BOOK REVIEWS

TWO STEPS FORWARD AND ONE STEP BACK: MINORITY PROGRESS AND THE TYRANNY OF THE MAJORITY

A REVIEW-ESSAY BASED ON LANI GUINIER'S THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY. NEW YORK, N.Y.: THE FREE PRESS, 1994.

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INTRODUCTION

[T]hose who stand for principles may lose in the short run, but they cannot be suppressed in the long run.[1]

Hindsight is 20/20. In the spring of 1993, President Clinton nominated Lani Guinier for Assistant Attorney General in charge of the Civil Rights Division. This ignited the media, which eagerly fueled an intensely polarized, misinformed debate about Guinier's beliefs, goals, and job qualifications. Ultimately, this led the President to withdraw the nomination on June 3, 1993.[2] On June 28, 1993, the Supreme Court, through *Shaw v. Reno*,[3] began its work of gutting the Voting Rights Act.[4] On November 8, 1994, the nation showed its disgust with its own system, and elections devastated the Democratic Party. As we thirst

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1. LANI GUINIER, *The Tyranny of the Majority*, *in* THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY 1, 19 (1994) [hereinafter GUINIER, *The Tyranny of the Majority*].

2. *See Transcript of President Clinton's Announcement*, N.Y. TIMES, June 4, 1993, at A19.

3. 113 S. Ct. 2816 (1993).

4. 42 U.S.C. § 1973 (1988).

for alternatives, Guinier's collection of essays, *The Tyranny of the Majority: Fundamental Fairness in Representative Democracy*, reveals a refreshing perspective: determined faith in the fundamental principles of democracy and enduring optimism that there are solutions to our malaise. One such solution, semi-proportional representation, which is markedly different from current winner-take-all voting systems, has had some success. Two years after her nomination, Guinier's work merits renewed attention — this time for substance, not sound bites. Perhaps her principles could help Republicans and Democrats maintain an operative dialogue, enable the factions of the Democratic Party to work together, and ultimately ameliorate societal stratification.

President Clinton had spoken and written on the need to eliminate barriers to effective voting.[5] Yet, when the media and conservatives labeled Guinier a "Quota Queen," he did not challenge the stereotype.[6] Withdrawing her nomination, he explained that she had "ideas that I myself cannot embrace."[7] African-Americans within the Administration also refused to support her.[8]

Subscribing to the fiction of "color-blindness" appeased the Right. In reality, says Professor Stephen Carter, "we yet live in a nation in which every black nominee comes before the Senate and the public with a particular cross to bear: the need to dispel a set of assumptions about work ethic, rationality, and intelligence."[9] Yet Guinier's willingness to confront racial issues set off an anti-fringe alarm, allowing the White House to turn its back on her. She was denied a Senate confirmation hearing due in part to a fear that it "would be divisive and polarizing."[10] In a

5. *See, e.g.*, Bill Clinton, *State Initiatives to Increase Citizen Participation*, *in* VOTING RIGHTS IN AMERICA: CONTINUING THE QUEST FOR FULL PARTICIPATION 143 (Karen M. Arrington & William L. Taylor eds., 1992).

6. David Garrow, *"Quota Queen" Was Her Crown of Thorns*, NEWSDAY, June 21, 1993, at 37.

7. *Transcript of President Clinton's Announcement*, *supra* note 2, at A19.

8. At a meeting of 600 lawyers at the Justice Department, Derrick Bell asked, "perhaps you can help me understand how the multitude of women and people of color who made it safely past the shoals of the confirmation process could stand quietly by while Lani Guinier . . . was sacrificed to the sharks." Maudlyne Ihejirika, *Blacks' Silence Hurt Guinier, Professor Says*, CHI. SUN-TIMES, June 16, 1993, at 25.

9. Stephen L. Carter, *Foreword* to LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY xviii (1994).

10. Lani Guinier, *Beyond Winner Take All: Democracy's Conversation*, THE NATION, Jan. 23, 1995, at 85, 86.

nutshell, Guinier's own experiences reflected that which has propelled her life's work. The White House, seeking support of moderates and conservatives, ignored a minority voice — quintessential majority tyranny.

The media did not have to know Guinier to label her. Said Guinier:

> "Quota Queen" was a headline looking for a person, and I walked in. The reason I could be tagged with that headline is that I was writing about race. If you write about race, you must be writing about racial preferences, and therefore you're writing about quotas.[11]

The label "resonates mellifluously with welfare queen"[12] and reverberated more recently when the media tagged Joycelyn Elders the "Condom Queen."[13] Guinier and Elders are black and female — facts subjecting them to a political double standard, declared Patricia Ireland, president of National Organization of Women (NOW). In an environment where "the racist 'welfare queen' stereotypes [were] made popular by the Reagan administration,"[14] the labels were deadly. If there was an ounce of merit in the accusations hurled against Guinier, it remained irrelevant; in the short run, a sound bite packed more punch than an intelligent debate. Lani Guinier was "borked,"[15] but unlike Robert Bork, she was not allowed to defend herself in a hearing. *The Tyranny of the Majority* is her response.

Electoral outcomes have vindicated many of Guinier's ideas. Foremost, the election of racial and ethnic minority representatives does not equal minority political power. After the 1992 election, many minorities were hopeful for change. Minorities comprised about twenty percent of Democrats in the House of Representatives, and a Democrat had been elected President.[16] Now lacking allies, black and other minority members of Congress can do little to meet the needs of their constituencies. Before November, black Democrats chaired three House committees and seventeen subcommittees. Now they must relinquish

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11. Garrow, *supra* note 6, at 37.

12. Carter, *supra* note 9, at xix.

13. *See* Frank Rich, *The Last Taboo*, N.Y. TIMES, Dec. 18, 1994, § 4, at 15.

14. Patricia Ireland, *Still Fighting the Double Standard*, CHI. TRIB., June 27, 1993, at 11. "Anyone who doubts there is one standard in politics for men and another, tougher one for women hasn't kept up with the news." *Id.*

15. Carter, *supra* note 9, at xii.

16. William J. Eaton, *Minorities' House Gain May Help Clinton; Congress: Election of Record Number of Non-Whites Is Seen As Major Boost For Incoming President's Economic Programs*, L.A. TIMES, Nov. 7, 1992, at 16.

these chairs. For the first time since Reconstruction, House Republicans outnumber Democrats from thirteen Southern states, 73 to 64.[17] Only two black House members vote with the Republican majority, which has cut off the Congressional Black Caucus' funds.[18] And Georgia, where blacks gained two congressional seats for a total of three, is now represented by seven Republicans, led by Newt Gingrich, to four Democrats.[19]

On the local level, when minorities newly elected to county legislatures or school boards have assumed their seats, white majorities have changed decision-making rules, depriving the new representatives of actual power. While Guinier argues that the right to a meaningful vote encompasses "a fair chance of policy influence,"[20] the Supreme Court has upheld a challenge to this practice.[21]

Unlike some scholars, Guinier does not presume that white politicians can represent black interests.[22] Rather, mobilizing minority political participation and ensuring a representative legislature requires the election of minority representatives who are "authentic" — voted in by and sharing cultural and psychological

17. Peter Applebome, *The 1994 Elections: The South: The Rising G.O.P. Tide Overwhelms the Democratic Levees in the South*, N.Y. TIMES, Nov. 11, 1994, at A27. There were 83 Southern Democrats to 46 Republicans in the House in 1990. *Id.*

18. Lani Guinier, *Don't Scapegoat the Gerrymander*, N.Y. TIMES, Jan. 8, 1995, (Magazine), at 37 [hereinafter Guinier, *Don't Scapegoat the Gerrymander*].

