at-large representatives, those in power ensured that although blacks could vote, and even run for office, they could not win.”<sup>15</sup>

Second-generation voting-rights activists sought to combat at-large elections and similar vote-diluting processes through litigation aimed at making black votes more meaningful. For example, second-generation activists worked to elect more black officials, “primarily by creating majority-black single-member districts.”<sup>16</sup> Initially, second-generation lawsuits were resisted by the Supreme Court. For example, in *City of Mobile v. Bolden*,<sup>17</sup> the Court held that an at-large voting system in Mobile, Alabama could not be found illegal or unconstitutional unless the plaintiffs could demonstrate that the politicians who created or maintained the system intended to discriminate against racial minorities.<sup>18</sup>

In response to the *Bolden* decision, a broad coalition of civil rights activists “urged Congress to amend the [1965 Act] to specify that discriminatory results alone would establish a violation.”<sup>19</sup> Congress answered in 1982 by adding such a second-generation voting rights provision to section two of the 1965 Act.<sup>20</sup> As amended, section two eliminates the “discriminatory intent” test that the Supreme Court articulated in *Bolden*,

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<sup>14</sup> GUINIER, *supra* note 4, at 19.

<sup>15</sup> *Id.* Guinier defines racial polarization as “the degree to which blacks and whites vote differently.” *Id.* at 138. Assuming a racially polarized electorate unevenly divided among ethnic groups, an at-large system will elect only those candidates favored by the majority, whereas a district system will elect some majority candidates and some minority candidates. For example, suppose city X is 59% white and has racially polarized elections for its six-member city council. If seats on the council are elected on an at-large basis, each member of the “white” slate will receive approximately 59% of the vote, and all six council members will be white. On the other hand, if the elections are held in neighborhood-based districts, the black neighborhoods will likely be able to elect one or two council members to represent them. Of course, this scenario applies with any two polarized groups, not just racial ones; for instance, at-large elections might exclude Republicans in cities dominated by Democrats, and vice versa.

<sup>16</sup> *Id.* at 50. Single-member districts are districts that elect one representative to a legislative body. In such districts, the one candidate who gets the most votes wins. Thus, single-member districting is a “winner-take-all voting” system.

<sup>17</sup> 446 U.S. 55 (1980).

<sup>18</sup> *Id.* at 66.

<sup>19</sup> GUINIER, *supra* note 4, at 26.

<sup>20</sup> Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (codified at 42 U.S.C. § 1973(b) (1988)).

and provides instead that voting rights violations “[can] be proved based on discriminatory results alone.”<sup>21</sup> Under section two’s “results test,” the “absence of black elected officials is circumstantial evidence . . . of discriminatory results,”<sup>22</sup> whereas “roughly proportional black representation legitimate[s] the electoral process.”<sup>23</sup> In keeping with section two’s emphasis on making the black vote more meaningful, the classic second-generation remedy under section two is a redistricting plan that gives minorities proportional representation through the creation of single-member “majority-minority” districts.<sup>24</sup>

To avoid section two liability, or to remedy section two violations, politicians have enacted districting plans designed to increase the number of black legislators by herding black voters into overwhelmingly black single-member districts. In North Carolina, for example, the state legislature designed a black-majority congressional district that traces the narrow path of Interstate 85, “creating a swatch of voters on either side of the highway from one end of the state to another.”<sup>25</sup> Similarly, Illinois legislators created a congressional district shaped like an earmuff, connecting two non-contiguous Latino neighborhoods in Chicago in order to establish a Latino-majority district.<sup>26</sup>

This type of race-conscious districting, as encouraged by section two, has been attacked from all directions for focusing too closely on race. *The Wall Street Journal*, for example, described minority-dominated districts as “rigged by race,”<sup>27</sup> while the *Almanac of American Politics*, in its description of North Carolina’s Twelfth Congressional District, stated that such districting “amount[s] to a form of apartheid.”<sup>28</sup> Indeed, even Guinier criticizes race-conscious districting because it does not necessar-

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<sup>21</sup> GUINIER, *supra* note 4, at 50; *see* 42 U.S.C. § 1973(b) (1988).

<sup>22</sup> GUINIER, *supra* note 4, at 50; *see* 42 U.S.C. § 1973(b).

<sup>23</sup> GUINIER, *supra* note 4, at 53; *see* 42 U.S.C. § 1973(b).

<sup>24</sup> GUINIER, *supra* note 4, at 53.

<sup>25</sup> *Id.* at 120. In *Shaw v. Reno*, 113 S. Ct. 2816 (1993), the Supreme Court held that the North Carolina plan that created the State’s elongated Twelfth Congressional District would be unconstitutional absent: (1) a demonstration of a legitimate non-racial justification; and (2) a finding that the plan was sufficiently “narrowly tailored to further a compelling state interest.” *Id.* at 2828, 2832. The Court specifically avoided deciding whether “‘the intentional creation of majority-minority districts, without more[,]’ always gives rise to an equal protection claim,” *id.* at 2828 (quoting *id.* at 2839 (White, J., dissenting)), and therefore offered no explanation of how to distinguish legitimate race-conscious redistricting plans from unconstitutional ones.

<sup>26</sup> GUINIER, *supra* note 4, at 120.

<sup>27</sup> *Id.* (quoting Jim Sleeper, *Rigging the Vote by Race*, WALL ST. J., Aug. 4, 1992, at A14).

<sup>28</sup> MICHAEL BARONE & GRANT UJIFUSA, *THE ALMANAC OF AMERICAN POLITICS* 969 (1994 ed.); *see also* ABIGAIL THERNSTROM, *WHOSE VOTES COUNT?* 192-231 (1987) (contending that by focusing on group rights to proportional officeholding instead of procedural fairness, “confused” courts interpreting § 2 have tended to go to

ily guarantee minorities the political equality they seek. Guinier reasons that the ability to elect a proportionate number of minorities does not necessarily ensure political influence within a legislative body.<sup>29</sup> Accordingly, she argues for a "third generation" of legislation and litigation "to police the legislative voting rules whereby a majority consistently rigs the process to exclude a minority."<sup>30</sup> In short, Guinier's belief that section two did not go far enough makes it unsurprising that her nomination stirred so much controversy.

### B. *What Guinier's Job Would Have Been*

The Justice Department's Civil Rights Division has considerable influence over voting rights law. Section five of the 1965 Act<sup>31</sup> includes what is known as the "preclearance" provision. This provision requires "covered jurisdictions"<sup>32</sup> to "submit all proposed changes in electoral rules or procedures to the U.S. Attorney General or the U.S. District Court for the District of Columbia."<sup>33</sup> These proposed changes, which include not only "state rules prescribing who may register to vote,"<sup>34</sup> but also "any state enactment which altered the election law of a covered state in even a minor way,"<sup>35</sup> may not be implemented until the Attorney General or the court has determined that the proposed changes are non-discriminatory.<sup>36</sup> Because most southern states and portions of numerous others qualify as "covered jurisdictions,"<sup>37</sup> and because ongoing redistricting is necessary to comply with the "one person, one vote" principle,<sup>38</sup> the

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the unnecessary and unintended extreme of guaranteeing racial minorities the right to win elections).

<sup>29</sup> See GUINIER, *supra* note 4, at 54-70 (discussing the inadequacies of second-generation voting rights law).

