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DEMOCRACY AND DIS-APPOINTMENT

Pamela S. Karlan*

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

Russell Baker once described Alexis de Tocqueville as the most widely quoted unread writer in America.¹ Lani Guinier² could certainly give Tocqueville a run for his money. Her nomination to head the Civil Rights Division of the U.S. Department of Justice provoked a storm of controversy, centered in large part on a half-dozen snippets from her voluminous voting rights scholarship. The President, who admitted that he had not previously read her work, yanked the nomination after spending a seventy-five-mile helicopter ride with Guinier's seventy-seven-page *Michigan Law Review* article and concluding that her ideas about "proportional representation" and the "minority veto" were "anti-democratic."³

The battle over Guinier's nomination illustrated a key contention of her scholarship. Too often, when race is involved, the American political system forecloses both candid discussion and efforts to build consensus. Instead, it produces polarized contests in which individual aspirants for public office win or lose. *The Tyranny of the Majority* contains most of Guinier's previously published voting rights scholarship, along with an introductory essay putting the pieces in context and reflecting on the nomination process. Two years after her hotly debated nomination, her book offers a chance to think about the freighted question: What does Lani Guinier mean?

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1. Russell Baker, *Off the Top of de Tocq.*, N.Y. TIMES, Nov. 23, 1976, at 33.

2. Professor of Law, University of Pennsylvania Law School.

3. *Text of President Clinton's Comments on Withdrawal of Guinier Nomination*, WASH. POST, June 4, 1993, at A10. The article read by the President was Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077 (1991).

I. WHAT LANI GUINIER WROTE

Few legal scholars are as intimately involved as Lani Guinier has been in creating the law they criticize. As a lawyer for the NAACP Legal Defense and Educational Fund during the 1980s, Guinier was one of the prime movers behind the 1982 amendments to the Voting Rights Act of 1965,⁴ the legislation that sets the backdrop for contemporary voting rights law.⁵ In addition, she litigated the leading Supreme Court case interpreting amended section 2 of that Act — *Thornburg v. Gingles*.⁶

Section 2 requires that “the political processes leading to nomination or election” for public office be “equally open to participation by members of a class of citizens” protected by the Act’s ban on racial and language-based discrimination.⁷ The statute is explicitly race- and group-conscious: it asks whether members of classes *defined by race* are able to participate fully, and it expressly provides that “[t]he extent to which members of a protected class have been elected to office in the [defendant] State or political subdivision is one circumstance which may be considered” in deciding whether an electoral system violates the statute.⁸

Congress amended section 2 to respond to the so-called second generation of voting rights issues.⁹ The first generation of voting rights activity — which occupied the civil rights movement of the early 1960s — focused on registering eligible black citizens and enabling them to cast their ballots.¹⁰ Although the movement’s immediate aim was to secure the formal right to participate in the electoral process, activists were animated by a vision of “participatory democracy” in which voting would not only affirm individuals’ senses of “self-worth and human dignity” (p. 45) but would also serve as the starting point for a grass-roots effort to enact an

4. Pub. L. No. 97-205, 89 Stat. 402 (codified at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1988)) (amending The Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445).

5. For an account of the lobbying for and passage of the 1982 amendments, including Guinier’s role, see MICHAEL PERTSCHUK, *GIANT KILLERS* (1986).

6. 478 U.S. 30 (1986).

7. 42 U.S.C. § 1973(b) (1988).

8. 42 U.S.C. § 1973(b) (1988). For a discussion of the Act’s race consciousness and its consequences, see Pamela S. Karlan, *Our Separatism? The Voting Rights Act as an American Nationalities Policy*, 1995 U. CHI. LEGAL FOR. — (forthcoming).

9. P. 49. For more extensive discussions of the various “generations” of voting rights analysis, see also, for example, Chandler Davidson & Bernard Grofman, *Editors’ Introduction to QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990*, at 3, 14-15 (Chandler Davidson & Bernard Grofman eds., 1994) [hereinafter *QUIET REVOLUTION*]; Pamela S. Karlan, *The Rights To Vote: Some Pessimism About Formalism*, 71 TEXAS L. REV. 1705, 1709-19 (1993) [hereinafter Karlan, *The Rights To Vote*].

10. First-generation political participation issues, while no longer the primary focus of voting rights enforcement, remain important today. Guinier details continuing barriers to black voting, such as restrictive registration practices and changes in polling places. See pp. 32-33.

inclusive, progressive agenda in every aspect of American life. This first-generation approach culminated in the portions of the 1965, 1970, and 1975 Voting Rights Acts that suspended literacy tests and other discriminatory devices,¹¹ provided for federal registrars and election observers in particularly recalcitrant jurisdictions,¹² and required federal approval under section 5 for any changes in voting practices in specified states and localities.¹³

It soon became clear, however, that simply removing formal barriers to registration and voting would not, by itself, realize the civil rights movement's broader goals. Electoral rules such as winner-take-all at-large elections often resulted in the defeat of candidates sponsored by the black community, and allowed officials elected by the white majority to ignore the needs and interests of their black constituents.¹⁴

Accordingly, the second generation of voting rights activity addressed the problem of racial vote *dilution* rather than outright disenfranchisement. The civil rights community shifted its focus from grass-roots political action to litigation. Second-generation lawsuits sought to empower blacks by providing them with an opportunity to elect officials who would champion the needs of the black community.

Gingles was the paradigmatic vote dilution case. In several areas of North Carolina where there were large, politically cohesive black communities, the state drew multimember rather than single-member legislative districts. Given the level of racial bloc voting within these multimember districts, the white majority in each district was usually able to defeat the candidates sponsored by the black community. Although white voters constituted only a *majority*, they controlled election to *all* the seats. The remedy Guinier achieved for her clients was the disaggregation of the multimember districts into single-member districts.¹⁵ Some of the single-member districts were majority black; in these districts, black voters were able to elect legislators of their choice despite continued bloc voting by the white community.

11. See 42 U.S.C. §§ 1973b, 1973aa (1988).

12. See 42 U.S.C. §§ 1973d, 1973f (1988).

13. See 42 U.S.C. § 1973c (1988). For a discussion of these various provisions, see Chandler Davidson, *The Recent Evolution of Voting Rights Law Affecting Racial and Language Minorities*, in *QUIET REVOLUTION*, *supra* note 9, at 21, 30-32.

14. In fact, jurisdictions often instituted at-large elections and multimember districts in response to increased black registration precisely because of their potential to dilute black voting strength. Guinier was involved in a number of cases raising precisely this kind of claim. See *Dillard v. Crenshaw County*, 640 F. Supp. 1347, 1356-59 (M.D. Ala. 1986) (discussing Alabama's adoption and modification of at-large systems for the purpose of diminishing black political power).

15. See *Gingles v. Edmisten*, 590 F. Supp. 345, 376-84 (E.D.N.C. 1984), *affd. in relevant part sub nom. Thornburg v. Gingles*, 478 U.S. 30, 42-51 (1986).

In the wake of *Gingles*, the trend towards single-member districting accelerated.¹⁶ The Court soon extended *Gingles*'s analysis to districting schemes as well.¹⁷ Measured in terms of the election of black candidates, *Gingles* was a smashing success. The number of black elected officials, almost all of whom were elected from majority-nonwhite districts, skyrocketed.¹⁸

And yet the inclusionary promises of the civil rights movement seemed as far away as ever. At the very outset of her scholarly career, Guinier pointed to a key source of the problem: eight years of Reaganism had deliberately polarized the debate over civil rights issues (p. 22). The administration had repudiated the idea of "consensus" and had "recast civil rights as 'special interest' politics."¹⁹ This left officials elected by black communities politically isolated and relatively powerless within elected bodies. Thus, we now face a "third generation" of voting rights issues connected with questions of postelectoral representation and power within elective bodies, even as the gains of the second generation are coming under serious attack. Guinier's scholarly project has had two primary goals: to identify and evaluate the assumptions underlying second-generation voting rights law, and to suggest new means for rebuilding a pro-civil rights consensus and fostering a progressive, participatory politics.