19. Ben Smith III, *Election '94 Redrawn Districts Sparked GOP Gains*, ATLANTA J. & CONST., Nov. 12, 1994, at B2.

20. LANI GUINIER, *No Two Seats, in* THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY, 71, 93 [hereinafter GUINIER, *No Two Seats*]; *see also id.* at 249 n.64.

21. Presley v. Etowah County Comm'n, 502 U.S. 491 (1992); *see infra* note 113.

22. *See* ABIGAIL THERNSTROM, WHOSE VOTES COUNT: AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS 225–26 (1987) [hereinafter THERNSTROM, WHOSE VOTES COUNT]. Guinier also does not presume that black representatives will represent the interests of blacks, particularly in a district system of voting. *See* LANI GUINIER, *The Triumph of Tokenism, in* THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY, 41, 55–58 (1994) [hereinafter GUINIER, *The Triumph of Tokenism*]; LANI GUINIER, *Groups, Representation, and Race Conscious Districting, in* THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY, 119, 141–46 (1994) [hereinafter GUINIER, *Groups, Representation, and Race Conscious Districting*].

ties with particular minority communities[23] — and accountable to those minority communities.[24]

In Part I of this Book Review, I discuss the manipulation of the black vote by the Democratic party and the enduring effects of the Reagan Revolution on voting rights. In an era of increased racial polarization, racial concerns do not seem politically advantageous. Guinier argues that a partisan Justice Department augmented such polarization by failing to enforce the Voting Rights Act.

In Part II, I examine *Shaw v. Reno*[25] and its aftermath. *Shaw* proves that geographically-based redistricting, the current approach to voting rights, is a flawed litigation tool. When white plaintiffs challenged a redistricting plan designed to comply with section 5 of the Voting Rights Act,[26] the Court engendered confusion in voting rights litigation by redefining equal protection.

Now, unusually shaped majority-minority districts must withstand strict scrutiny,[27] but at the same time, the Court's earlier decision in *Thornburg v. Gingles*[28] has left majority-minority districting as the only solution to minority vote dilution. Bizarre district lines undermine legitimacy. The Court fails to acknowledge that all line-drawing involves political decisions; there are no natural voting boundaries.

In Part III, I focus on Guinier's solutions to the voting rights dilemma. Ironically, *Shaw* "may move 'the mainstream' in the direction of the precise course charted by Guinier."[29] In *No Two*

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23. GUINIER, *The Triumph of Tokenism*, *supra* note 22, at 55–58. Guinier's references to "authentic" black representatives have frequently been mischaracterized. *See* Carter, *supra* note 9, at x, xi; GUINIER, *The Tyranny of the Majority*, *supra* note 1, at 12–13; Abigail Thernstrom, *Guinier Miss: Clinton's Civil Rights Blooper; Assistant U.S. Attorney General Nominee Lani Guinier*, NEW REPUBLIC, June 14, 1993, at 16 [hereinafter Thernstrom, *Guinier Miss: Clinton's Civil Rights Blooper*].

24. GUINIER, *The Triumph of Tokenism*, *supra* note 22, at 57–58.

25. 113 S. Ct. 2816 (1993).

26. 42 U.S.C. § 1973c (1988). *See infra* note 124.

27. 113 S.Ct. at 2024.

28. 478 U.S. 30 (1986). The Court established a three-prong test of minority vote dilution in *Gingles*. To succeed in a dilution claim, plaintiffs must demonstrate that (1) the white majority votes as a bloc, which usually defeats a (2) geographically compact and (3) politically cohesive minority group. *Id.* at 37. Since *Gingles*, the only remedy to claims of vote dilution which the Court has recognized has been single-member, majority-minority districts.

29. T. Alexander Aleinikoff & Samuel Issacharoff, *Race & Redistricting: Drawing Constitutional Lines After* Shaw v. Reno, 92 MICH. L. REV. 588, 628 (1993).

Seats,[30] originally published before *Shaw*, Guinier argues that the current voting solutions — single-member, majority-minority districts — are fundamentally flawed. They do not ensure an effective vote. Empowering voters has always been her chief concern. If votes provide a real opportunity to elect an empowered representative, voters of all stripes will be more likely to participate in the political process, resulting in a more representative, "bottom-up"[31] democracy.

Guinier seeks solutions which satisfy a need for fairness and legitimacy. The cumulative voting solutions she suggests have been proven viable and legitimate to both sides of the majority-minority battlefield. Nevertheless, although her name is frequently associated with cumulative voting, she is less concerned with any particular voting process than with the fairness of the choice. History demonstrates that current processes do not give minority voters a fair opportunity for political participation.

I. PARTY POLITICS AND THE BLACK VOTE

Redistricting following the 1990 census provided the first wholesale opportunity to implement the 1982 amendments to the Voting Rights Act.[32] When majority-black districts were created to comply with the Act, white Democratic incumbents in neighboring districts were deprived of needed votes.[33] Lawmakers were not blind to the possibility of this outcome.[34]

According to some critics, an "uncomfortable alliance" between minority politicians and the Republican party ensued, "the latter armed with the oversight powers of the Justice Department."[35] In a recent article in the *New York Times*, Guinier ac-

30. GUINIER, *No Two Seats*, *supra* note 20 at 71. The title of the essay honors Fannie Lou Hamer. When the Mississippi Freedom Democratic Party was snubbed at the 1964 Democratic National Convention, Hamer said, "We didn't come all this way for no two seats when all of us is tired." *Id.*

31. GUINIER, *Groups, Representation, and Race Conscious Districting*, *supra* note 22, at 125.

32. *See infra* notes 61, 124.

33. Ben Smith III, *supra* note 19, at B2.

34. Aleinikoff & Issacharoff, *supra* note 29, at 589 n.8. Lee Atwater saw redistricting following the 1990 census as an opportunity to undermine Democratic control of state legislatures and the House by packing Democratic votes, weakening the biracial power bases of liberal Democrats and drawing necessary votes away from Democratic incumbents. *Id.*; *see also* Thomas E. Mann, *Preface* to CONTROVERSIES IN MINORITY VOTING XIII (Bernard Grofman & Chandler Davidson eds., 1991); James A. Barnes, *Minority Poker*, THE NAT'L L. J., May 4, 1991, at 1034.