<sup>30</sup> *Id.* at 8. In *Presley v. Etowah County Comm'n*, 112 S. Ct. 820 (1992), the first case that Guinier categorizes as addressing third-generation concerns, the Supreme Court declined to interpret changes restricting the powers of black county commissioners as diminishing the right of blacks to vote in general elections. *Id.* at 829.

<sup>31</sup> 42 U.S.C. § 1973c (1988).

<sup>32</sup> "Covered jurisdictions" are those which: (1) have employed voter registration tests requiring proof of education level, moral quality, or standing in the community; and (2) have had unusually low voter registration or turnout. See 42 U.S.C. § 1973b(b).

<sup>33</sup> Dale Krane, *Implementation of the Voting Rights Act: Enforcement by the Department of Justice*, in *THE VOTING RIGHTS ACT 123, 124* (Lorn S. Foster ed., 1985); see 42 U.S.C. § 1973c.

<sup>34</sup> *Presley*, 112 S. Ct. at 827.

<sup>35</sup> *Id.* at 827-28 (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 566 (1969)).

<sup>36</sup> Krane, *supra* note 33, at 124; see 42 U.S.C. § 1973c.

<sup>37</sup> Krane, *supra* note 33, at 124-25.

<sup>38</sup> The "one person, one vote" doctrine has evolved from Justice Stewart's recognition in *Gray v. Sanders*, 372 U.S. 368, 382 (1963), that "[w]ithin a given constituency, there can be room for but a single constitutional rule—one voter, one vote." *Id.* at

preclearance provision gives the head of the Civil Rights Division a virtual veto power over the constant redistricting and formation of other election-related rules in an area of more than 1,000,000 square miles, containing a population of over 50 million people, more than 1000 counties, and several thousand municipalities.<sup>39</sup>

## II. GUINIER ON VOTING RIGHTS

In the introduction to *The Tyranny of the Majority*, Guinier lays out her basic thesis: Elections are fair only if minorities<sup>40</sup> also have some influence over public policy. Thus, majority rule is fair only if it is the "rule of shifting majorities, [whereby] 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."<sup>41</sup> Unless the rule of shifting majorities takes hold, the majority effectively becomes a "permanent majority" that will be tempted to abuse its power.<sup>42</sup> This may in turn lead to instability, because it leaves minority voters without any incentive to participate in such a system and instead tempts them to overthrow it.<sup>43</sup>

To eliminate this problem, Guinier recommends that under certain circumstances, winner-take-all majority rule be replaced by a system that promotes "consensus and positive-sum solutions."<sup>44</sup> Specifically, Guinier concludes that: (1) race-conscious districting under section two is preferable to race-neutral districting, because it provides greater assurance that minorities will be represented in legislatures;<sup>45</sup> (2) race-conscious districting under section two, although preferable to the status quo ante, is inadequate to ensure adequate minority representation for a variety of reasons;<sup>46</sup> and (3) within some legislative bodies, majority rule should be altered because even where ethnic minorities are proportionately repre-

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382 (Stewart, J., concurring). Article I, § 2 of the Constitution requires decennial apportionment of federal congressional districts, and the Equal Protection Clause requires that "representation in a state legislature . . . be clearly based upon population unless a legitimate state objective demands otherwise," LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 13-3 (2d ed. 1988) (citing *Reynolds v. Sims*, 377 U.S. 533 (1964)).

<sup>39</sup> Krane, *supra* note 33, at 125.

<sup>40</sup> Congress enacted the 1965 Act to protect racial minorities, and thus Guinier focuses on protection of racial minorities. However, she recognizes that majority rule may be unfair if "any significant group of people ends up as permanent losers." GUINIER, *supra* note 4, at 9.

<sup>41</sup> *Id.* at 4.

<sup>42</sup> *Id.* at 9.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 20.

<sup>45</sup> *Id.* at 72.

<sup>46</sup> *Id.* at 73.



sented in legislative bodies, they have little political power if they are usually outvoted by white legislators.

I will address each of these issues in turn.

#### A. *Why Guinier Supports Race-Conscious Districting*

The American electoral system was adapted from the pre-1832 British system,<sup>47</sup> which emphasized land as the basis of political representation.<sup>48</sup> This type of geographic districting “assumes that each voter is a ‘member’ of a ‘group’ comprised of all the voters in [the] district.”<sup>49</sup> In many ways, however, America has outgrown this system: As greater numbers of people within a geographic district have gained the right to participate politically, the diversity of views in those districts have reduced the importance of geography as a proxy for shared interests.

In response to this problem, Guinier suggests that if districting can be based on geography, it can also be based on a mixture of geography and race—a combination that by definition guides race-conscious redistricting under section two. Guinier reasons as follows:

(1) Historically, the rationale for geographic redistricting has been that people who live in the same area have common interests.<sup>50</sup>

(2) Just as people who live near each other have common interests, people of the same racial background also have common interests because “[r]ace in this country has defined individual identities, opportunities, frames of reference, and relationships.”<sup>51</sup> Thus, race, like geography, “serves as a political proxy for shared experience and common interests.”<sup>52</sup>

(3) Race, like geography, is therefore relevant to voters’ interests, and can accordingly help legislators create districts containing voters with common interests.

In arriving at this conclusion, Guinier rebuts some of the arguments against second-generation race-conscious districting. One such argument is that because “the right to vote is individual, not group-based,” minorities are adequately represented “as long as individual minority group members have a fair chance to participate formally by voting.”<sup>53</sup> Guinier rejects this argument for two reasons. First, she notes that geography, like race, lumps voters into groups based on interests. Thus, race-con-

<sup>47</sup> *Id.* at 127.

<sup>48</sup> *Id.* at 128.

<sup>49</sup> *Id.* at 127.

<sup>50</sup> *Id.* at 127-29; *see also* *Shaw v. Reno*, 113 S. Ct. 2816, 2826 (1993) (acknowledging that the geographic “compactness” of an electoral district may be a legitimate state interest).

<sup>51</sup> GUINIER, *supra* note 4, at 137.

<sup>52</sup> *Id.* Guinier acknowledges that race is a “useful but limited proxy,” but reserves her strongest support for interest-based representation. *Id.* at 127.

<sup>53</sup> *Id.* at 139.

scious districting is no more "group-based" than geography-conscious districting.<sup>54</sup> Second, people vote not merely to express themselves, but also to affect public policy.<sup>55</sup> Because a single voter cannot affect public policy unless other voters have similar preferences, the right to "participate politically" "is a right best realized in association with other individuals, *i.e.*, as a group."<sup>56</sup> Thus, voting involves group as well as individual interests.

Next, she addresses the argument that "since whites can, and do, represent black voters, blacks should pursue instead an 'integrative' electoral strategy in which white politicians compete for black votes" in majority-white districts.<sup>57</sup> Guinier responds that where voters are racially polarized, politicians may be unable to satisfy both white and black demands,<sup>58</sup> and will therefore have to ignore black views in order to be elected.<sup>59</sup> In such situations, black interests will receive consideration only in majority black districts. Guinier also observes that even white politicians who compete for minority votes do not generally always take minority demands seriously.<sup>60</sup>

Third, she rebuts the argument that geography is a more effective political proxy than race because geography, "unlike race, is temporal, individualistic, and discretionary."<sup>61</sup> Guinier responds that residence in a district is no more voluntary than race because "the one-person, one-vote rule mandates continual redistricting," and because "existing district configurations" are temporary.<sup>62</sup> Even if redistricting does not affect most voters, "very few people move somewhere in recognition of their likely voting efficacy within particular election subdistricts . . . [or even] know in advance the particular elected officials by whom they are likely to be represented."<sup>63</sup> Furthermore, geography "reflects the very essence of limita-

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<sup>54</sup> *Id.* at 140.