A. Why Not the "BEST"? Guinier's Critique of Current Voting Rights Doctrine

Guinier identifies the prevailing second-generation wisdom as "black electoral success theory" (p. 54). Elsewhere, Guinier has used the ironic acronym "BEST" to describe this theory.²⁰ Put briefly, Guinier sees *BEST* as essentially beginning, and unfortunately ending, with the question whether black candidates are being elected. *BEST* assumes

16. For discussions of this trend towards single-member districts, see, for example, Bernard Grofman & Chandler Davidson, *The Effect of Municipal Election Structure on Black Representation in Eight Southern States*, in *QUIET REVOLUTION*, *supra* note 9, at 301, 317, 320; Lisa Handley & Bernard Grofman, *The Impact of the Voting Rights Act on Minority Representation: Black Officeholding in Southern State Legislatures and Congressional Delegations*, in *QUIET REVOLUTION*, *supra* note 9, at 335, 336, 339-40.

17. See *Voinovich v. Quilter*, 113 S. Ct. 1149 (1993).

18. See Chandler Davidson & Bernard Grofman, *The Voting Rights Act and the Second Reconstruction*, in *QUIET REVOLUTION*, *supra* note 9, at 378, 385.

19. P. 24. Guinier quotes a memorandum from William Bradford Reynolds, the Assistant Attorney General in charge of the Civil Rights Division, to his subordinates, in which Reynolds states, "In addition, we must polarize the debate. We must not seek 'consensus,' we must confront." P. 194 n.9.

20. See Lani Guinier, *The Representation of Minority Interests: The Question of Single-Member Districts*, 14 *CARDOZO L. REV.* 1135, 1151 (1993).

that black representatives are (1) authentic psychological and cultural role models, whose election (2) mobilizes black voter participation, (3) reduces electoral polarization by transforming cross-racial contact from the anonymity and ignorance of the ballot box to the intimacy and expertise of the legislature, and who (4) respond to the needs of all their constituents, including poor blacks.²¹

BEST embodies both a goal — political empowerment of black citizens — and a means — the creation of majority-black geographically defined electoral districts.

Although Guinier describes her analysis as a criticism of *BEST*, her work does *not* involve a wholesale rejection of *BEST*. Rather, it is an argument that *BEST* conceives of its goals only incompletely and relies on a strategy that cannot fully realize even those incomplete goals.²²

First, Guinier argues that while there is some value in having black representatives who serve as visible symbols of inclusion and as “role models” (p. 56), it is wrong to assume that an official’s race, without more, makes her an adequate representative of the black community. Descriptive representativeness, standing alone, is only an incomplete form of authenticity. The focus should be not on the race of the official but instead on whether minority voters have the ability to elect the representatives — of whatever race — they prefer and on whether these officials can effectively represent their interests. Thus, the theory’s concentration on descriptive representation obscures inquiry into the question whether the official is a true and effective champion of the voters’ interests.

This issue of authenticity was one of the flash points in the debate over Guinier’s nomination. Her opponents claimed that Guinier had suggested that Virginia Governor L. Douglas Wilder was not an “authentic” black.²³ That charge was nonsense. In fact, what Guinier wrote was that Wilder’s narrow margin of victory, which some observers had ascribed to support from (overwhelm-

21. This formulation of *BEST*, which is the most succinct statement of the relationship among its four assumptions of (i) “authenticity”; (ii) “mobilization/electoral control”; (iii) “polarization”; and (iv) “responsiveness/reform,” (p. 54), was contained in a part of Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1423-24 (footnote omitted) (1991). This part is omitted from *The Tyranny of the Majority* because it simply recapitulates the argument laid out in *The Triumph of Tokenism*, *supra* note 3, which appears in *The Tyranny of the Majority* as the chapter before *No Two Seats*. See p. 41 (explaining the elision of the two articles).

22. This argument demonstrates one of the ways in which, as Guinier writes in her Introduction, her thinking has evolved. P. 13. Compare *id.* at 34-35 (describing the enhancement of minority turnout that accompanies the prospect of electoral success, the general responsiveness of black elected officials to their constituents, and the deference white congressional representatives pay to their black colleagues on issues of special concern to the black community) with *id.* at 59-60, 61-66 (criticizing these assumptions of *BEST*).

23. See, e.g., Paul A. Gigot, *Hillary’s Choice on Civil Rights: Back to the Future*, WALL Sr. J., May 7, 1993, at A14.

ingly white) single-issue prochoice voters, might have "vitiating" his "ability to govern on other issues important to the black community" (p. 219 n.110). Guinier cited warnings from other commentators that black voters' interests might lose out in a competition against those of "Virginia's white-majority constituency — and those of Wilder's large campaign contributors."²⁴ Guinier's concerns went to the authenticity of Wilder's representation of the black community's interests, and not remotely to the authenticity of his status as a black person.

The expositional ambiguity of Guinier's argument, to which I alluded earlier, may have abetted the critics' disingenuous reading. At the outset, Guinier announces that she means to criticize the "authenticity assumption" (p. 54). But her definition of authenticity sometimes embraces ideas she in fact does hold. At some points, for example, she includes within the authenticity assumption the emphasis on "community-based and culturally rooted leadership" or sponsorship by the black community (p. 55). At other points — when she is clearly criticizing the authenticity assumption — authenticity is simply a synonym for descriptive similarity (p. 58); in this view, a black elected official is definitionally an authentic representative of the black community.

Guinier's central criticism of authenticity goes only, I think, to this latter definition. Her point is that electing people who are black is only a "limited empowerment tool" (p. 58). Guinier does not deny that it is *an* empowerment tool. Guinier seems to believe that some degree of descriptive representation may be *necessary* in a legitimate democracy. But she argues that the mere presence of black faces is not *sufficient* to ensure that black voices get heard.²⁵ In short, Guinier does value authenticity, but she has a broader, more complex vision of what authentic representation requires.

24. P. 219 n.108 (quoting James A. Barnes, *Into the Mainstream*, 22 NATL. J. 262, 264 (1990)).

25. See p. 40 ("[B]lack remain seen, and not heard."). So, for example, the election of black officials in majority-white jurisdictions does not guarantee authenticity, even if black voters within the jurisdiction actually cast their ballots for the winning candidate, if the black community would have elected a different candidate absent the need to forestall decisive bloc voting by the white community.

A similar expositional ambiguity occurs in Guinier's discussion of the "polarization assumption." Pp. 60-66. *BEST* proponents start with the empirical premise that voting in many jurisdictions is characterized by pervasive racial bloc voting. Guinier shares that premise: "As a general rule a majority of whites do not vote for blacks." P. 60. The next step in the "assumption" is inescapable: in a majority-white jurisdiction characterized by racial bloc voting, candidates preferred by the black community will lose. Guinier agrees. *Id.* Where Guinier parts company with *BEST* is in her skepticism that racial bloc voting can be overcome simply by creating some majority-black constituencies that elect candidates responsive to blacks. Given racial polarization, she warns, "electing black representatives may simply relocate to the legislature polarization experienced at the polls." P. 61. Once again, Guinier's rejection rests largely on the incompleteness of the assumption, rather than on its wholesale incorrectness.