35. Aleinikoff & Issacharoff, *supra* note 29, at 589.

knowledges that "[n]o doubt some majority-black districts were created that left other districts whiter, more conservative and more Republican,"[36] but believes that the 1994 election did not solely result from the lines chosen in remedial single-member redistricting:

> The truth is, of course, that the Democrats lost for many reasons. Three stand out. First, white voters fled the party. Second, the Democratic Party gave its traditional base — minorities, labor and city dwellers — little incentive to vote, courting marginal Democratic voters with big television buys rather than turning out its core constituency. Third, about 62 percent of all eligible voters stayed home: both parties are turning off voters. Thirty-six Republicans won previously Democratic seats with fewer votes than unsuccessful Republicans got in 1992.[37]

White and minority voters alike were disillusioned with the political process. Minority voters especially saw little promise that either party would represent their interests. As discussed below, historically both parties have appealed to minorities at times when minority votes were needed. Given the intensely racially polarized environment we now have, however, both parties strategically chose to court voters in the majority and neglect minority voters.

A. *Democrats — Benign Neglect*

In *Keeping the Faith*, written in 1988–1989, Guinier examines the stances of the Democratic and Republican Parties towards minority votes. "One party has taken blacks for granted; the other, at best, ignored them."[38] Although the "Reagan Legacy"[39] has been particularly damaging to minority political empowerment, African-Americans have "begun to relinquish the presumption that a Democratic White House is necessarily the ticket to a better future."[40] Guinier characterizes the Democratic Party's policy toward African-Americans as "benign neglect."[41] This understates the history of the party.

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36. Guinier, *Don't Scapegoat the Gerrymander*, *supra* note 18, at 36.

37. *Id.*

38. LANI GUINIER, *Keeping the Faith*, *in* THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY 21, 22 (1994) [hereinafter GUINIER, *Keeping the Faith*].

39. *Id.* at 23.

40. *Id.* at 30.

41. *Id.* at 31.

1. Post-War to LBJ

Tracing the Democratic Party's racial politics from World War I, Edward Carmines and Robert Huckfeldt state: "In one sense the Democratic Party was truly classless and unified . . . its support was rooted in white racial dominance, and the great majority of the whites belonged to the party regardless of their class."[42] A two-party system threatened white domination, so Southern conservatives swallowed a "bitter pill," forming Roosevelt's core support.[43] "In short, continued racial discrimination was the tacit basis for the success of the New Deal coalition — the ugly secret that made Democratic hegemony possible during the 1930s and 1940s."[44]

The Party's strength depended upon avoiding race issues, which was not possible for long. Blacks migrated to the North and gained political power there, where fewer voting barriers existed. Candidates on the national level needed to win northern industrial states, and therefore needed the support of urban blacks. After Roosevelt, the issue of racial discrimination could no longer be ignored. The party needed to retain the support of Southern whites and Northern blacks simultaneously.[45] In light of this tension:

> John Kennedy's call to Coretta King during the 1960 presidential campaign, made while her husband sat in a Birmingham jail, takes in a political as well as a moral relevance. Kennedy, whose position on civil rights in the campaign was similar to Richard Nixon's, was attempting to attract blacks without alienating southern whites.[46]

Kennedy succeeded. Johnson, however, did not try to strike such a balance. Johnson tied the party's future to the critical

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42. Edward Carmines & Robert Huckfeldt, *Party Politics in the Wake of the Voting Rights Act*, *in* CONTROVERSIES IN MINORITY VOTING, 117–18.

43. *Id.* at 18.

44. *Id.; see* STEVEN F. LAWSON, BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944–1969 at 137 (1976).

45. Carmines & Huckfeldt, *supra* note 42, at 118–19. *See* LAWSON *supra* note 44, at 137–39. Civil rights legislation was a major concern to Harry Truman. "For the first time in the twentieth century a chief executive identified the Negroes' battle for equal citizenship rights as a matter for active national concern." LAWSON, *supra* note 46, at 137. Truman "was swayed by a combination of principle and politics." *Id.* He was moved by Southern violence, but also well aware that blacks in the North were emerging as a powerful political force. Despite his concerns, Truman was willing to sacrifice his civil rights proposals to win the support of Southern white Democrats for other New Deal programs. *Id.* at 137–38.

46. Carmines & Huckfeldt, *supra* note 42, at 120.

black vote.[47] By 1964, the two parties were polarized. The Democratic Party had become the party of racial liberalism. The Republican Party, once the "party of Lincoln," became the party of racial conservatism.[48] In 1964, voting divisions by class among Southern whites began to vanish, and as the Democratic Party lost Southern white voters, it gained large numbers of black voters.[49] In this context, the Voting Rights Act of 1965 was "not only morally correct but also politically expedient."[50]

2. The Reagan Impact

The Reagan years led to "a racially skewed reality in which blacks vote but do not govern, at least not in majority white jurisdictions."[51] In response to the increased racial polarization of the 1980s, the Democratic Party began disassociating itself from black interests and avoiding race issues. White Democratic candidates display lukewarm support for black Democratic candidates, most notably Jesse Jackson, and infrequently seek black allies.

The loyal black constituency has not been blind to this neglect.[52] When Guinier's nomination was withdrawn, Professor Derrick Bell's remark captured a growing sentiment:

> The ominous question is how long blacks with the competence and commitment of Lani Guinier will be willing to offer their services to a government that as a prerequisite of appointment, demands that they deny — or at least remain silent regarding — racial conditions that will only deteriorate with neglect. Diversity as decoration is worse than no diversity.[53]

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47. *Id.* at 121.

48. *Cf.* LAWSON, *supra* note 44, 140–64; HUGH D. GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960–1972, at 16–17 (1990). The Republican party saw "three generations of Negro Republicans loyalty dissolve with alarming speed since the mid-1930's." *Id.* at 16. In its 1944 platform, the Party attempted to appeal to blacks by supporting the establishment of a "Fair Employment Practice Commission." *Id.* at 14, 16. Eisenhower, when elected in 1952, showed little support for civil rights legislation. "For him prejudice was a moral problem that had to be solved primarily in the home or in church rather than in the halls of Congress." LAWSON, *supra* note 44, at 144. However, realizing that the 1956 election would be a close race, he supported the drafting of an omnibus civil rights bill to garner black votes. This bill became the Civil Rights Act of 1957. *Id.* at 150–63.

49. Carmines & Huckfeldt, *supra* note 42, at 121–25.

50. *Id.* at 126–27.

51. GUINIER, *Keeping the Faith, supra* note 38, at 30.

52. *Id.* at 31.

53. Iherjirika, *supra* note 8, at 25.

At the 1994 annual meeting of the NAACP, black leaders expressed bitterness over the failed nomination of Guinier. At the meeting, Vice President Gore attempted to garner pre-election support, naming policies which he claimed would benefit blacks. Nevertheless, William Gibson, then Chair of the NAACP Board of Directors, urged the pursuit of "a radical and aggressive movement 'disregarding any political expediencies or White House relationships.' "[54]

More recently, at a conference of the National Rainbow Coalition, prominent liberals, who "held their tongues while the Administration pursued an agenda that they had a hard time accepting,"[55] expressed a willingness to challenge Clinton's "apparent readiness to shift to the right,"[56] further fracturing the Democratic party. Jesse Jackson is considering challenging Clinton in 1996.[57] Disillusioned blacks must seek political empowerment through their own ballot.