<sup>55</sup> *Id.* at 134.

<sup>56</sup> *Id.* at 125.

<sup>57</sup> *Id.* at 36.

<sup>58</sup> For example, if whites want most government services to be given to white neighborhoods and blacks want most government services to be given to black neighborhoods, a politician will have difficulty pleasing both groups. If either group constitutes a stable majority of the electorate, politicians have a strong incentive to heed majority demands and ignore the minority.

<sup>59</sup> GUINIER, *supra* note 4, at 37. Indeed, a districting plan violates § 2 *only* when the electorate is racially polarized. See *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986) (holding that multimember districts operate to impair minority voters' ability to elect representatives only when the minority group is politically cohesive and the white majority votes as a bloc frequently enough to enable it to defeat the minority's preferred candidate).

<sup>60</sup> GUINIER, *supra* note 4, at 37.

<sup>61</sup> *Id.* at 141.

<sup>62</sup> *Id.* at 129.

<sup>63</sup> *Id.*

tions on choice based on group identity," because "residential ghettos are often the result of racial discrimination."<sup>64</sup>

In dismissing the "voluntary district" argument, Guinier fails to point out that for geographically mobile citizens, the very temporariness of geography makes it irrelevant to a voter's interests. For example, if a voter moves back and forth between a city and its suburbs, the circumstance of residency in a city as opposed to a suburb cannot be said to provide an observer with any insight into the voter's political preference.

Fourth, Guinier rejects the argument that "[r]acial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters."<sup>65</sup> Guinier responds that "in a racially polarized environment, the process of districting is inevitably race-conscious."<sup>66</sup> She admits that race-conscious districting is to some extent divisive,<sup>67</sup> but adds that "those who take issue with current approaches have a responsibility not just to criticize but to propose alternative solutions that protect the right of the minority to have its voice represented and heard in the legislative debate."<sup>68</sup> As noted above, Guinier believes that districting merely on the basis of geography does not protect this right, because in a racially polarized area, only a majority-black district will give blacks a voice.<sup>69</sup>

#### B. *Why Guinier Prefers Cumulative Voting to the Status Quo*

Although Guinier prefers the status quo to race-neutral redistricting, she contends that race-conscious districting fails to represent all voters' interests adequately. Specifically, she posits that any form of single-member districting—whether it is race-neutral or race-conscious—wastes most citizens' votes, and that single-member districts should under some circumstances be replaced with what she calls "interest representation."<sup>70</sup> Interest representation is based not on involuntary and fixed territorial constituencies, but rather on representing voters through their "self-identified interests."<sup>71</sup> As a practical matter, "interest representation" means replacing geographic districting with a modified at-large system known as

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<sup>64</sup> *Id.* at 141.

<sup>65</sup> *Shaw v. Reno*, 113 S. Ct. 2816, 2832 (1993).

<sup>66</sup> GUINIER, *supra* note 4, at 265 n.2.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 274 n.53.

<sup>69</sup> Guinier also notes that "in light of recent [riots] in Los Angeles, concerns about unnecessarily dividing society do not seem consistent with the divided society in which we already find ourselves." *Id.* Because race-conscious districting has been the law for a decade, I find this statement quite puzzling.

<sup>70</sup> *Id.* at 94.

<sup>71</sup> *Id.*

“cumulative voting.” In this section, I will discuss: (1) Guinier’s criticisms of single-member districting; and (2) cumulative voting.

### 1. What’s Wrong With Single-Member Districts?

For Guinier, the touchstone of the ideal electoral system is what she calls the “one-vote, one-value” principle.<sup>72</sup> Guinier’s one-vote, one-value principle comes from a conception of political fairness in which “as many votes as possible should count in the election of representatives.”<sup>73</sup> Single-member districting fails to satisfy the one-vote, one-value principle because it “wastes votes of both individuals and groups . . . [by making] certain that there are political losers in each district.”<sup>74</sup> For example, white voters in a largely black district, or black voters in a largely white district, frequently “waste” their votes by voting for the losing candidate. Race-conscious districting thus gives black voters influence in “black” districts, but does nothing for other black voters.<sup>75</sup>

Although packing voters into homogeneous districts reduces “vote-wasting” by supporters of losing candidates, such districting wastes votes in other ways. As Guinier sees it:

When more people vote for the winning candidate than is technically necessary to carry the district, their votes are technically wasted because they were unnecessary to provide an electoral margin within the district *and* because they could have been used to provide the necessary electoral margin for a like-minded partisan in another district.<sup>76</sup>

Guinier also notes that where single-member districts exist,

political or racial partisans . . . may be inclined to gerrymander, *i.e.*, pack the minority party or minority race into a few districts to diminish their overall influence. Or they may fracture the likely supporters of the minority party or minority race, spreading out their votes among a number of districts and ensuring that they do not comprise an electoral majority in any district.<sup>77</sup>

Gerrymandering also increases the number of “safe,” politically non-competitive districts, which in turn reduces voter interest and voter turnout and wastes votes by ensuring that most elections are not close.<sup>78</sup>

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<sup>72</sup> *Id.* at 122.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 134.

<sup>75</sup> *Id.* at 135.

<sup>76</sup> *Id.* at 134.

<sup>77</sup> *Id.* at 136.

<sup>78</sup> *Id.* at 85. Guinier also suggests that single-member districting generally reduces voter turnout by “emphasizing individual candidacies rather than interests.” *Id.* at 83. Guinier explains that multimember districts force candidates to develop substantive initiatives to mobilize voter interest, because candidate success depends on high voter

Indeed, gerrymandering may allow incumbent politicians to “re-elect themselves” by creating “packed, safe” districts that will consistently re-elect them.<sup>79</sup>

Finally, Guinier notes that race-conscious single-member districts fail to solve the problem of minority underrepresentation in places where minorities are dispersed widely throughout a given jurisdiction and therefore cannot constitute a majority in any district.<sup>80</sup>

In short, Guinier argues that any form of single-member districting wastes votes, encourages gerrymandering, and reduces political competition. Thus, she favors replacing single-member districting with “cumulative voting,” in which “voluntary minority interest constituencies could choose to cumulate their votes to express the intensity of their distinctive group interests.”<sup>81</sup>

## 2. Cumulative Voting

Under a cumulative voting system, candidates run jurisdiction-wide. Each voter gets the same number of votes as there are seats up for election, and could distribute these votes among candidates. Thus, in a city with a four-member city council elected on an at-large basis, each voter would have four votes. The voters could cast all four votes for their favorite, or could register one or more votes for each of several candidates. All candidates who received more than twenty percent of the vote would be elected automatically, although a candidate could win with less than twenty percent of the vote.<sup>82</sup> Local governments occasionally use cumulative voting,<sup>83</sup> and the majority of states either permit or require

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turnout. This process may heighten the differences among candidates on substantive issues. *Id.* at 99; *see infra* note 96 (addressing the danger that multimember districts discriminate against groups with few voters). This argument ignores those multimember districts in which members of the same party may have to run against each other. As members of the same party may be more similar to each other than to members of the other party, it may be that multimember districts actually increase the role of personalities in elections, whereas single-member districts, by forcing voters to choose between one member of each party, increase the role of ideology and issues.