Perhaps if she had used a term other than *authenticity* — for example, if she had criticized a “physiognomy assumption” — her point would have been less subject to dishonest manipulation.

A second deep flaw Guinier finds in *BEST* is that creating “safe” majority-black districts may do very little to produce grassroots participation and engagement in the political process. Although black turnout at the polls does increase the first time a credible black candidate seeks office, turnout often drops off thereafter.²⁶ Some black representatives ignore their constituents, while others, particularly those who depend on the votes of nonminority voters, must trim their sails, thereby making black voters feel “neglected and taken for granted” (p. 59). When black voters form a “passive” electorate, they are subject to candidates who “simply ‘manipulate racial symbols and language’ to enlist support from the poorest black constituents” without addressing the constituency’s substantive needs (p. 60). Without real constituent engagement in the political process, representatives are not responsive to the policy preferences of those they represent.²⁷

Third, Guinier argues that an exclusive focus on the creation of black single-member districts does little to combat current, pervasive racial bloc voting (pp. 60-65). Although black candidates can get elected from majority-black districts despite racial bloc voting — because blacks in those districts form the predominant bloc — creating single-member districts does nothing to encourage or facilitate cross-racial coalition building because it isolates blacks and whites in separate districts.

Guinier’s fourth criticism is that *BEST* is too tied to the idea that geography defines how representation should be accomplished. The prevailing theory rests on carving a jurisdiction into discrete geographic subdistricts. But relying solely on geography to determine which groups get districts in which they form a majority of the electorate “excludes the possibility of representation for those whose interests are not defined by, or consistent with, those in the geographically defined district” (p. 84).

26. See p. 59. Indeed, once they are elected, officials may prefer low turnouts. See p. 99.

27. In her review of CHARLES FRIED, *ORDER AND LAW: ARGUING THE REAGAN REVOLUTION — A FIRSTHAND ACCOUNT* (1991), reprinted in chapter 6, Guinier suggests that a similar sort of criticism might be applied to civil rights litigation generally: “By assuming that courts can overcome political obstacles and produce change without mobilization and participation, public interest lawyers ‘both reified and removed courts from the political and economic system in which they operate.’ Crucial resources and talent are siphoned off into complex legal actions, which further weaken political efforts.” P. 184 (footnote omitted). At the same time, litigation — despite the ultimate settlement of most cases — does not allow for the kind of dialogue and consensus building Guinier values. “[T]he adversarial model does not depend on persuading the parties to compromise but simply declares who is right. . . . A judiciary committed to ideological outcomes” — as Guinier believes Reagan and Bush appointees to be — “is more likely to declare winners, without really listening to the claims of the losers.” P. 184.

This poses two parallel dangers. First, some groups will not be able to achieve direct representation at all, despite their size and distinctiveness. For example, Latino voters often live in small, segregated pockets spread throughout a jurisdiction; it may be impossible to create a majority-Latino single-member district even when Latinos are a substantial percentage of the population.²⁸ Similarly, a substantial number of voters may have progressive politics, but if they are randomly or uniformly spread across a jurisdiction, they may form no geographically defined majorities. Second, voters placed in districts in which they are not part of the predominant group will have essentially no say in who is elected from their own district and no say at all in the selection of the official who “virtually” represents their group-connected interests as a consequence of her election from another district in which their group predominates. This was the analytic problem with *United Jewish Organizations v. Carey*,²⁹ in which the Court presumed that a cohesive Hasidic Jewish community split between two majority nonwhite districts would be virtually represented by white legislators elected from districts in other parts of Brooklyn. Guinier concludes: “Districting provides no clear theoretical justification for resolving — and may instead exacerbate — conflict between the interests of competing minority groups. For example, subdistricting may set off a ‘political land grab’ in which each minority group has a legitimate but potentially unfulfilled claim to representation” (p. 84). By separating white voters from black voters who share common interests, districting “limits the options of white, as well as black, voters” (p. 85).

Fifth, Guinier points out that even if black voters elect black representatives from one or a few majority-black single-member districts, “race-conscious districting may simply reproduce within the legislature the disadvantaged numerical and racial isolation that the majority minority district attempted to cure at the electoral level” (p. 135). In fact, Guinier suggests that this legislative exclusion may be an unintended consequence of *BEST*'s insistence that black voters be placed into majority-black districts. The electoral separation of blacks and whites may eliminate the incentive for white representatives elected from homogenous white districts to enlist in cross-racial coalitions, because they can “ignore black interests without adverse electoral consequences” (p. 65). Guinier provides several striking examples of such legislative exclusion. Black legislators in Louisiana, for example, were excluded from a

28. See Frank J. Macchiarola & Joseph G. Diaz, *The 1990 New York City Districting Commission: Renewed Opportunity for Participation in Local Government or Race-Based Gerrymandering?*, 14 CARDOZO L. REV. 1175, 1207 (1993).

29. 430 U.S. 144 (1977).

secret meeting during which white state legislators drew the state's congressional districts (pp. 9, 75-76). A county school board in Texas changed its operating procedures when the first Mexican American won a seat, thereby inhibiting her from placing items on the agenda (pp. 9, 75). And immediately after a section 2 lawsuit resulted in the creation of a majority-black district and the election of the first black county commissioner to an Alabama county commission, the incumbent white commissioners stripped individual commissioners of their power to hire and supervise road crews — the primary source of both patronage and discretionary public works — and then assigned control over the road shop in the black commissioner's district to a white commissioner (pp. 8, 76). Thus, *BEST* has "transformed the [civil rights movement's] original goals of broad-based voter participation, reform, and responsive representation into the shorthand of counting elected black officials" (p. 49) and has failed to transform the American political culture.

B. *Better than BEST: Guinier's Proposals*

Having criticized *BEST* and its virtually exclusive reliance on territorially based single-member districts, Guinier asks whether changes other than the adoption of geographically defined single-member districts could more fully transform our politics. To replace *BEST*, Guinier offers "proportionate interest representation" (p. 55). This phrase encompasses Guinier's rejection of both the prevailing perspectives on voting rights — the pure majoritarianism of conservatives and neo-liberals (or are they neo-conservatives?), and the *BEST* partisans' protectionism for racially or linguistically defined classes.

Guinier's vision is *proportionate* in the sense that she rejects winner-take-all rules, which she sometimes calls "zero-sum" solutions, in favor of systems that acknowledge that a "majority should enjoy a majority of the power but [provide that] the minority should also enjoy some power too" (p. 152). She advocates representation for people's *interests* rather than their status or their geographic residence. She seeks to go beyond the "relation between the characteristics of the population and the physiognomy or cultural attributes of representatives,"³⁰ to achieve representation of points of view. "[T]he right to vote is a claim about the fundamental right to express and represent ideas. Voting is not just about winning elections. People participate in politics to have their ideas and interests represented, not simply to win contested seats" (p. 93).

30. Lani Guinier, *Voting Rights and Democratic Theory: Where Do We Go From Here?*, in *CONTROVERSIES IN MINORITY VOTING — THE VOTING RIGHTS ACT IN PERSPECTIVE* 283, 285 (Bernard Grofman & Chandler Davidson eds., 1992).