B. *The Reagan Legacy*

However incensed one may be by Republican racial politics (ironically known as "color-blind"), at least they have made little effort to mask their intentions, unlike the Democrats. Under Reagan:

> [T]he Department of Justice filed briefs in employment and voting cases opposing women and minority plaintiffs, took the position that only intent to discriminate should be covered by the Voting Rights Act of 1982, and generally demonstrated greater sympathy for white males, who were perceived as victims of "reverse discrimination" rather than for those "actual, identifiable" black victims of state-supported legal segregation. The President also fired members of the United States Civil Rights Commission for doing their jobs and vetoed the Civil Rights Restoration Act. Some suggest that President Reagan's popularity was helped by these blatant appeals to the perception that federal civil rights policy unfairly benefitted blacks and other minorities.[58]

Guinier identifies two Reagan appointees who are particularly noteworthy for their advocacy of Reagan's agenda: William

54. Amy Bayer, *Gore Tells NAACP Our Way is Working but Some Black Leaders are Skeptical*, SAN DIEGO UNION-TRIB., July 13, 1994, at 14.

55. Steven A. Holmes, *Liberal Anger, States Hope and a Technology Debate; Liberals: Bitter Attacks on the President*, N.Y. TIMES, Jan. 7, 1995, at 8.

56. *Id.*

57. *Id.*

58. GUINIER, *Keeping the Faith, supra* note 38, at 23.

Bradford Reynolds, who held the position for which Guinier herself was nominated, and Solicitor General Charles Fried. Both men assumed positions in which their duties included protecting the Constitution but used those positions to chip away at Constitutional rights.

1. The Department of Justice, Civil Rights Division

In *Keeping the Faith*, Guinier argues that the Department of Justice took a position contrary to the purposes of the Voting Rights Act. Although "no one prior to the Reagan Administration had seriously contended that that Act's intended beneficiaries were other than racial and language minority victims of entrenched, official and continuing discrimination,"[59] the Civil Rights Division "took every opportunity through its enforcement authority under the Act to protect incumbent white elected officials."[60] Led by Assistant Attorney General William Bradford Reynolds, the Division attempted to raise the burden of proof for minority plaintiffs in voting rights suits.

Congress amended section 2 of the Voting Rights Act in 1982.[61] A bipartisan Congress carefully drafted a "results" test, overturning *Mobile v. Bolden*,[62] in which the Supreme Court had required purposeful discrimination to establish a voting rights violation. Reynolds testified against the change, but tried to take credit for the amendments when his arguments failed.[63] The Department of Justice then filed an amicus brief opposing black

59. *Id.* at 25.

60. *Id.*

61. 42 U.S.C. § 1973 (1988). Section 2 reads, in pertinent part:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color . . . .

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

62. Mobile v. Bolden, 446 U.S. 55 (1980). Black plaintiffs challenged the City of Mobile's practice of electing a three-member City Commission using an at-large system. The Court found the evidence sufficient to establish a Fourteenth Amendment violation. However, Justice Stewart's opinion expressed concern that the floodgates of litigation not be opened against the common multi-member district systems. *Id.* at 66–70.

63. GUINIER, *Keeping the Faith*, *supra* note 38, at 26.

plaintiffs in *Thornburg v. Gingles*,[64] the first case in which the Court interpreted the amendments. Additionally, Reynolds had the responsibility of enforcing section 5 of the Act, under which covered jurisdictions submit changes in election procedures to the Department for pre-clearance. As Guinier reveals, Reynolds misused his position to advance the interests of white Republicans instead of the Act's intended beneficiaries.[65]

2. Order and Law — Charles Fried, Solicitor General

The "Reagan Revolution" was also hard-fought by Solicitor General Charles Fried. In *Lines in the Sand*, written in 1991, Guinier reviews Fried's book, *Order and Law: Arguing the Reagan Revolution — A Firsthand Account*.[66] While many believe that "the Solicitor General's job is to interpret and protect the Constitution,"[67] Fried was "aggressively political."[68] A Harvard law professor, Fried attempted to advance the Reagan philosophy with "legal teeth, intellectual heart, and judicial soul."[69] He believed that "neutral, principled reasons . . . compel judicial adoption of conservative public policy choices."[70] The linchpin of the ideology was a rigid view of the separation of powers, with the executive branch holding the broadest power, because the executive best personifies the nation as a whole.

As Guinier observes, this is not a neutral stance — to her, "the legislature, not the President, best represents the people; separation of power connotes power checking — not separating — power; power-sharing, not power dividing."[71] Historically, the Framers rebelled against a centralized authority — the monarchy — and both Madison and Hamilton feared too much power in the hands of few.[72] The Reagan philosophy would destroy the checks and balances between the branches, allowing for an unconstrained and dangerous majority.[73]

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64. 478 U.S. 30 (1986). Guinier joined the briefs for the appellees. *Id.* at 33.

65. GUINIER, *Keeping the Faith, supra* note 38, at 27–29.

66. CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION — A FIRSTHAND ACCOUNT (1991).

67. LANI GUINIER, *Lines in the Sand, in* THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY 157, 158 (1994) [hereinafter GUINIER, *Lines in the Sand*].

68. *Id.* at 159.

69. *Id.* at 162.

70. *Id.* at 158.

71. *Id.* at 173.

72. *See* THE FEDERALIST No. 47 (James Madison).

73. GUINIER, *Lines in the Sand, supra* note 67, at 173–74.

Fried's second mission was to implement the color-blind ideal. He wanted to eliminate quotas, seeing them as "a kind of racial industrial policy" not reflecting the marketplace and antithetical to the idea of individual liberty.[74] Fried opposed the single district remedy in *Thornburg v. Gingles*, arguing for an intent standard.[75]

In *Gingles*, the Court rejected Fried's argument.[76] However, the Reagan Revolution sought an enduring agenda, and it has largely achieved this through conservative federal judges.[77] Fried's aggressively political stance helped lead to this outcome. Ironically, Fried claimed that liberals misused the courts to advance a political agenda,[78] yet his own approach, "while claiming neutrality of results, was actually very result-oriented. And the quickest way toward different results was to change the membership of the federal judiciary."[79] After *Gingles*, the Court's opin-

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74. *Id.* at 177.

75. 478 U.S. 30, at 61–67 (1986).

76. *Id.* Justice Brennan addressed Fried's argument that a results test belied Congressional intent. The 1982 amendments were accompanied by a Senate Report, which Brennan found "dispositively rejects the position of the plurality in *Mobile v. Bolden*, which required proof that the contested electoral practice or mechanism was adopted or maintained with the intent to discriminate against minority voters." *Id.* at 43, 44. He stated that an intent test would require plaintiffs "to prove that most of the white community is racist in order to obtain judicial relief. It is difficult to imagine a more racially divisive requirement." *Id.* at 72.