<sup>79</sup> GUINIER, *supra* note 4, at 85.

<sup>80</sup> *Id.* at 84.

<sup>81</sup> *Id.* at 93.

<sup>82</sup> For a discussion of the mathematics of a cumulative voting system, see *id.* at 15. As a rule, the “exclusion threshold,” i.e., the proportion of voters required to elect a candidate in an election where  $n$  seats are available, is  $1/(n+1)$ . If only one candidate can be elected, any candidate who receives more than  $1/2$  of the vote is automatically elected because  $(1/(1+1))=1/2$ . Of course, if more than two candidates are running, a candidate can win with far less than  $1/2$  of the vote. For example, if four candidates can be elected, anyone who gets more than  $1/5$  of the vote is automatically elected because  $(1/(1+4))=1/5$ . *Id.*

<sup>83</sup> *See, e.g.,* Dillard v. Chilton County Bd. of Educ., 699 F. Supp. 870, 871 (M.D. Ala. 1988) (approving the settlement of a Voting Rights Act suit that provided for

cumulative voting in elections for corporate boards of directors.<sup>84</sup>

As Guinier sees it, cumulative voting offers the major advantage of allowing minority groups to "vote strategically to win representation,"<sup>85</sup> even in places in which the minority is "too geographically dispersed for a districting plan to result in many, if any, 'majority minority' districts."<sup>86</sup> For example, in 1987, the city of Alamogordo, New Mexico adopted cumulative voting in order to settle a Voting Rights Act suit. Although Latinos constituted twenty-one percent of the city's voting age population,<sup>87</sup> the city's at-large voting system had prevented any Latinos from being elected to the city council between 1968 and 1987.<sup>88</sup> Under the city's cumulative voting scheme, voters could cast up to three votes for any one candidate, and could elect three at-large council members. In the first election held under the cumulative voting system, a Latina finished third and therefore won a council seat.<sup>89</sup> The Latina won primarily because the majority of Latino voters gave her overwhelming support, casting an average of 2.6 votes apiece of a possible three for her.<sup>90</sup> The Alamogordo example suggests that cumulative voting can increase minority representation, and that despite the apparent complexity of cumulative voting, voters are intelligent enough to understand cumulative voting and to cast multiple votes for their favorite candidates.<sup>91</sup>

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cumulative voting), *aff'd mem.*, 868 F.2d 1274 (11th Cir. 1989). Guinier notes that before the settlement, Chilton County's school board and commission were monopolized by white Democrats. GUINIER, *supra* note 4, at 16. By contrast, each body now includes blacks and Republicans. *Id.*

<sup>84</sup> GUINIER, *supra* note 4, at 15 (noting that 30 states either require or permit corporate cumulative voting); *see also* Jeffrey N. Gordon, *Institutions as Relational Investors: A New Look at Cumulative Voting*, 94 COLUM. L. REV. 124, 145-46 (1994) (observing that although few states mandate corporate cumulative voting, only Massachusetts forbids it).

<sup>85</sup> GUINIER, *supra* note 4, at 15.

<sup>86</sup> Richard L. Engstrom et al., *Cumulative Voting as a Remedy for Minority Vote Dilution: The Case of Alamogordo, New Mexico*, 5 J.L. & POL. 469, 471 (1989); *cf.* Gordon, *supra* note 84, at 127 (describing corporate cumulative voting as a vehicle for increasing representation of significant minority factions among shareholders).

<sup>87</sup> Engstrom et al., *supra* note 86, at 481.

<sup>88</sup> *Id.* at 489.

<sup>89</sup> *Id.* at 488.

<sup>90</sup> *Id.* at 495.

<sup>91</sup> *Cf.* ENID LAKEMAN, *HOW DEMOCRACIES VOTE 143-50 (1970)* (noting that no country using any of a variety of different and complicated alternative voting systems has ever abandoned its system because it was too difficult for voters to understand); Note, *Alternative Voting Systems as Remedies for Unlawful Vote Dilution*, 92 YALE L.J. 144, 155-56 (1982) (acknowledging that one argument against cumulative voting is that "[i]ts complexity could present special problems to members of minority groups, who are often less familiar with the voting process and tend to have less formal education," but noting that "experience with at-large voting . . . suggests that minority groups may be able to overcome this difficulty"). Guinier writes that fears

Guinier points out that cumulative voting has several other advantages. First, by allowing candidates to win with less than half of the total votes cast, cumulative voting reduces the number of votes “wasted” on losing candidates.<sup>92</sup> Second, cumulative voting encourages black representation without precluding multiracial coalitions. For example, Guinier explains that “the single-member districting approach may require submerging . . . white Democratic voters within majority-white Republican districts.”<sup>93</sup> In contrast, cumulative voting may encourage multiracial coalitions by allowing blacks to strike bargains with whites—for example, by agreeing to cast some votes for blacks and others for sympathetic whites.<sup>94</sup> Third, cumulative voting, like other at-large systems, would eliminate gerrymandering by eliminating redistricting.<sup>95</sup> Fourth, Guinier argues that campaigns will become more oriented toward issues and more responsive to the policy concerns of the electorate.<sup>96</sup> Fifth, cumulative voting “avoids the resentment of race-conscious districting among groups that are not protected under the Voting Rights Act”<sup>97</sup> by eliminating the submergence of whites—or non-black ethnic minorities—in majority-black districts.

Guinier also rebuts what she considers the major argument against cumulative voting: that cumulative voting creates a “proliferation of political interest constituencies [that] may undermine consensus, exacerbate tension, and destabilize the political system.”<sup>98</sup> To Guinier, for

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of cumulative voting’s complexity are “overstated,” particularly in light of the significant advantages cumulative voting affords minority communities. GUINIER, *supra* note 4, at 152.

<sup>92</sup> GUINIER, *supra* note 4, at 14-15.

<sup>93</sup> *Id.* at 95.

<sup>94</sup> *Id.* at 96-97. For example, Alamogordo, New Mexico, elected its first-ever Latina council member in the city’s first election after the implementation of a cumulative voting system. Despite overwhelming support in the Latino community, she could not have won without significant non-Latino white “crossover” support. Engstrom et al., *supra* note 86, at 493.

<sup>95</sup> GUINIER, *supra* note 4, at 152. Of course, it could be argued that this aspect of cumulative voting disadvantages “communities with large numbers of noncitizens, age-ineligible citizens,” or other non-voters. *Id.* at 154. Guinier responds that cumulative voting allows non-voters to protect their interests because it increases the number of competitive elections, thereby encouraging forms of political participation other than voting. *Id.* at 155. Guinier also notes that even under a cumulative voting system, some districting may be required both for large governmental bodies such as big-city councils and state legislatures, *id.* at 154-55, and so that “representatives [will] have a local constituency for whom they are responsible without regard to who actually voted for them,” *id.* at 155.

<sup>96</sup> *Id.* at 99.

<sup>97</sup> *Id.* at 100.