1. Cumulative Voting

Guinier's first recommendation for creating a nonmajoritarian, interest-oriented election system involves cumulative voting for county and municipal assemblies. In a cumulative system, each voter is given a number of votes equal to the number of seats to be filled, but she is free to distribute those votes among candidates as she sees fit. She can choose among a variety of strategies — "plumping" all her votes behind one candidate she supports intensely or, alternatively, casting her votes for an array of candidates who form a "slate."³¹

Cumulative voting, like all voting systems, has a property known as the "threshold of exclusion." This term refers to the size a group must exceed before its members, voting strategically, can be sure to clinch a spot on the elected body. Within a single-member district, for example, the threshold of exclusion is fifty percent. Unless a group of voters constitutes more than fifty percent of the electorate, it may end up being shut out. Thus, single-member districting is, within each district, straightforwardly majoritarian.³² The same is true of pure at-large systems: no group can ensure the election of candidates it supports unless it constitutes more than one-half the electorate. By contrast, in cumulative systems, the threshold of exclusion is $1/(n+1)$, where n is the number of seats up for election. A group larger than the threshold of exclusion whose members plump their votes behind a single candidate is *assured* of victory. Thus, any electoral district in a cumulative scheme is nonmajoritarian.

Guinier uses Chilton County, Alabama, as an example of the benefits she sees in cumulative voting. Both the county commission and the school board have seven members. Under the traditional at-large system in place until 1988, each body was invariably composed of white Democrats only. As part of the settlement of a section 2 lawsuit, the county adopted cumulative voting. Accordingly, the threshold of exclusion dropped from 50% to 12.5% ($1/(7+1)$, or $1/8$). As a result, for the first time, blacks were elected to both the county commission and the school board. In addition, the first *Republicans* ever to serve on each body were elected; and the

31. Pp. 14-15. A slate may be either prearranged by community groups, à la the "balanced tickets" of the old ethnic politics, see Pamela S. Karlan, *Undoing the Right Thing: Single-Member Offices and the Voting Rights Act*, 77 VA. L. REV. 1, 35-36 (1991), or individually chosen by the voter herself in a manner rather similar to putting together a plate at a buffet.

32. It is *possible* for a group smaller than the threshold to get its candidate elected — for example, in a three-way race, a group constituting 40% of the electorate might have its candidate win by a plurality — but such a group is not *certain* to obtain representation. See Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 222-23 (1989).

school board elections produced the first female member as well.³³ After cumulative voting, the two bodies each contained three white Democrats, three white Republicans, and one black Democrat.

Guinier offers three observations about these sorts of results. First, cumulative voting gives more voters the ability to elect representatives of their choice. In Chilton County, for example, the prior electoral system gave only white Democrats the ability to obtain direct representation on the two bodies. Now, blacks and Republicans have also obtained representation. More broadly, any *other* group of voters greater than 12.5% of the electorate — white progressives, women, or evangelicals, for example — who felt intensely about a candidate could also plump its votes. Cumulative voting thus enables each individual to decide for herself with whom to affiliate, rather than being assigned to a district based on residence or race. It allows voters to form voluntary, mutable, nongeographic “districts” subject to “automatic, self-defined apportionment based on shifting political or cultural affiliation and interests” (p. 140). Voters redistrict themselves.

Second, cumulative voting obviates the need for race-conscious remedies to provide racially fair outcomes. It may “avoid[] the resentment of race-conscious districting among groups that are not protected under the Voting Rights Act” (p. 100) because it neither districts nor involves any governmental race consciousness. It “allows for the possibility that not all members of a minority group share common interests or common perceptions of their interests. Nor does it assume that all members of the majority group are hostile to minority interests.”³⁴

Third, Guinier believes that cumulative voting offers the potential to change the dynamic *within* legislative bodies. In Chilton County, for example, no single bloc now holds a majority of seats. Thus, to pass its proposals, *each* group must build coalitions. There is no longer a monolithic white majority with the potential to freeze out the black community’s elected representative. Instead, there are competing white blocs. Each has an incentive to build temporary coalitions with the black community’s representative. Cumulative voting thus encourages shifting, fluid coalition politics in which black voters, white Democrats, and white Republicans all have valuable chips to use. This more nearly attains, in Guinier’s view, the Madisonian notion of a pluralist political process. By disaggregat-

33. See Peter Applebome, *Where Ideas That Hurt Guinier Thrive*, N.Y. TIMES, June 5, 1993, at A9.

34. Guinier, *supra* note 3, at 1148 n.331. Cumulative voting is in this sense an anti-essentialist solution. It “does not presume that all blacks will submerge their differences to present a monolithic front. Where voting patterns suggest overwhelming majority but not unanimous issue cohesion [among black voters], interest representation would allow dissenting blacks to cast their votes as they chose.” P. 98.

ing "The Majority" into a series of "Madisonian majorities" — shifting winning coalitions that "rule[] but do[] not dominate" (p. 4) — cumulative voting creates some of the conditions for more truly democratic politics.

2. *Legislative Voting Rules*

Guinier recognizes that while cumulative voting solves some second-generation voting rights problems, it may not fully cure the third-generation problem of legislative exclusion. Even if black voters elect a proportionate number of representatives, those representatives may find themselves politically marginalized within the legislature. Guinier explains the problem as follows: "The paradox is that by winning, blacks ultimately lose; as soon as they achieve one electoral success, the focus of the discrimination shifts to the legislative arena."³⁵ She concludes, "Simply put, racism excludes minorities from ever becoming part of the governing coalition" (p. 103).

Thus, Guinier suggests, voting rights law must look at voting behavior *within* the legislature as well.³⁶ Proportionate interest representation asks three questions about procedural rules within collective decisionmaking bodies: "(1) [D]o they make black representatives necessary participants in the governing process; (2) do they disaggregate an otherwise permanent, homogenous majority faction; and (3) do they give dignity and satisfaction to the strongly held sentiments of minorities?" (p. 104). The Voting Rights Act, Guinier argues, gives each protected class "a right to have its interests represented, and . . . to have its interests satisfied a fair proportion of the time" (p. 104; emphasis omitted).

Guinier seeks to accomplish this proportionate interest representation through modifications of legislative operating rules to produce "decisions [that] are not always measured in binary win/lose terms, but may include compromise alternatives in which participants all gain something."³⁷ Her modifications "seek[] to promote the deliberative process by imposing voting rules that reduce

35. P. 82. Guinier wrote much of her discussions of legislative exclusion prior to the Supreme Court's decision in *Presley v. Etowah County Commn.*, 502 U.S. 491 (1992), which held that the county commission's decision to strip a newly elected black commissioner of the traditional powers of his office was not covered by § 5 of the Voting Rights Act. After *Presley*, she strongly criticized the Court for "overlook[ing] the racial fault line dividing those who govern from those who merely vote." P. 180.

36. See also Karlan, *supra* note 32, at 236-39 (discussing legislative exclusion).

37. Pp. 248-49 n.59. At one point, Guinier offers jury deliberations as a model for restricting the decisionmaking process. P. 107. Juries may not turn out to be such a wonderful analogy, because their decisions are often quite binary — between acquittal and conviction, for example — and because compromise verdicts may in fact reflect a *failure* to perform their sworn task. What really appeals to Guinier about juries seems to be only their requirement of consensus decisionmaking rather than simply an up-or-down majority vote.

the number of up and down votes, instead of inviting consensus through compromise and trading of procedural resources" (p. 107).