77. Sixty-five percent of the federal judiciary are Reagan and Bush appointees. If President Clinton fills current vacancies, GOP appointments will remain majorities on twelve of the thirteen courts of appeal. David M. O'Brien, *The Courts; Diversity Goal Hurts Liberals*, L. A. TIMES, Feb. 5, 1995, at M1. Under Bush, many of the appointees who received lifetime tenure were young, which may partially account for why many received poor ratings from the American Bar Association. Neil A. Lewis, *The 1992 Campaign; Selection of Conservative Judges Insures a President's Legacy*, N.Y. TIMES, July 1, 1992, at 13 [hereinafter *The 1992 Campaign*]. The American Bar Association has rated 65% of Clinton's appointees as "well-qualified," as opposed to 59% of Bush's and 55% of Reagan's. Almost 60% of Clinton's selections are women and minorities. O'Brien, *supra*. While left-wingers have criticized Clinton for his moderate choices, *see* Neil A. Lewis, *At the Bar; A Republican Senator Forces the Administration to Rethink its Strategy on Judicial Appointments*, N.Y. TIMES, Dec. 9, 1994, at B7, it is worth noting that Reagan-Bush appointees were "markedly different even from those who were put on the bench by Richard M. Nixon and Gerald R. Ford." Lewis, *The 1992 Campaign, supra*. A 1990 study revealed restrictions on abortions were supported by judges appointed under Reagan "about 77 percent of the time," Carter appointees about twelve percent of the time, and Nixon appointees about twenty-one percent. *Id.* Note that Clint Bolick, whose *Wall Street Journal* article touched off the "Quota Queen" label, said that when Bush was elected, the selection of conservative judges was "the greatest priority of conservatives." *Id.*

78. GUINIER, *Lines in the Sand, supra* note 67, at 182.

79. *Id.*

ions on voting rights began to reflect the "neutral," logical reasoning by which Fried had buttressed party politics.[80]

C. *Legal and Political Avenues*

1. The Goal of Political Inclusion

> Litigation to enforce the Voting Rights Act transformed the original goals . . . into the shorthand of counting elected black officials.[81]

The "theory of black electoral success," discussed in *The Triumph of Tokenism*, "puts all faith in electing black representatives."[82] Guinier believes this theory fails to actualize the civil rights movement's beliefs in "broad-based political participation and representation as instrumental to community autonomy and to community-based reforms."[83] Following passage of the Voting Rights Act in 1965, black activists focused on attaining and protecting the right to vote, working within the framework of the Act as interpreted by the courts. The "triumph of tokenism" obscured the empowerment vision of the civil rights movement.[84]

The shorthand method has technical and substantive flaws. As amended, section 2 states that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."[85] To rely upon headcounts opens the door to the defense that blacks are not guaranteed a proportionate number of elected officials; it also misconstrues the meaning of the Act. Abigail Thernstrom, who disagrees with Guinier about what constitutes representation of minority interests, does assert that "statistical analysis can only tell part of the story."[86] According to Guinier, an opportunity for members of a protected class "to participate in the political process and to elect representatives of their choice"[87] signifies an opportunity to elect "authentic," responsive officials

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80. *See supra* Parts II.A and II.B.

81. GUINIER, *The Triumph of Tokenism*, *supra* note 22, at 41.

82. *Id.* at 41.

83. *Id.* at 43.

84. *Id.* at 43, 48.

85. 42 U.S.C. § 1973 (2)(b) (1988).

86. THERNSTROM, WHOSE VOTES COUNT, *supra* note 22, at 221. Thernstrom argues that "the proper test for electoral exclusion is the presence of legislative seats largely reserved for whites — not legislative seats occupied disproportionately by whites. Disproportionately low office-holding by minorities does not necessarily mean that considerations of race are controlling electoral outcomes, or that the legacy of past discrimination is distorting the entire political process." *Id.* at 225.

87. 42 U.S.C. § 1973 (2)(b) (1988).

who themselves have an opportunity to participate fully in the legislative process.

During her nomination, Guinier was accused of calling black Republicans "unauthentic."[88] Her concern, however, is not the black representative's political party, but whether or not she aggressively advocates for her constituency. A safe majority-minority district may not encourage sustained minority political participation, and thus may result in reduced accountability. Furthermore, in light of the recent elections, it has become clear that the number of black representatives is an inadequate measure of political power.[89]

Guinier stated in *Keeping the Faith* that mobilizing African-Americans to participate in the political process will not happen "without a vision of the future that reaches out to include them broadly and not just euphemistically."[90] Following the Reagan and Bush years, she hoped for an Administration which would "actively implement a voting rights agenda,"[91] and "seek out black allies, by supporting — not undermining or patronizing — black and other minority leadership, by appointing a diverse group of black federal officials and by encouraging potential African-American candidates for federal, state and local office."[92] Her own experience has demonstrated the limits of these hopes.

In a later essay, *The Triumph of Tokenism*, she argues that the election of "authentic" black representatives is a good start but ultimately a "limited empowerment tool."[93] "The right to vote for representatives, standing alone, does not ensure a fair chance of policy decisions. The right to a meaningful voice requires extending the statutory inquiry to examine legislative decisional rules."[94] In her next essay, *No Two Seats*, Guinier outlines a new approach to a legal claim of vote dilution. She argues for a comparison of a challenged voting practice to a benchmark that "fairly reflects proportionate minority influence."[95] Evidence

88. Thernstrom is an outspoken critic of Guinier's views. *See* Thernstrom, *Guinier Miss: Clinton's Civil Rights Blooper, supra* note 23. "Thernstrom's theory of voting rights has received considerable attention, in part because its proponent utilizes effectively the inflammatory language of quotas." GUINIER, *The Triumph of Tokenism, supra* note 22, at 57 n.97.

89. *See supra* text at 4.

90. GUINIER, *Keeping the Faith, supra* note 38, at 32.

91. *Id.* at 38.

92. *Id.* at 39.

93. GUINIER, *The Triumph of Tokenism, supra* note 22, at 58.

94. GUINIER, *No Two Seats, supra* note 20, at 93.

95. *Id.* at 92.

that minority interests consistently differ from and are submerged by mainstream interests, distinct from the sheer number of minority representatives, establishes a potential claim of vote dilution.[96] A proportionate interest representation model creates incentives for minority communities to more actively educate their constituencies, organizing around common interests rather than personalities of candidates.[97] According to Guinier, proportionate interest representation more accurately reflects the purposes of the Voting Rights Act.

2. Evolution of the Voting Rights Act

Guinier's opening essay, *The Tyranny of the Majority*, describes three generations of voting rights litigation. The 1965 Voting Rights Act focused on access to the vote, outlawing literacy requirements,[98] ensuring safe access to the polls, and requiring federal oversight of particular local voting practices. According to Guinier, the Act resulted in a dramatic increase in black voter registration,[99] although other scholars have documented tremendous increases in black voter participation *prior* to the Act.[100] Nevertheless, as Thernstrom points out, until the Act was passed, access to the ballot remained dependent upon the efforts of the voting rights litigators in highly unsympathetic local courts. The Act, codifying lessons learned by these litigators, was widely viewed as radical.[101]

In response to increased minority voting, Southern states and localities revised their voting systems, most commonly from single-member districts to multi-member at-large schemes. Because minority votes were always outnumbered by white votes, the at-large, winner-take-all system rendered minority votes functionally meaningless. Blacks were ensured of losing elections. Therefore, the second generation focused on "vote dilu-

96. *Id.* at 98–99.