<sup>98</sup> *Id.* at 153. This argument has also been made in the context of cumulative voting in corporate board elections. Cf. Gordon, *supra* note 84, at 150-53, 160-65 (noting

whom "exclusiveness is a greater evil than controversy,"<sup>99</sup> any system that shuts minorities out to create consensus is a failure because it merely camouflages conflict instead of eliminating it. Guinier could also note (but does not) that race-conscious districting, by making legislatures more diverse, may create as much conflict and fragmentation as cumulative voting.

### 3. Flaws in Guinier's Discussion of Cumulative Voting

Guinier's discussion of cumulative voting suffers from three major flaws. First, she offers no details as to why cumulative voting is preferable to other semi-proportional electoral systems, such as "pure proportional representation" or the "single transferable vote" ("STV").

Under a pure proportional representation system, voters cast ballots for a single list of candidates affiliated with a single political party. The parties are then represented in a legislature in the same proportion of votes they receive in the general election.<sup>100</sup> Guinier's failure to explain fully the inadequacies of pure proportional representation is puzzling, especially because she raises several points that suggest that pure proportional representation inadequately serves her purposes. For example, Guinier stresses that under a cumulative voting system, the exclusion threshold can be set be high enough to eliminate extremist groups.<sup>101</sup> In some proportional representation systems, however, the exclusion threshold falls as low as one percent.<sup>102</sup> Guinier also notes that cumulative voting permits recognition of intense minority preferences by allowing multiple votes to be cast for single candidates.<sup>103</sup> By contrast, pure pro-

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that some commentators oppose cumulative voting in corporate settings because it increases battles for corporate control and reduces harmony and mutual respect within corporations). Corporate cumulative voting, however, does not necessarily provide the best vehicle for evaluating cumulative legislative elections. Opponents of corporate cumulative voting argue that it turns a corporate board into "a debating forum," *id.* at 167, and causes the election of "directors who are by their nature partisans of particular interest groups," *id.* (quoting Charles M. Williams, *Cumulative Voting*, HARV. BUS. REV., May-June 1955, at 108, 112). Legislatures, on the other hand, *should* be debating fora, and *should* include partisans of different interests. The principal policy in favor of cumulative voting in legislative elections—the prevention of "tyranny of the majority"—is less important in the corporate realm, because large public firms usually have no majority shareholder who can dominate other shareholders, and because all shareholders "are ordinarily assumed to share the same goal—the maximization of share price." *Id.* at 168-69, 169 n.143.

<sup>99</sup> GUINIER, *supra* note 4, at 153.

<sup>100</sup> See Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. REV. 77, 161-62 (describing the operation of proportional representation schemes as an alternative to single-member, plurality-based districting).

<sup>101</sup> GUINIER, *supra* note 4, at 99.

<sup>102</sup> *Id.* at 261 n.126.

<sup>103</sup> *Id.* at 95.



portional representation allows voters only one vote. On the other hand, pure proportional representation does eliminate gerrymandering because it allows jurisdiction-wide voting even in large districts. By contrast, cumulative voting may require multimember districting in large states and localities to prevent voters from having to choose among an unwieldy number of candidates.<sup>104</sup>

STV is another alternative to cumulative voting. Under STV, voters list all candidates running for office in order of preference. Once a voter's first choice has received a sufficient number of votes to be elected, his or her vote is transferred to the next-choice candidate who has not yet received a sufficient percentage of the vote to be elected.<sup>105</sup> Guinier does not provide a sufficient explanation for favoring cumulative voting over STV.

Second, Guinier fails to clarify when the law requires cumulative voting or which circumstances suggest that cumulative voting would be appropriate. Initially, she notes that the fairness of a voting system should not be legally relevant unless "a black interest agenda consistently differs from the mainstream emphasis of white working- or middle-class representation."<sup>106</sup> However, she also suggests that such polarization should be easy to prove, because "blacks, wherever they reside, tend to be politically cohesive . . . . Even disagreements among blacks pale by comparison with the differences in political interest and philosophy between blacks and whites."<sup>107</sup> Where racial polarization exists, Guinier calls on courts to "assess the fairness of the at-large system against the potential representativeness" of cumulative voting.<sup>108</sup> Indeed, as at-large systems usually shut minorities out of the political process,<sup>109</sup> cumulative voting would usually elect more minorities than at-large systems. In sum, Guinier's logic suggests that she thinks cumulative voting is always preferable to traditional winner-take-all at-large systems.

On the other hand, Guinier does not consider cumulative voting a "panacea" that "should be imposed on nonconsenting jurisdictions nationwide."<sup>110</sup> Guinier makes her argument even more confusing by

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<sup>104</sup> In addition, pure proportional representation with low exclusionary thresholds may help eliminate the wasted-vote phenomenon Guinier discusses throughout her book.

<sup>105</sup> Enid Lakeman, *Choosing an Electoral System*, in CHOOSING AN ELECTORAL SYSTEM 44-45 (Arend Lijphart & Bernard Grofman eds., 1984) (outlining the mechanics of STV). See generally Grofman, *supra* note 100, at 162-70 (discussing various alternative voting schemes that have been used in the United States, including STV).

<sup>106</sup> GUINIER, *supra* note 4, at 98.

<sup>107</sup> *Id.* (endnote omitted).

<sup>108</sup> *Id.* at 94.

<sup>109</sup> See *supra* note 15 and accompanying text.

<sup>110</sup> GUINIER, *supra* note 4, at 277 n.74.

failing to explain when cumulative voting should be imposed in areas with single-member districting systems. If, as Guinier suggests, cumulative voting always represents minorities more effectively than single-member systems because it reduces the number of "wasted votes," why shouldn't cumulative voting be imposed in all areas with single-member districting? Unfortunately, Guinier never addresses this issue directly.

Third, Guinier has not fully examined those cumulative voting systems that have actually been implemented. She does note that some corporations and rural county commissions have recently adopted cumulative voting.<sup>111</sup> However, she ignores Illinois's lengthy experiment with this system. Between 1872 and 1980, Illinois used cumulative voting to elect the lower house of its legislature.<sup>112</sup> Under the now-abandoned Illinois system, voters received three votes to distribute among the three candidates running in their district. Voters could distribute these votes in any manner they saw fit.<sup>113</sup>

The vices of the Illinois system indicate that cumulative voting may be more appropriate in some situations than in others. For example, cumulative voting—or any other scheme involving multimember districts—would require a large state either to make the legislature unusually large, as happened in Illinois, or to create unacceptably large legislative districts.<sup>114</sup> By contrast, a rural city council would not face this problem, because a city with 2000 people presumably would not require as many districts or legislators as a state with two million people.

Cumulative voting also creates special problems in partisan elections. Suppose that each party nominates four candidates in a four-member legislative district. If every party member votes the straight party line, the majority party will win all four seats, thus wasting minority party members' votes, and defeating the purpose of cumulative voting.<sup>115</sup> In fact, to obtain any seats at all, minority party legislative candidates would be forced either to campaign against each other by asking their own party's voters to cast all their votes for one candidate,<sup>116</sup> or to ask the other party's voters to "cross over" and cast one vote for a minority party can-

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<sup>111</sup> *Id.* at 15.