Guinier tentatively suggests cumulative voting within the legislative body (pp. 107-08). This idea is not fully sketched out, but it seems to involve presenting a "package" of legislative proposals to be voted on simultaneously. A representative who felt strongly about only a few bills — either affirmatively or negatively — could cast several votes on those bills while forgoing her vote on other parts of this legislative "package."³⁸ Guinier does not pursue this idea all that vigorously, perhaps because it would be impossible to implement. In most legislatures, the form bills take is subject to so much manipulation that a minority could be forced to expend all its votes simply to block a few objectionable proposals, thereby both making it impossible for the group affirmatively to enact anything and stripping its members of an effective voice on the remaining items on the agenda. No legislature uses internal cumulative voting, though many engage in the sort of legislative drafting and log-rolling that it might resemble. Guinier's primary suggestion for reform, however, capitalizes on a relatively common legislative rule: supermajority voting.

Federal and state legislative decisionmaking rules are already honeycombed with supermajority requirements.³⁹ One notable example, exploited and lauded by vehement critics of Guinier's approach, is the Senate's three-fifths rule to invoke cloture: a minority of forty-one Senators can prevent a bill that fifty-nine Senators strongly favor from even coming to a vote.⁴⁰ Such rules are

38. In her earliest work, Guinier proposed something similar with regard to federal judicial nominations. The Senate Judiciary Committee, she suggested, 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 not only the individual qualifications of each, but the impact of these twenty or thirty nominations as a totality on the composition of the federal bench.

P. 39. Presumably, this sort of packaging or slating would increase the likelihood of a diverse judiciary.

39. For catalogs of such rules, see, for example, Karlan, *supra* note 32, at 245-46; Note, *Extraordinary Majority Voting Requirements*, 58 GEO. L.J. 411 (1969).

40. Rule XXII of the Standing Rules of the Senate, *reprinted in* STANDING RULES OF THE SENATE, S. DOC. NO. 1, 102d Cong., 1st Sess. 21-23 (1992).

Conservative commentator Paul Gigot got substantial mileage out of a comparison of Guinier's view of supermajorities with John C. Calhoun's view of concurrent majorities. See Gigot, *supra* note 23; see also JOHN C. CALHOUN, A DISQUISITION ON GOVERNMENT 22-30 (New York, D. Appleton & Co. 1854). But if Gigot really believed what he wrote, he should have criticized fellow conservative pundit George Will instead. In a column in the *Washington Post*, Will supported the Republicans' filibuster against the Clinton economic package as the height of democracy:

Is efficiency, understood as the ability to implement the majority's will quickly, the primary value in government? Or is the primary value caution born of anxiety about government power, caution that respects the right of an intense minority to put sand in the gears of government?

the functional equivalent of a “minority veto” (pp. 16-17, 108, 116, 260 n.119). Supermajority requirements invest numerical minorities with a bargaining chip because they may make black representatives “necessary participants in the governing process” by preventing the majority from reaching the supermajority threshold without them.⁴¹ They may also give satisfaction and “dignity to the strongly held sentiments of minorities” by allowing their sentiments to trump those of a bare majority and by forcing a slight majority to deal directly with the minority’s concerns.⁴² Supermajority requirements, Guinier believes, can enhance the quality of the deliberative process by requiring more discussion and debate and requiring a more broad-based consensus for legislative action.⁴³ At the same time, like cumulative voting, supermajority rules are “race-neutral”; thus “[d]epending on the issue, different members of the voting body can ‘veto’ impending action” (p. 16). For reasons I explain in the next section, however, Guinier’s procedural solution is a double-edged sword.

C. *The Puzzling Persistence of Process-Based Fixes*

Ultimately, Guinier’s vision of political fairness can be satisfied only if racial minorities receive “a fair share of substantive, legislative policy outcomes” (p. 40). Her scholarship, however, concentrates exclusively on legislative inputs — how representatives are elected and what decisionmaking rules the legislature uses: “Concern over majority tyranny has typically focused on the need to monitor and constrain the substantive policy outputs of the decisionmaking process. In my articles, however, I look at the *procedural* rules by which preferences are identified and counted.”⁴⁴

Democracy is trivialized when reduced to simple majoritarianism — government by adding machine. A mature, nuanced democracy makes provision for respecting not mere numbers but also intensity of feeling.

George F. Will, *The Framers’ Intent*, WASH. POST, Apr. 25, 1993, at C7.

41. Karlan, *supra* note 32, at 247. This was the result in Mobile, Alabama. The requirement that five of seven council members concur to pass a law or transact business made at least some degree of black consent necessary, because three council members were elected from majority-black districts and thus the assent of at least one of those districts’ representatives was essential. *See id.* at 246-48.

Such requirements are, however, two-edged swords. One could easily imagine a jurisdiction, for example, where *one* of the four white council members was progressive and three were quite conservative. A supermajority requirement in that jurisdiction would *preclude* a black-white coalition from attaining its goals. *See id.*

42. *Id.* at 246.

43. This braking effect is precisely why conservatives like supermajority requirements. *See Will, supra* note 40.

44. P. 14; *see also* p. 249 n.64 (“I recognize that some may criticize [my approach] as outcome-oriented jurisprudence that improperly invades the province of the local legislature. I believe that my focus on legislative decisional *rules*, not decisional *outcomes*, adequately answers this criticism.”).

But without *some* substantive theory of *when* and *how often* minorities should prevail, Guinier cannot provide a measuring stick for assessing whether the existing system, particularly as to legislative decisionmaking, is working fairly. Most individuals of goodwill would probably agree that there is something wrong if forty percent of a city's residents are black and yet there has never been a black city council member, or if black elected officials are locked out of the room while white officials deliberate, or if a local government is completely unresponsive to the needs of a sizeable black constituency.⁴⁵ But what if blacks are only fifteen percent of the population and there is a three-member city council? Should the city expand the council's size to five members and impose cumulative voting so that the black community will be able to elect a candidate?⁴⁶ What if white representatives listen to the impassioned speeches of their black colleagues and seriously debate the merits of their proposals, but simply disagree and vote those proposals down? True, a supermajority requirement may give a black legislative caucus a "veto" over truly objectionable legislation, but it may do little to fortify an affirmative legislative strategy. Indeed, supermajority rules might actually *impede* such a strategy by denying progressive majorities the ability to overcome the resistance of a conservative, or even racist, minority.⁴⁷ Supermajority rules tend to favor the status quo by making change difficult to achieve. That, after all, is one of the primary functions of the supermajority rules in Article V.

Moreover, disaggregation of the white majority into competing blocs will provide opportunities for representatives from the black community only to the extent that the benefits to a white representative of logrolling with the black representative exceed the benefits of rebuilding a white consensus. If Guinier criticizes partisans of the "swing vote" theory in popular elections and argues that the election of black representatives "may simply relocate to the legislature polarization experienced at the polls" (p. 61), then she needs to explain why swing voting in the legislature would be any more likely to result in the enactment of desirable policies. Other propo-

45. See, e.g., *Rogers v. Lodge*, 458 U.S. 613 (1982) (holding that the at-large system of elections in Burke County, Georgia, resulted in unconstitutional vote dilution, demonstrated by the absence of black members on the Board of Commissioners, despite a black majority population); *Hawkins v. Town of Shaw*, 437 F.2d 1286 (5th Cir. 1971) (holding that disparities in providing municipal services to black residents resulted in denial of equal protection), *affd. on reh'g.*, 461 F.2d 1171 (5th Cir. 1972).

46. Cf. *Holder v. Hall*, 114 S. Ct. 2581 (1994) (holding that the size of an elected body is not subject to scrutiny under § 2). In *McNeil v. City of Springfield*, 658 F. Supp. 1015 (C.D. Ill.), *appeal dismissed*, 818 F.2d 565 (7th Cir. 1987), for example, the size of the city council had to be expanded in order to create a majority-black single-member district.