97. *Id.* at 100.

98. Thernstrom describes the fraudulent Southern literacy test: "In the 1960s southern registrars were observed testing black applicants on such matters as the number of bubbles in a soap bar, the news contained in a copy of the Peking Daily, the meaning of obscure passages in state constitutions, and the definition of terms such as habeas corpus. By contrast, even illiterate whites were being registered." THERNSTROM, WHOSE VOTES COUNT, *supra* note 22, at 15.

99. GUINIER, *The Tyranny of the Majority, supra* note 1, at 7.

100. Carmines & Huckfeldt, *Party Politics in the Wake of the Voting Rights Act, supra* note 42, at 125–28. "The revolution in black voting rights had already occurred in many parts of the South by the time the act was adopted." *Id.* at 125.

101. THERNSTROM, WHOSE VOTES COUNT, *supra* note 22, at 14–16.

tion."[102] The 1982 amendments to the Voting Rights Act were designed to address this concern, "openly shift[ing] from simply getting blacks the ability to register and vote to providing blacks a realistic opportunity to elect candidates of their choice."[103] The remedy for vote dilution has been to replace at-large systems with single-member district systems which include one or more majority-minority districts.

The third generation of voting rights litigation focuses on the decision-making authority of the minority elected officials. As remedies for vote dilution were enforced, minority officials began to take office. However, localities responded by changing legislative rules so that the new representatives had less decision-making authority. Guinier believes that a fair opportunity to elect minority representatives may fall short of a truly effective vote. "Under some unusual circumstances, it may be necessary to police the legislative voting rules whereby a majority consistently rigs the process to exclude a minority."[104] This generation of litigation depends on an expansive interpretation of the meaning of the right to vote — a right to influence. It looks at the fairness of legislative procedures. An opportunity "to participate in the political process"[105] is protected by the Voting Rights Act.

Critics of a broad reading of the Voting Rights Act claim that a broad interpretation would be unconstitutional.[106] Nevertheless, it is apparent that, at a minimum, Congress intended second generation results:

> [T]o the degree that there was ignorance of or doubt about the possibility of vote dilution at the time the Voting Rights Act was passed, there was ample evidence in the years following that southern states were adopting a host of strategies expressly to reduce the practical effects of black enfranchisement. Had Congress wished to overturn court interpretations of the act and mandate a narrow interpretation, it could have done so by passing clarifying language. Instead, in 1970 — after the Supreme Court decision in *Allen* — Congress extended the act. Five years later Congress again extended the act, expanding the number of groups covered. In 1982 Congress again extended the act. This time, in effect, it overruled a Supreme Court decision; rather than narrowing the impact

102. GUINIER, *The Tyranny of the Majority, supra* note 1, at 7.

103. *Id.*

104. *Id.* at 8.

105. 42 U.S.C. § 1973(b) (1988).

106. *See* Jeffers v. Clinton, 730 F. Supp. 196 (E.D. Ark. 1989) (Eisele, C.J., dissenting).

> of the act, it explicitly reversed the impact of *Mobile v. Bolden*, making it clear that the relevant statutory standard was an effects test and that electing representatives, as opposed to merely casting ballots, was a crucial component of the act. Thus, however one views Congress's initial intent, legislative approval of prior court decisions and a mandate for future actions can be found in the revised language of Section 2.[107]

The opportunity to cast a vote but perennially lose the election is not much of a right. Scholars argue that the protections of the amended Voting Rights Act are vital to a properly functioning democracy and do not merely benefit the protected class:

> [A] pluralistic Congress, perhaps more importantly, also nurtures a truer representative democracy. A Congress with members of all colors brings more American citizens into the political system, as it announces that government is for all Americans, increases the confidence of all American voters in the government, and thereby cultivates political participation of all Americans.[108]

Unfortunately, it appears that the Act's goals of achieving a representative democracy have been increasingly thwarted by judicial interpretation. Much of Guinier's work has anticipated this. In light of a conservative judiciary, to achieve political inclusion minorities must consider alternatives to litigation. These methods may reflect the civil rights movement predating 1965. Skepticism towards litigation is nothing new; as Thernstrom has observed, the Voting Rights Act of 1965 was shaped by lessons learned from federal attorneys litigating voting rights, who realized that "questions of disfranchisement should not, in fact be litigated at all."[109]

3. Weaknesses of the Litigation Approach

After thirty years of enforcing the Voting Rights Act, progress has moved two steps forward and one step back. Following the Reagan Revolution, attempts of minority groups to gain an effective vote have been greeted with significant setbacks. First, in spite of Congressional intent, the Court's views propounded in

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107. BERNARD GROFMAN ET AL., MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 130 (1992).

108. A. Leon Higginbotham, Jr. et al., Shaw v. Reno: *A Mirage of Good Intentions with Devastating Racial Consequences*, 62 FORDHAM L. REV. 1593, 1637–38 (1994).

109. THERNSTROM, WHOSE VOTES COUNT, *supra* note 22, at 16.

Shaw v. Reno,[110] *Holder v. Hall*,[111] and *Presley v. Etowah County*[112] have limited litigation as an empowerment tool. The Court rejected the third generation view in *Presley*.[113] Second, *Keeping the Faith* envisioned an Administration that was responsive to minority interests. Since the initial publication of the article, the debacle surrounding Guinier's own failed nomination has proven that her hopes were too high.

Third, even if a third-generation approach to voting rights litigation were effective, it would not reach voter initiatives. In California, in response to the liberal orientation of the legislators in leadership positions under a black speaker, voters removed some authority from their legislature. "New populism,"[114] or "direct democracy," works through referendums and initiatives, which Bruce Cain points out "are essentially forms of at-large elections."[115] Voter initiatives such as California's Proposition 187 have had stark winner-take-all effects.[116] The new Congress is unlikely to draft amendments to the Voting Rights Act to support the third generation approach; it is even more unlikely to question majoritarian rule through direct democracy.

In her final essay, *Lines in the Sand*, Guinier alters the strategy she developed in her earlier essays. She acknowledges:

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110. 113 S. Ct. 2816 (1993).

111. 114 S. Ct. 2581 (1994) (No reasonable benchmark exists to challenge size of a governing body under a claim of vote dilution).

112. 502 U.S. 491 (1992).

113. Guinier's broad view of the right to vote was tested in *Presley*, 502 U.S. at 491. The appellants were the first black county commissioners in Etowah and Russell Counties, Alabama. When they took office, the commissions "alter[ed] the prior practice of allowing each commissioner full authority to determine how to spend the funds allocated to his own district," so that the new commissioners had no control over roadwork in their districts. *Id.* at 497. The Court held that the policy changes were not a change "with respect to voting" covered by § 5 of the Voting Rights Act. *Id.* at 503–08.

114. Bruce E. Cain, *Voting Rights and Democratic Theory: Toward a Color-Blind Society?*, *in* CONTROVERSIES IN MINORITY VOTING, *supra* note 34, at 261, 274.