<sup>112</sup> See Engstrom et al., *supra* note 86, at 476 n.38 (noting that Illinois eliminated cumulative voting as a side effect of reducing the size of its state legislature, rather than out of concern over the effects of cumulative voting); Charles W. Dunn, *Cumulative Voting Problems in Illinois Legislative Elections*, 9 HARV. J. LEGIS. 627, 628 (1972) (calling for the abolition of cumulative voting in favor of a single-member system).

<sup>113</sup> Dunn, *supra* note 112, at 627.

<sup>114</sup> See *id.* at 643-46 (describing how cumulative voting can lead to legislative bodies so large as to preclude effective deliberation of issues).

<sup>115</sup> *Id.* at 662-63 (predicting that a minority party could be shut out of representing a district altogether if it were required to nominate one candidate for every seat).

<sup>116</sup> Such intra-party warfare occasionally occurred in Illinois when the minority party nominated more than one candidate per district. *Id.* at 648-49.

didate. Thus, cumulative voting in partisan elections creates a substantial risk of collusion between the parties.<sup>117</sup>

Arguably, a state could limit these problems by allowing parties to limit the number of candidates they nominated. If, however, parties nominated fewer candidates than seats, electoral competition might be virtually eliminated. For many years, Illinois allowed parties to limit the number of candidates nominated under its cumulative voting system. As a result, the minority party typically would nominate only one candidate in a three-member district.<sup>118</sup> Under these circumstances, cumulative voting could actually serve to reduce, rather than increase, electoral competition. In nonpartisan elections, however, cumulative voting might spur competition, because the parties could not limit the number of effective candidates through their control over the nomination process.

In sum, Guinier's discussion of cumulative voting is interesting but inadequate. Although she persuasively explains the virtues of cumulative voting, she fails to explain fully: (1) when cumulative voting is appropriate; and (2) how to avoid the drawbacks of the Illinois system.

### C. *Guinier on Legislative Decisionmaking*

Guinier's most controversial ideas involve her solutions to racial polarization in legislative decisionmaking. One conservative activist accuses Guinier of "demand[ing] equal legislative outcomes, requiring abandonment not only of the 'one person, one vote' principle, but of majority rule itself."<sup>119</sup> Indeed, Guinier does question the fairness of majority rule, even where racial minorities are proportionately represented in the legislature. But the accusation at the time of her nomination that Guinier was a "quota queen" is misleading because she believes that quotas inadequately remedy the problem of minority underrepresentation.<sup>120</sup>

Guinier contends that "[w]here decisions are made by a simple major-

<sup>117</sup> Obviously, these problems would not come up in a city with non-partisan elections.

<sup>118</sup> *Id.* at 646. Dunn notes that in 1776 district elections between 1902 and 1979, only 17 districts ever had as many as five candidates—*e.g.*, three majority-party and two minority-party candidates—competing for the three available legislative seats.

<sup>119</sup> Clint Bolick, *Showdown over Civil Rights*, L.A. DAILY J., June 2, 1993, at 6.

<sup>120</sup> Guinier claims that she "has never been in favor of quotas," GUINIER, *supra* note 4, at 189, but she also says that the Senate should encourage "diversity in the [judicial] appointment process by withholding its advice and consent until enough nominations have been made to establish a pattern of 'affirmative recruitment,'" *id.* at 39. For example, she suggests that the Senate Judiciary Committee "could decline to consider any nominee until a sufficient number of nominations—such as twenty or thirty—were made so as to enable the Committee to consider . . . the impact of these twenty or thirty nominations as a totality on the composition of the federal bench." *Id.* Because Guinier's scheme sounds suspiciously quota-like, one must conclude that her definition of a "quota" is quite narrow.

ity vote, deliberation may be incomplete and less inclusive of minority viewpoints."<sup>121</sup> Black elected officials in such circumstances may fail to generate cross-racial alliances. As Guinier notes, for example, a black elected to a city council operating by majority vote may be isolated and ignored.<sup>122</sup> Additionally, she states that white legislators in those circumstances occasionally go out of their way to ignore minority legislators.<sup>123</sup>

According to Guinier, the result of winner-take-all democracy is institutionalized unfairness—because one group of legislators is always outvoted, it never has the opportunity to present its ideas.<sup>124</sup> By extension, pure majority rule fails to protect the interests of racial and ethnic minorities, because “[v]oting is not just about winning elections. . . . People participate in politics to have their ideas and interests represented, not simply to win contested seats.”<sup>125</sup> In Guinier’s vision of a fair system, “all voters [have] an equal opportunity to be part of the winning coalition. . . . A permanent majority should not exercise *all* the power and a permanent minority should not always lose.”<sup>126</sup>

Guinier thus wants legislatures to operate according to the “proportionality principle”<sup>127</sup>—51 percent of the voters should not possess 100 percent of the power. Of course, Guinier recognizes that the “proportionality principle,” if applied consistently, would make government unmanageable. Instead, she suggests that majority rule should only be limited where racial polarization exists, because only racial minorities “have succeeded in making a strong, historically supported and congressionally mandated case for their claims that a homogenous, permanent majority has exercised disproportionate power consistently.”<sup>128</sup> Guinier dismisses concerns about the effect such remedies would have on groups other than racial majorities: “other groups need not resent interest representation claims, for once a violation is found, the remedy does not disadvantage them, and indeed, advantages them to the extent that they are politically cohesive and sufficiently numerous.”<sup>129</sup>

Guinier’s remedy for majority tyranny involves “restructuring the legis-

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<sup>121</sup> *Id.* at 63.

<sup>122</sup> *Id.* at 64.

<sup>123</sup> Guinier cites a Texas school board that changed its rules for placing items on the agenda after the town elected a Mexican-American member to the board. Prior to the Mexican-American’s election, any board member could put an item on the agenda, but afterward issues would be considered only if another member seconded the motion. *Id.* at 75.

<sup>124</sup> It is worth noting that race is not the only factor that may polarize a legislative body. A minority bloc in an ideologically polarized legislature may be outvoted as consistently by the majority as a racial minority.

<sup>125</sup> GUINIER, *supra* note 4, at 93.

<sup>126</sup> *Id.* at 92.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 110.

<sup>129</sup> *Id.*

lative decisionmaking process on the model of jury deliberations . . . by imposing voting rules that reduce the number of up and down votes,” and thereby inviting meaningful consensus.<sup>130</sup> Specifically, Guinier recommends: (1) cumulative voting in legislatures; and (2) some form of veto power for minorities.

I shall address these remedies first, and then proceed to constitutional concerns.

### 1. Cumulative Voting

When evidence demonstrates that minority legislators have little influence, Guinier suggests that “one innovative and potentially transformative remedial measure would be to reproduce within the council a cumulative voting process,” in which “over a period of time and a series of legislative proposals, votes on multiple bills would be aggregated or linked.”<sup>131</sup> Guinier seems to envision a system in which a black legislator might have one vote to cast on each of five bills, and could cast all five for the bill that interested him most—much like voters in a cumulative voting jurisdiction either cast numerous votes for one candidate or disperse them among multiple candidates. The practical result of this proposal would be to give small blocs of legislators near-absolute power over issues they care about.