47. This was certainly the effect of U.S. Senate supermajority rules that gave racist southern senators the ability to prevent any effective civil rights legislation from being passed prior to the 1960s.

nents of cumulative voting have pointed to the greater possibility for cross-racial consensus in intimate, repetitive settings such as legislative chambers,⁴⁸ but Guinier expresses deep skepticism about these assumptions (p. 63). Without such a mechanism, Guinier's proposal ultimately faces the same risk as the system she seeks to replace.

In light of claims that Guinier is too pessimistic about racial progress in the United States,⁴⁹ it is ironic that the most puzzling part of *The Tyranny of the Majority* is Guinier's *optimism*. In the face of three generations of voting rights problems, the persistence of racial bloc voting, and continuing levels of racial polarization in society as well as in politics, she nonetheless argues that cumulative voting or supermajority requirements will do more than marginally improve black political prospects. Guinier has offered a radical — in the sense of fundamental, rather than far left — critique of existing doctrine with its reliance on geographic districting, its complacency once black faces appear in the legislative chamber, and its equation of majoritarianism with democracy. But her skepticism of claims that either black enfranchisement or black electoral success can transform our politics leaves open the question why she thinks other procedural rules will have a more deeply transformative effect. As the Supreme Court noted in explaining why school desegregation law alone could not be expected to resolve the myriad social problems revolving around race, “[o]ne vehicle can carry only a limited amount of baggage.”⁵⁰ Similarly, though the Voting Rights Act is undoubtedly “one of the most monumental laws in the entire history of American freedom,”⁵¹ electoral reform, even of the profound type that Guinier champions, cannot completely transform American politics. Jimmy Carter once promised us a government as “good and honest and decent and truthful and competent and compassionate and as filled with love as are the American people.”⁵² Sad but true, that is what our electoral system produces. To the extent that America is often still burdened with

48. See, e.g., Karlan, *supra* note 32, at 216-19.

49. See, e.g., Charles Fried, *President Clinton Won't Give Me A Job Either*, 2 RECONSTRUCTION MAG., 127, 128 (1994) (asserting that Guinier's work “bespeak[s] a sympathy for the hard-bitten view that racism in this country is far worse, far more pervasive, and far more ineradicable than many of us would like to think”); Randall Kennedy, *Lani Guinier's Constitution*, AM. PROSPECT, Fall 1993, at 36, 44 (asserting that one weakness in Guinier's analysis is her “tendency . . . to minimize the substantial reforms that have transformed race relations over the past half-century”); *A Civil Rights Struggle Ahead*, N.Y. TIMES, May 23, 1993, § 4 (Editorial), at 14 (suggesting that Guinier's work downplays the changes that followed the enactment of the 1965 Voting Rights Act).

50. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 22 (1971).

51. DAVID J. GARROW, *PROTEST AT SELMA: MARTIN LUTHER KING, JR., AND THE VOTING RIGHTS ACT OF 1965* at 132 (1978) (quoting President Lyndon B. Johnson).

52. For one version of this oft-repeated quotation, see Lynn Langway, *Huckstering the Candidates*, NEWSWEEK, Apr. 12, 1976, at 87.

the crippling effects of three centuries of overt, state-sponsored racism and is occasionally prone to fresh eruptions of bias, our politics will reflect the ugly side of who we are, no matter how democratic and how inclusive the rules we use.

II. HOW LANI GUINIER HAS BEEN READ

Hamlet: Do you see yonder cloud that's almost in shape of a camel?

Polonius: By th' mass and 'tis, like a camel indeed.

Hamlet: Methinks it is like a weasel.

Polonius: It is back'd like a weasel.

Hamlet: Or like a whale.

Polonius: Very like a whale.⁵³

The debate about voting rights is hardly academic. Barely a fortnight after the Clinton administration withdrew Guinier's nomination, the Supreme Court's decision in *Shaw v. Reno*⁵⁴ cast serious doubt on the continued vitality of race-conscious districting.⁵⁵ Just last Term, in *Holder v. Hall*,⁵⁶ Justice Thomas, joined by Justice Scalia, borrowed heavily from Guinier's analysis to argue for abandoning the entire enterprise of judicial oversight.⁵⁷

But there is another debate — this one largely within the law schools — in which Guinier herself, as much as the content of her writing, has constituted a flash point. Many people who are not deeply, or perhaps even casually, interested in Guinier's work have been quite interested indeed in what Guinier's nomination tells them about *our* work — legal scholarship. What is legal scholarship about? To what extent do we demand realism, particularly about the likely acceptability of scholarly positions within the legal or political process? To what extent is scholarship a free-floating thought experiment? How does scholarship relate to advocacy? Does, or should, scholarship disqualify one from public office?

53. WILLIAM SHAKESPEARE, *THE TRAGEDY OF HAMLET, PRINCE OF DENMARK* act 2, sc. 2, ll. 355-61 (Bedford Books 1994).

54. 113 S. Ct. 2816 (1993).

55. For discussions of *Shaw*, see T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 MICH. L. REV. 588 (1993); A. Leon Higginbotham, *Shaw v. Reno: A Mirage of Good Intentions with Devastating Racial Consequences*, 62 FORDHAM L. REV. 1593 (1994); Pamela S. Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 SUP. CT. REV. 245; Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483 (1993); Conference, *The Supreme Court, Racial Politics, and the Right to Vote: Shaw v. Reno and the Future of the Voting Rights Act*, 44 AM. U. L. REV. 1 (1994) (conference among voting rights scholars and litigators); Thomas C. Goldstein, Note, *Unpacking and Applying Shaw v. Reno*, 43 AM. U. L. REV. 1135 (1994).

56. 114 S. Ct. 2581 (1994).

57. See 114 S. Ct. at 2591-2619 (Thomas, J., concurring). For Guinier's response, see Lani Guinier, *[E]racing Democracy: The Voting Rights Cases*, 108 HARV. L. REV. 109 (1994).

Guinier's disappointment seemed to offer a concrete occasion for pursuing these questions.

Last year, in *A Nation Under Lawyers*,⁵⁸ Harvard Law School professor Mary Ann Glendon issued a stinging indictment of contemporary legal education and scholarship. The legal realists who dominated law schools during the mid-twentieth century, according to Glendon, possessed "an appetite and energy for creative problem solving that yielded innovative . . . legislation."⁵⁹ These realists were "interested in ordinary politics and [came] to appreciate consensus building."⁶⁰ They employed a form of dialectic reasoning that "attends to available data and experience, forms hypotheses, tests them against concrete particulars, weighs competing hypotheses, and stands ready to repeat the process in the light of new data, experience, or insight."⁶¹ The realists, among whose heirs Glendon counts herself, "would have been skeptical about their successors' preference for litigation over ordinary politics" and "repelled by the current vogue for pure theory."⁶² Contemporary law schools, Glendon argues, suffer from the "dwindling number of professors with background or interest in practice"⁶³ and from academic neglect of critical aspects of the American political and legal tradition — "deliberation, voting, legislation, [and] local government."⁶⁴ On the other hand, Glendon does see some rays of hope — in the "scholar's commitment to pursue knowledge wherever it leads and whatever its unpopularity,"⁶⁵ and in the scholarly agendas of professors such as John Langbein of Yale, who has "created an academic subject out of a complex regulatory field that did not even exist when he graduated from law school" — pension law — and who has been active in law reform activities.⁶⁶

Glendon's analysis suggests she should find much to applaud in Guinier's career profile and scholarly project. Guinier spent over a decade as a government official, lobbyist, and public-interest litigator shaping and enforcing the statutory scheme her scholarship studies. She thus had more practical experience than virtually any other recent entry-level scholar at a top-ranked law school. Like Langbein, Guinier and a half-dozen other young legal scholars "created an academic subject out of a complex regulatory field that did

58. MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* (1994).

59. *Id.* at 194.