115. *Id.*

116. Proposition 187 bans undocumented immigrants from attending California public schools, denies undocumented immigrants publicly assisted health care, and requires verifying the immigration status of arrestees. Following a bitter campaign, the proposition passed by a 59% margin. Hugo Martin, *California Elections; Immigration Was No. 1 Election Issue, Local Voters Say; Exit Poll: Half Those Questioned Said Prop. 187 Was the Leading Factor in Deciding Who To Vote For*, L.A. TIMES, Nov. 10, 1994, at A26. Eight federal and state lawsuits were filed against 187 by the ACLU, the Asian Pacific American Legal Center, MALDEF, the Los Angeles Unified School District, and others. Roberto Suro, *Two California Judges Block Anti-Immigrant Measure at the Start*, WASH. POST, Nov. 10, 1994, at A39.

> The judicial imprimatur gives moral forces to one side in a public controversy. But if the judiciary is controlled by political renegades, litigants get what they pay for. So if disciplined legal reasoning is not the coin of the realm, it is worth considering other currency.[117]

Guinier suggests but does not elaborate upon new approaches to litigation. First, if progressive lawyers identify conservative activists on the bench, they may expose and "delegitimize the moral force as well as the philosophical attractiveness of unfair or deeply politicized solutions."[118] Second, she argues, "[i]f politics have taken over the judiciary, then some may begin to push for . . . accountability,"[119] which may be obtained through elections and term limits. Third, in contrast to Fried's disciplined legal reasoning approach, she suggests a storytelling approach. "[S]torytelling empowers plaintiffs by giving them a voice in a restructured forum that emphasizes case-by-case conflict resolution by consensus, not fiat."[120] Finally, Guinier recognizes the ultimate limits of litigation. Thus, believing that of the three branches, the legislature best represents the people, she suggests "it may be time for progressives to articulate a competing vision with a clear political, rather than jurisprudential, dimension . . . legislative bodies offer a more public, more participatory forum within which to debate and shape collective values."[121]

In light of the prevalence of "color-blindness" and "new populism," it is difficult to envision progressive politics making significant gains. On the other hand, it may be that minority disillusionment following the recent election may result in a new, more powerful minority coalition. Guinier's essays reflect her enduring optimism. "Politics can become positive-sum in which everyone wins something,"[122] she asserts. Undeterred when her earlier approach in *Keeping the Faith* proved untenable, she continues to search for ways to achieve minority political inclusion.

II. VOTING RIGHTS LITIGATION AFTER *SHAW V. RENO*

When in 1992, North Carolinians elected Eva Clayton and Mel Watt, two African-Americans, to the House of Representa-

117. GUINIER, *Lines in the Sand, supra* note 67, at 185.
118. *Id.*
119. *Id.*
120. *Id.* at 185–86.
121. *Id.* at 186.
122. *Id.*

> tives of the United States Congress, many Americans — black and white — were ecstatic, believing they were experiencing a new dawn in American congressional racial politics. Not since 1901 had an African-American represented North Carolina in Congress.[123]

In 1991, to comply with the pre-clearance provision of the Voting Rights Act,[124] North Carolina redistricted, drawing two majority-black congressional districts for a total of twelve.[125] In 1993, in *Shaw v. Reno*, white plaintiffs succeeded in their equal protection challenge to the plan. The Supreme Court held that an election district which appeared "so bizarre on its face that it is unexplainable on grounds other than race," was subject to strict scrutiny.[126] The Court acknowledged a new claim; no decision from any court previously had held that a redistricting plan enacted to comply with the Voting Rights Act violated the U.S. Constitution due to its unusual geography.[127] Thus, despite the legislative intent of the Voting Rights Act to protect minorities from vote dilution, equal protection worked to disadvantage African-Americans. The Supreme Court has handed down several significant voting rights decisions since Lani Guinier's failed nomination,[128] but none have been as hotly debated as *Shaw*. A.

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123. Higginbotham, Jr. et al., *supra* note 108, at 1598–99.

124. As amended, a jurisdiction covered under § 5 of the Voting Rights Act cannot revise any "standard, practice or procedure with respect to voting" without federal determination that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973 (1988). The jurisdiction may seek a declaratory judgement from the U.S. District Court for the District of Columbia or seek pre-clearance of the changes by the Attorney General.

125. Approximately 53% of eligible voters in the two districts were African-American. *See Southern U.S. Congressional Districts by Party and Black Vote*, 103d Cong., 1st Sess (1993).

126. The first majority-black district was described in the *Wall Street Journal* as resembling a "bug splattered on a windshield." *Shaw*, 113 S. Ct. at 2820 (citing WALL ST. J., Feb. 4, 1992, at A14). The second district was "approximately 160 miles long and, for much of its length, no wider than the I-85 corridor. It winds in snake-like fashion through tobacco country, financial centers, and manufacturing areas 'until it gobbles in enough enclaves in black neighborhoods.' " *Id.* at 2820–21.

127. Richard H. Pildes & Richard G. Neimi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Apprearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 484 (1993).

128. Guinier discusses two 1993 term cases, Johnson v. De Grandy and Holder v. Hall, in Lani Guinier, *The Supreme Court, 1993 Term: [E]racing Democracy: The Voting Rights Cases,* 108 HARV. L. REV. 109 (1994) [hereinafter *The Supreme Court, 1993 Term*].

Leon Higginbotham noted, "Shaw has created a cottage industry for its critics."[129]

A. *The Supreme Court's Ideal: A Color-Blind Constitution*

An often-heard objection to voting rights enforcement is that representational advantages based upon race or ethnicity move society further away from the "cherished ideal of a color-blind society."[130] In *Shaw*, Justice O'Connor stated, "Racial 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 — a goal that the Fourteenth and Fifteenth Amendments embody."[131] The view that entitlements based upon race or ethnicity are "unAmerican" is believed to be most widely held among the white middle class.[132] However, later in 1993, Justice Thomas, concurring in *Holder v. Hall*,[133] said, "[t]he assumptions upon which our vote dilution decisions have been based should be repugnant to any nation that strives for the ideal of a color-blind Constitution."[134] Guinier has observed that Thomas believes "the conventional view of the Act as embodying the concept of group representation is not only a dangerous political choice; it is also an immoral choice, because it treats racial groups as if they were political interest groups."[135]

Distrust of visibly race-conscious measures is certainly not new, nor unique to voting rights. Four years earlier in *Richmond v. J.A. Croson Co.*,[136] Justice O'Connor, joined only in part by Rehnquist, White, and Kennedy, set the stage for *Shaw*. In *Croson*, the Court held that a program designed to award city construction contracts to minority businesses violated the Equal Protection Clause of the Fourteenth Amendment. "Classifications based on race carry a danger of stigmatic harm," declared O'Connor, and "the standard of review under the Equal Protec-

129. Higginbotham, Jr. et al., *supra* note 108, at 1604 n.52.
130. Cain, *supra* note 114, at 261.
131. *Shaw*, 113 S. Ct., at 2832.
132. *Id.*
133. 114 S. Ct. 2581 (1994).
134. *Id.* at 2598 (Thomas, J., concurring). Thomas argued against stare decisis, believing that previous interpretations of the Voting Rights Act were unworkable and should be overruled. Section 2 of the Voting Rights Act should not be construed to allow claims of vote dilution, only practices or procedures obstructing formal access to the ballot. *Id.*
135. Guinier, *The Supreme Court, 1993 Term*, *supra* note 128, at 122.
136. 488 U.S. 469 (1989).