Guinier’s claim that legislative cumulative voting would be “innovative”<sup>132</sup> is a radical understatement. Throughout her book, she emphasizes the virtues of consensus, and yet under her proposal for cumulative legislative voting, a small number of legislators could effectively pass a law. Thus, cumulative legislative voting might exchange “tyranny of the majority” for “tyranny of the minority.”<sup>133</sup>

The only justification for such a scheme would be that intense minorities are somehow wiser about their own group’s needs than disorganized majorities. However, an intense minority’s interest may often be adverse to those of an ever-apathetic majority. For example, during the 1980s, the savings and loan (“S&L”) industry persuaded Congress to enact legislation that enabled S&L’s to engage in risky investments. The risky investments caused many S&L’s to become insolvent, and eventually through federal deposit insurance, cost taxpayers hundreds of billions of dollars.<sup>134</sup> Further, as Stephen Carter’s foreword to Guinier’s book recognizes, organized minorities of all political stripes often get their way, even

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<sup>130</sup> *Id.* at 107.

<sup>131</sup> *Id.* at 107-08.

<sup>132</sup> *Id.* at 107.

<sup>133</sup> By contrast, cumulative voting in elections is far less radical. Even if 10% of the voters elect an extremist or two, the extremists would be outvoted in the legislature.

<sup>134</sup> For a very brief explanation of the S&L fiasco, see BARONE & UJIFUSA, *supra* note 28, at 475-76. In addition, numerous books have been devoted to the subject.

without cumulative voting.<sup>135</sup> Cumulative voting could exacerbate the problem of special interest domination by enabling a few legislators to pass laws merely by “cumulating” their votes on issues in which they—or the wealthiest contributors to their campaigns—were especially interested.

Indeed, if all legislators could cumulate their votes, a small bloc of legislators could get their way merely by persuading the rest of the legislators to abstain from voting, rather than embarking upon the more difficult task of persuading the majority to endorse the organized minority’s pet projects. For example, the majority of legislators might be sufficiently apathetic to abstain from voting on the minority’s pet projects in return for the minority’s abstention from voting on the majority’s pet projects. Thus, black legislators could pass a bill paying people to dig ditches in black neighborhoods, while white legislators could pass a separate bill doing the same for whites—yet neither group would be blamed for pork-barreling, because cumulative voting allows each group to abstain from voting on the other’s bill and to cast multiple votes in favor of its own bill.

Of course, one could limit cumulative voting to minority legislators. However, cumulative voting by minority legislators raises the same special interest domination problems as legislature-wide cumulative voting, and raises a number of other difficult questions about implementation. For example, who would be a “minority legislator” under such a scheme? Are all blacks minority legislators, or is it necessary to make further distinctions, such as between liberal and conservative blacks, or among legislators born of interracial marriages? Do other cohesive groups, such as Hasidic Jews, deserve minority legislator status? These questions demonstrate that the dangers of legislative cumulative voting are matched by the difficulty of implementing such a scheme.

## 2. Supermajority Votes and Minority Vetoes

Guinier also suggests “a supermajority vote on issues of importance to the majority or its equivalent, a minority veto on critical minority issues.”<sup>136</sup> Because it gives minorities mere veto power over legislation,

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*See, e.g.,* MARTIN MAYER, *THE GREATEST-EVER BANK ROBBERY* (1990) (tracing thoroughly the S&L crisis, including Congress’s role).

<sup>135</sup> Stephen Carter, *Foreword* to GUINIER, *supra* note 4, at xvi-xvii (“Conservatives like to point to strong majorities who support school choice plans and term limits but are unable to get even a vote in the Congress. Liberals counter with citations to the equally strong majorities who support gun control and federal funding for abortion.”).

I note that at the national level, racial minorities can actually *benefit* from such special-interest domination. For example, the “civil rights” lobbies helped persuade Congress to pass the Voting Rights Act Amendments of 1982 and the Civil Rights Act of 1991.

<sup>136</sup> GUINIER, *supra* note 4, at 108.

as opposed to empowering them to enact "special interest" laws, the supermajority voting proposal is far less radical than legislative cumulative voting.<sup>137</sup>

As an example of situations in which such special protection may be appropriate, imagine a situation in which two ethnic groups are so divided that if either group could pass legislation on its own without obstruction, the other group would be oppressed. Even Guinier's many critics implicitly conceded this point by suggesting that her proposals were appropriate for foreign countries which had recently experienced ethnic civil wars.<sup>138</sup> However, it does not follow that such rules are appropriate in the United States.

### 3. When Should Legislatures Be Reformed?

Even if the current system of winner-take-all majority rule is unfair, it might not be illegal. Guinier equivocates on the question of whether a legislature's failure to address polarization within its ranks violates the Voting Rights Act of 1965. In one passage, Guinier states that "impermissible vote dilution should be defined by comparison to a fair voting system in which: (1) neither the majority nor the minority always dominates; (2) each voter has an equal opportunity to cast a 'meaningful vote'; and (3) the decisional rules use principles of proportional power to induce consensual approaches to problem solving."<sup>139</sup> More specifically, she states that "statutory voting rights cases could measure deviations from an ideal proportional power share to determine gross interest representation disparities."<sup>140</sup>

Read in isolation, these passages suggest that majority rule within a legislature should be illegal whenever a racial minority has less than a "proportional power share."<sup>141</sup> Yet a few pages later, Guinier stresses

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<sup>137</sup> Of course, supermajority rules may raise the same problems as legislative cumulative voting. It may be difficult to define "minority legislator," and nearly impossible to define "critical minority issues."

<sup>138</sup> See Paul Gigot, *Potomac Watch*, WALL ST. J., June 4, 1993, at A14 (suggesting that Guinier's views are better suited to nations such as Bosnia, "where ethnic and racial tensions are extreme enough to require extreme minority protections," than to the Civil Rights Division of the Justice Department); see also GUINIER, *supra* note 4, at 18 (citing Lally Weymouth's endorsement of special protections for South African whites as an example of an "acceptable" limitation on majority rule).

<sup>139</sup> GUINIER, *supra* note 4, at 106.

<sup>140</sup> *Id.*

<sup>141</sup> The "proportional power share" concept seems quite unclear. How does one determine what constitutes a "proportional power share?" Does one simply tally up all votes—including issues of little racial significance—and figure out how often the majority of the legislature agreed with the majority of non-white legislators? This rule would encourage legislators to force votes on issues merely to show racial polarization or the absence of racial polarization.

If only "racial" issues will be considered, what constitutes a "racial" issue? Even if

that her proposals are neither "statutorily or constitutionally required," and are "wholly exploratory suggestions" limited "to the specific context of a remedial approach to extreme cases of racial discrimination at the local level."<sup>142</sup> Thus, Guinier fails to make it clear whether white domination of a legislature is: (1) itself a Voting Rights Act violation; (2) evidence of such a violation; or (3) a factor that courts should consider in framing remedies once a violation has been found.<sup>143</sup>

Assuming that supermajority rules and cumulative voting merely remedy independent Voting Rights Act violations, Guinier still fails to clarify when she believes such remedies should be adopted. Even if she feels such rules become appropriate only in extreme cases of racial discrimination, Guinier still does not specify what differentiates an "extreme case of racial discrimination" from an ordinary voting rights violation.<sup>144</sup>

One could argue that line-drawing concerns are irrelevant, and that legislative rules must err on the side of promoting consensus rather than winner-take-all majority rule because of the importance of achieving consensus on racial issues. Consensus, however, has costs. Over most of the past quarter-century, control of the federal government has been split between a Republican president and a Democratic legislature. This political split has often required some level of bipartisan consensus to pass major legislation, enabling both liberals and conservatives to blame the federal government for the nation's problems: Liberals have blamed the Republicans in office, while conservatives have blamed the Democrats. Voters, of course, do not know whom to blame. Would a government dominated by one party have done any better over the past 25 years? Perhaps not, but if "one-party" government were the rule rather than the exception, the dominant party could implement its philosophy and voters could hold it accountable. Where government by consensus prevails, no one need accept responsibility or blame for the status quo.<sup>145</sup>

Of course, concerns about accountability become more relevant in some settings than others. In national and, to a lesser extent, state and

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there were some logical way to identify racial issues, not all votes on racial issues are the same. If, for example, a legislature holds 10 votes on bills "advancing" black interests, such as strengthening civil rights laws, blacks are helped by the legislature even if they "win" only once or twice. On the other hand, if the legislature holds 10 votes on bills "impairing" black interests, such as measures to repeal civil rights laws, blacks lose even if they win 9 times out of 10. Therefore, statistics showing a "black win percentage" may not reflect the political strength of black legislators.