60. *Id.* at 195.

61. *Id.* at 238.

62. *Id.* at 178.

63. *Id.* at 223.

64. *Id.* at 219.

65. *Id.* at 209.

66. *Id.* at 245.

not even exist when [they] graduated from law school.”⁶⁷ Guinier’s writing focuses primarily on “deliberation, voting, legislation, [and] local government.”⁶⁸ Her articles propose “creative problem solving” — alternative remedies directed at getting beyond the common wisdom of *BEST* and devising mechanisms for encouraging a greater degree of “consensus” to help to open up the processes of “ordinary politics” to all citizens.⁶⁹ In particular, given Guinier’s central involvement in the creation of *BEST* during her career as a voting rights litigator, Guinier seems the very model of Glendon’s vaunted dialectical legal thinker. After contributing to the prevailing hypothesis, Guinier then tested *BEST* against the concrete particulars of continuing political exclusion from several state and local legislative bodies. Guinier also considered new data from jurisdictions that had adopted alternative voting systems and proposed a new way of understanding and enforcing the Act.

Guinier’s life and work make it especially puzzling that Glendon, who never mentions Guinier in *A Nation Under Lawyers*, chose Guinier as the prime example in an op-ed piece entitled *What’s Wrong With the Elite Law Schools*.⁷⁰ Glendon wrote that the reception Guinier’s work has received, and, implicitly, Guinier’s work itself, “raises a question about the milieu in which her ideas were developed, tested and first aired.”⁷¹ But besides noting that Guinier is in her mid-forties, Glendon never bothered to ask what Guinier’s milieu was. She merely suggested that Guinier’s approach was a function of her legal education during the early 1970s. But Guinier was of course more likely to have developed and tested her ideas during her service at the Department of Justice from 1977 to 1981 and at the NAACP Legal Defense Fund for seven years during the 1980s. To suggest that Guinier suffers from “a zany passion for novelty” or “a confusion of advocacy with scholarship”⁷² seems equally incongruous given the extensive historical use of cumulative voting and supermajority requirements and Guinier’s ex-

67. *See id.*

68. *Id.* at 219.

69. *Id.* at 198 (celebrating the “one-man, one-vote cases” — those *bêtes noires* of the common-law lawyers’ hero John Marshall Harlan the younger — because they “showed that lawyers could help to open up . . . political participation to all citizens”). Of course, urban and suburban voters were in no sense prevented from *participating* in politics before the one-person, one-vote cases. They simply had their votes *diluted* relative to the votes of rural residents. *See* James U. Blacksher & Larry T. Menefee, *From Reynolds v. Sims to City of Mobile v. Bolden: Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 *HASTINGS L.J.* 1 (1982) (tracing the development of the problem of minority vote dilution).

70. Mary Ann Glendon, *What’s Wrong With the Elite Law Schools*, *WALL. ST. J.*, June 8, 1993, at A16.

71. *Id.*

72. *Id.*

PLICIT *criticism* of the approach with which she had been associated as a litigator.

Glendon concluded her op-ed by asserting that Guinier's "fate . . . should send two messages" to the legal academy: first, that scholars should abandon work like Guinier's in favor of "painstaking work within a living, dynamic, self-critical tradition," and second, that the "elite disdain for politics through bargaining, education and persuasion" would "blight . . . the ability of promising young scholars to contribute constructively to public life."⁷³ Glendon is not, and does not claim to be, a scholar in voting rights law. It is therefore not surprising that she seemed relatively unaware of the long-standing debates that form the living, dynamic voting rights tradition within which Guinier works — a tradition both within the academic community of political scientists, historians, and lawyers who write about voting and in the larger public community of legislatures, courts, and litigators who have constructed and amended voting rights doctrine.⁷⁴ It is somewhat less excusable for Glendon to assume that Guinier's belief in a consensus-driven, rather than a purely majoritarian, political process manifests elite disdain, rather than celebration, of bargaining and politics. It is one thing to disagree with Guinier's conclusions; it is quite another to say that they indicate she is not a scholar. Glendon seems more interested in continuing a battle over the "hot-house environment" of legal academe⁷⁵ than in engaging the substance of Guinier's ideas. Perhaps the problem is not "[t]he ratio of 'practical' to 'theoretical' articles" within the law journals,⁷⁶ but rather the ratio of articles about law, however the field is defined, to articles about — apparently unread — articles about law.⁷⁷

73. *Id.*

74. For example, several proposals to adopt cumulative voting as a remedy in voting rights cases — including one made by a full-time practicing lawyer — antedated Guinier's articles by over five years. See, e.g., Edward Still, *Alternatives to Single-Member Districts, in MINORITY VOTE DILUTION* 249 (Chandler Davidson ed., 1984); Note, *Alternative Voting Systems as Remedies for Unlawful At-Large Systems*, 92 *YALE L.J.* 144 (1982). See generally Leon Weaver, *Semi-Proportional and Proportional Representation Systems in the United States, in CHOOSING AN ELECTORAL SYSTEM: ISSUES AND ALTERNATIVES* 191 (Arend Lijphart & Bernard Grofman eds., 1984). Other scholars had previously examined how cumulative voting had actually worked when used as a remedy. See, e.g., Richard L. Cole et al., *Cumulative Voting in a Municipal Election: A Note on Voter Reactions and Electoral Consequences*, 43 *W. POL. Q.* 191 (1990); 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 (1989); Richard L. Engstrom & Charles Barrilleaux, *Native Americans and Cumulative Voting: The Sisseton-Wahpeton Sioux*, 72 *SOC. SCI. Q.* 338 (1991); Karlan, *supra* note 32, at 231-36; Delbert A. Taebel et al., *Alternative Electoral Systems as Remedies for Minority Vote Dilution*, 11 *HAMLIN J. PUB. L. & POLY.* 19 (1990).

75. Glendon, *supra* note 70, at A16.

76. *Id.*

77. For three relatively short and accessible examples of how other scholars perceived both Guinier's ideas and the controversy over her nomination, see STEPHEN L. CARTER, *THE*

Starting ostensibly with very different premises, both about scholarship and about the merits of Guinier's nomination, Robert Post of Boalt Hall reached an incongruously similar conclusion about the lessons for legal scholarship from Guinier's dis-appointment.⁷⁸ Post identified two strands of legal scholarship — the traditional and the utopian. Traditional scholarship, in Post's view, "attempts to establish the meaning of a statute by extrapolating the intent of the legislature which enacted it."⁷⁹ It is realistic in that it remains aware of the relationship "between the legal implementation of statutes and the political will that enacted them."⁸⁰ Its strength "lies in its humility, in its respect for the political reconciliation of difference and for the values of existing social institutions."⁸¹ Utopian scholarship, by contrast, argues that legal arrangements are to be justified by their congruence with "moral vision"; it is "thus prepared to use law to pursue radical reconstitutions of society."⁸² Rather than addressing the "ordinary politics" of legislation, utopian politics seems, in Post's view, to address itself to judges — perhaps, though Post did not himself say this, because of the still-glowing embers of liberal faith in the Warren Court.

Post claimed that Senator Joseph Biden's suggestion — that Guinier could be confirmed only if she could

come up here [to Capitol Hill] and . . . convince people that what she wrote was just a lot of academic musing. . . . If she comes up here and says she believes in the theories that she sets out in her articles and is going to pursue them, [then she would] not [have] a shot⁸³

— shocked him "into a wholly different picture of law."⁸⁴ As a result of the controversy Guinier's nomination spawned, Post perceived a central flaw with the utopian approach: because it rests on moral visions that reflect simply the "political perspective appropriate to the citizen," utopian scholarship ultimately "offers no justification for claiming scholarly expertise with respect to the ascertainment and advocacy of [political] purposes."⁸⁵

CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS 37-44 (1994); Fried, *supra* note 49, at 128-31; Kennedy, *supra* note 49, at 38-46.

78. Robert Post, *Lani Guinier, Joseph Biden, and the Vocation of Legal Scholarship*, 11 CONST. COMMENTARY 185 (1994).

79. *Id.* at 189.

80. *Id.* at 190.

81. *Id.* at 191.

82. *Id.* at 190.

83. *Id.* at 185 (quoting Neil A. Lewis, *Senate Democrats Urge Withdrawal of Rights Nominee*, N.Y. TIMES, June 2, 1993, at A1 (emphasis deleted)).

84. *Id.* at 193.

85. *Id.* at 194-95.

Seen in this light, for Post, Lani Guinier was “a misfortune . . . simply waiting to happen.”⁸⁶ In Post’s reading, Guinier sets forth an essentially utopian interpretation of the Voting Rights Act; obviously, she is not attempting to interpret the statute Congress originally enacted.⁸⁷ Moreover, her approach is utopian because, rather than appealing to Congress with “a frank proposal for legislative amendment of the Voting Rights Act,” Guinier’s writing is “implicitly addressed to judges” — essentially asking them to implement her moral vision of the Act.⁸⁸ It reflects the utopian scholar’s distrust of the “opportunities of ordinary politics.”⁸⁹ Post comments, “surely such alienation lies at the source of Guinier’s own work.”⁹⁰ The rejection of Guinier’s ultimately political perspective — “the prerogatives of the expertise were abruptly dismissed”⁹¹ — reminded scholars “that in Washington truth rightly does not command political opinion, even truth about politics.”⁹²

Of course, a central problem with Guinier’s nomination was that few of the participants — and almost certainly not Senator Biden or the bulk of the news media — were aware of the truth *as to* what she had written, even leaving aside the question whether they would have agreed with the truth *of* what she had written.⁹³ But even as generally sympathetic an observer as Post seems to have misread much of Guinier’s work. In fact, Guinier’s work is *not* primarily addressed to courts. The implicit audience for her critique of *BEST* is more plausibly, at least in the first instance, the civil rights community, particularly its litigating members. Guinier’s analysis necessarily rested on a blend of expertise: a historical understanding of the goals of the civil rights movement that had viewed the Act as a centerpiece of its strategy for empowerment; a political scientist and sociologist’s understanding of problems of turnout, racial bloc voting, and electoral responsiveness; and a practitioner’s understanding of the pressures, both from courts and from the client base, for neat and tidy solutions to sprawling problems. *Utopian* is a somewhat inaccurate adjective even for Guinier’s proposed solutions — some, but not all, of which *were* addressed, at least ultimately, to a judiciary that would be asked by litigators to implement expansive remedies. Guinier had already participated in

86. *Id.* at 194.

87. *See id.* at 189-90.

88. *Id.* at 190-91.

89. *Id.* at 192.

90. *Id.*

91. *Id.* at 195.

92. *Id.*

93. For a thorough discussion of this point, see Laurel Leff, *From Legal Scholar to Quota Queen: What Happens When Politics Pulls the Press Into the Groves of Academe*, COLUM. L. REV., Sept./Oct. 1993, at 36.

a series of cases adopting cumulative voting, and close colleagues had been involved in crafting the legislatively imposed supermajority remedy in Mobile, Alabama.⁹⁴

Post comes closer to the truth of the Guinier case, I think, with an aside he makes during a paragraph in which he compares Guinier's experience with Robert Bork's: "Perhaps because issues of race are so highly explosive and because the margin of publicly accepted positions is consequently quite constricted, Guinier's views were dismissed out of hand."⁹⁵

The Voting Rights Act is a complex, technical, regulatory statute. But the Act trenches directly on questions of basic political theory and reality, and it does so in the context of the most divisive issue in America today — race. Even if Guinier's scholarship had focused solely on questions of legal expertise, she would have faced precisely the same problem. Whether racial bloc voting exists is a technical question subject to the application of social science expertise like that Guinier introduced into the legal doctrine in *Gingles*. But all the statistics Guinier could muster were ultimately powerless in the face of a deep desire to ignore, or reject, "the hard-bitten view that racism in this country is far worse, far more pervasive, and far more ineradicable than many of us would like to think."⁹⁶ The availability of alternatives to the dominant remedial approach is similarly a question, at least in part, of technical political science to which legal scholars might profitably contribute some expertise. But again, when race is involved, facts take a decided back seat to deeply held values. Even Guinier's entirely legalistic, scholarly truths were unpalatable to the politics of the moment. Guinier's experience was, as I suggested at the beginning of this review, a signal example of the point her scholarship made — that the current climate of winner-take-all, candidate-driven politics affords too

94. Moreover, at the time she wrote her *Michigan* and *Virginia Law Review* pieces, Guinier was involved in *Presley v. Etowah County Commn.*, 502 U.S. 491 (1992), which raised claims of postelection legislative exclusion in the context of § 5 of the Voting Rights Act. That Guinier's position lost, 6-3, hardly suggests that it was entirely outside the boundaries of what Congress intended. Indeed, the Bush administration's Department of Justice supported the position of Guinier's clients.

The *New York Times* editorial page concretely illustrates that many observers simply lost their heads during the nomination process. The paper's editorial board criticized Guinier for being too pessimistic about the integration of black elected officials into governing bodies, see *A Civil Rights Struggle Ahead*, N.Y. TIMES, May 23, 1993, § 4 (Editorial), at 14 (criticizing Guinier because "[h]er articles depict legislatures and local councils that, for all the political gains under the 1965 Voting Rights Act, remain racially polarized with blacks unable to influence laws or governance"), but earlier, when *Presley* was decided, the paper had excoriated the Court for permitting precisely that result, see *The Runaway Supreme Court*, N.Y. TIMES, Feb. 2, 1992, § 4 (Editorial), at 16 (claiming that the Voting Rights Act has not "stop[ped] the stubborn resistance" of covered jurisdictions: "Blacks could get the vote, and even sue to protect it — but could only watch helplessly as the effect of voting was nullified").

95. Post, *supra* note 78, at 191.

96. Fried, *supra* note 49, at 128.

few opportunities for genuine discussion and consensus building. The ordinary politics of Guinier's nomination was a deeply flawed politics.⁹⁷

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The Voting Rights Act is a battleground on which whites, blacks, Latinos, Asians, Democrats, Republicans, federal and state courts, Congress, and the Department of Justice struggle for political power. Given the way in which each of these groups twists the Act to serve its competing and occasionally even self-contradictory purposes, it is hardly surprising that Lani Guinier was caught in the crossfire. But now that at least some of the smoke has cleared, *The Tyranny of the Majority* offers scholars who have so far sat on the sidelines a chance to think and debate more deeply how law can contribute to fundamental questions of political structure.

⁹⁷. The deep flaws of the ordinary politics of the nomination process are explored in CARTER, *supra* note 77.