<sup>142</sup> GUINIER, *supra* note 4, at 109.

<sup>143</sup> *See id.* at 105-09 (discussing the rights and remedies that voting rights law should guarantee).

<sup>144</sup> *Id.* at 109.

<sup>145</sup> *See, e.g.*, Fred Barnes, *White House Watch: The Tilt*, NEW REPUBLIC, June 6, 1994, at 10, 11 (stating that Senate Majority Leader George Mitchell "destroy[ed]" George Bush's presidency because he "stymied Bush across the board, blocking every economic growth measure").



big-city government, elections often focus on ideological differences. Thus, to some extent politics will be a “search for truth”: Voters worried about a few major problems, such as crime and the economy, will have to decide who is best qualified to solve these problems. Even in cases of temporary racial polarization, groups can collectively “change their minds” after seeing governments succeed or fail in dealing with major issues. It may therefore be preferable for state and national governments to vest a disproportionate amount of power in the dominant party—so that it may be held accountable on Election Day.

By contrast, in a nonpartisan, small-town local government, issues like crime and the economy will often be of little relevance, because such problems are mostly statewide or national in nature. Local politics may primarily concern personalities, or division of tax revenues among groups. In such a polity, political differentiation relates only to who should be elected, or about how to divide government resources among groups—e.g., black neighborhoods versus white neighborhoods. Voters may display largely immutable preferences in small-town politics; other things being equal, voters usually prefer to redistribute resources to their own neighborhoods, or prefer candidates of their own race. Voters in such towns will not change their preferences in reaction to governmental error, which means there is no reason to give a faction disproportionate power for the purpose of helping voters determine their preferences. It follows that in a nonideological, local governmental body, the case for consensus is far stronger, and the case for majority rule far weaker, than in Congress, a state legislature, or even a big-city council.

Guinier is not completely oblivious to this distinction. She suggests “fashioning *local* councils in the image of the ideal, consensus-driven jury.”<sup>146</sup> However, she fails to explore the difference between state and local governments, and does not discuss what makes a consensus-driven legislature more appropriate for some local councils than for others.<sup>147</sup> For example, a partisan city council located in a large city may resemble a state legislature more than it resembles a small-town county commission: The big-city council may have to deal with major social problems, and may have parties or ideological factions which could be held collectively accountable for governmental failure.

#### D. *Constitutional Concerns*

Guinier makes sure to state that her remedies will withstand constitutional scrutiny. First, she argues that federalism and separation of powers concerns would not restrict the federal government’s ability to remedy

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<sup>146</sup> GUINIER, *supra* note 4, at 107 (emphasis added); *see also id.* at 17 (“It was never my intent that supermajority requirements should be the norm for all legislative bodies . . .”)

<sup>147</sup> *Id.* at 107-09.

racial polarization, because the Supreme Court has already recognized that the "extraordinarily intrusive" remedies that Congress has fashioned pursuant to the Voting Rights Act have been "necessary and appropriate to enforce the Reconstruction Amendments to the Constitution."<sup>148</sup>

Guinier also notes that her remedies do not affect the "one person, one vote" doctrine.<sup>149</sup> Because cumulative voting aims to ensure "that each voter exercises a similarly meaningful vote" while supermajority vetoes look "to ensure each voter an equal opportunity to influence the policymaking process," each serves permissible goals.<sup>150</sup> Further, supermajority rules are hardly unknown in American politics,<sup>151</sup> and have survived the scrutiny of the Supreme Court.<sup>152</sup>

#### CONCLUSION

Had the Senate been given the opportunity to vote on Guinier's confirmation, it would have been forced to decide whether Guinier was a dangerous radical or a "mainstream pro-integrationist".<sup>153</sup> As I have discussed in this Review, cumulative voting in elections and even supermajority rules may be appropriate in some situations, but they should probably not be used in state legislatures or in the United States Congress. Thus, to determine how radical Guinier's proposals were, a reasonable senator would need to learn whether Guinier's ideas were intended as extraordinary remedies for bizarre situations, or as "normal" remedies which a Guinier-led Civil Rights Division would encourage whenever the Division sensed racial polarization in the air.

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<sup>148</sup> *Id.* at 115. Thus, state court cases addressing the constitutionality of cumulative voting for state legislatures miss the point. See Grofman, *supra* note 100, at 165 nn.363-64 (noting that state courts have split on the constitutionality of cumulative voting).

<sup>149</sup> GUINIER, *supra* note 4, at 116.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 17 (citing examples).

<sup>152</sup> *E.g.*, *Gordon v. Lance*, 403 U.S. 1 (1971). In *Gordon*, the Court upheld West Virginia's requirement that 60% of the voters in a statewide referendum approve proposals for bond issuance and tax increases. *Id.* at 7. Writing for the Court, Chief Justice Burger stated that "[t]here is nothing in the language of the Constitution, or history, or our cases that requires that a majority always prevail on every issue." *Id.* at 6. In two other noteworthy cases, federal district courts have upheld the constitutionality of cumulative voting. See *Dillard v. Chilton County Bd. of Educ.*, 699 F. Supp. 870, 875 (M.D. Ala. 1988) (stating, but not discussing, that "[t]here is nothing in federal constitutional or statutory law that prohibits" cumulative voting in local elections), *aff'd mem.*, 868 F.2d 1274 (11th Cir. 1989); *Skolnick v. Illinois State Electoral Bd.*, 307 F. Supp. 691, 698 (N.D. Ill. 1969) (finding that cumulative voting in the Illinois House of Representatives did not violate the Constitution's equal protection provisions).

<sup>153</sup> William T. Coleman, Jr., *Three's Company: Guinier, Reagan, Bush*, N.Y. TIMES, June 4, 1993, at A31.

Unfortunately, though understandably given the novelty of her ideas, Guinier's writings never clearly state when, if ever, the Justice Department should pressure state and local governments to adopt cumulative voting or supermajority rules. This makes it unclear how radical a Guinier-led Civil Rights Division would have been, or whether a Guinier-led Civil Rights Division would require any more of state and local governments than a Civil Rights Division led by another Clinton appointee. *The Tyranny of the Majority* may indeed spark the debate that Americans missed out on when President Clinton withdrew Guinier's nomination, but, unfortunately, a large portion of that debate will focus on trying to figure out what Guinier's writings really mean.