tion Clause is not dependent on the race of those burdened or benefited by a particular classification."[137] Applying a standard of heightened scrutiny, O'Connor rejected, as too "amorphous," the antisubordination argument that past societal discrimination resulting in fewer minority contractors merited a set-aside remedy.[138]

Against a backdrop of thirty years of voting rights litigation, however, *Shaw* drew new standards. Unlike *Croson*, in which a city instituted a remedial program, in *Shaw* the Court faced a Congressional mandate to redress voting inequalities in the form of the Voting Rights Act.[139] There had never been any question that Congress had the power to pass the Voting Rights Act to benefit minorities. Furthermore, unlike *Croson* or *Regents of the University of California v. Bakke*,[140] it was difficult to argue that white individuals were being deprived of any entitlement[141] when they retained the right to vote. The Court was taking affirmative steps to disarm the Voting Rights Act. The popularity of the concept of color-blindness enabled the Court to be activist yet attempt to retain its legitimacy.

B. *The Process Perspective: Enabling Color-Blindness?*

Herbert Wechsler argued in a famous criticism of *Brown v. Board of Education*[142] that "courts must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved."[143] He sought a "neutral" principle by

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137. *Id.* at 493–94.

138. *Id.* at 499.

139. In *Croson*, O'Connor pointed out that "Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment." *Id.* at 491.

140. 438 U.S. 265 (1978). In *Bakke*, U.C. Davis Medical School's minority admissions program was challenged by a white applicant who believed he possessed qualifications equal or superior to those of the admitted minority applicants. The Court held the set-aside program unconstitutional. Unlike O'Connor, however, Justice Powell's opinion in *Bakke* reflects a "nuanced reading of race and society," and his recognition of the "need to find ways to include [minority applicants] while reaffirming the potential harm of classifications." Aleinikoff & Issacharoff, *supra* note 29, at 599.

141. Critics have pointed out that *Croson* is the first constitutional racial discrimination case in which the Court struck down an affirmative action plan which did not deprive a particular individual of a vested interest or expectation. *Id.*

142. 349 U.S. 294 (1955).

143. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959).

which to guide a decision which, in his view, necessarily favored the rights of one group over those of another.[144] Unfortunately, as Professor Barbara Flagg observes, white people tend to see "whiteness, and its associated characteristics and behaviors, as 'neutral.' "[145] Whiteness, the social norm, appears synonymous with "racelessness";[146] therefore, a decision-making process which benefits whites may have been formed under the mistaken belief that its elements are race-neutral. So-called neutral decision-making has counteracted the evolution of doctrines that would benefit nonwhites.[147] Professor Neil Gotanda believes that the idea of race neutrality is a legal fiction which legitimizes subordination.[148]

Both O'Connor's *Shaw* opinion and Thomas's *Holder* concurrence are cloaked in a guise of neutrality enabled by a process-oriented approach to constitutional law. According to Professor Flagg, this approach is grounded in two traditions:

> The first tradition is one of judicial restraint: it holds that the (unelected) judiciary ought to defer to legislative policy choices, absent special justification for judicial intervention. The second strand of the process perspective, a concern with institutionally appropriate decision making procedures, has its roots in the Legal Process school of the 1940s and 1950s. In constitutional law, this aspect of the process orientation directs one's analytic attention to the nature and proper functioning of judicial and legislative processes of decision making.[149]

This approach "has become so thoroughly embedded in the landscape of constitutional doctrine that analysts do not always pay sufficient attention to the influence it exerts on the development of specific doctrinal positions. It is 'just there,' providing the background for virtually all post-*Lochner* constitutional analysis."[150]

Flagg argues that a "process perspective" is "transparently white,"[151] rather than color-blind. She looks for unconscious racism as it manifests itself in approaches to constitutional law to

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144. *Id.* at 34.

145. Barbara J. Flagg, *Enduring Principle: On Race, Process, and Constitutional Law*, 82 CAL. L. REV. 935, 937 (1994).

146. *Id.* at 969.

147. *Id.* at 937, 964–66.

148. Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 23 (1991).

149. Flagg, *supra* note 145, at 936.

150. *Id.* at 936–37.

151. *Id.* at 937-38, 973–76.

assign responsibility for the harm in the theories themselves.[152] In a structural concept of racism, a theory must be shown to systematically advantage whites.[153] A "transparently white" theory is formulated predominantly by whites, operates to advantage whites, and is a form of unconscious racism.[154]

Where the rights of majority-white versus minority racial and ethnic groups are at stake, a "color-blind" decision is believed to be superior to a race-conscious decision.[155] However, the process underlying the decision, although perceived to be race-neutral, may actually be imbued with whiteness or characteristics associated with whiteness.[156] In other words, whether looking at process or the substantive outcome, it is impossible to ignore race. Gotanda calls the technique of "noticing but not considering race" — which is self-contradictory — "nonrecognition."[157]

> Nonrecognition is a technique, not a principle of traditional substantive common law or constitutional interpretation. It addresses the question of race, not by examining the social realities or legal categories of race, but by setting forth an analytical methodology. This technical approach permits a court to describe, to accommodate, and then to ignore issues of subordination. This deflection from the substantive to the

152. Flagg's critique is not intended to find the (predominantly white) theorists personally responsible. *Id.* at 974.

153. *Id.* at 973.

154. *Id.* at 973–74.

155. Gotanda, *supra* note 148, at 17. "Wechsler's discussion of *Brown* implies that a decision resting on an explicit colorblindness rationale would satisfy his 'neutral principles' standard for evaluating judicial decision-making, but that one relying on an antisubordination rationale would not." Flagg, *supra* note 145, at 961. Palmer v. Thompson, 403 U.S. 217 (1971), provides a striking example of a "color-blind" decision. Black residents of Jackson, Mississippi sued to enjoin the city to reopen swimming pools it had closed after a desegregation order. The Supreme Court affirmed the ruling that the city did not violate the Equal Protection Clause. The Fourteenth Amendment did not impose an affirmative duty on a State to operate the pools; furthermore, no one, black or white, was able to use the pools. "It is not a case where a city is maintaining different sets of facilities for blacks and whites and forcing the races to remain separate." *Id.* at 220. Under the theory that the equal protection clause covered only affirmative state action, and furthermore, that state action created discrimination, the Court reached a "color-blind" decision, purportedly favoring neither race. *Id.* at 225–27. In fact, however, whites continued to have access to private pools, while blacks did not. *Id.* at 252 (White, J., dissenting). See also Paul M. Barrett, *Stuck in Reverse: Minority Contractors Find Gains Are Eroded By Courtroom Attacks*, WALL ST. J., Dec. 7, 1994, at A1, A12 (describing the situation of minority contractors after the Court struck down the race-based local program in *Croson*).

156. *See* Flagg, *supra* note 145, at 973–76.

157. Gotanda, *supra* note 148, at 16.

> methodological is significant. Because the technique appears purely procedural, its normative, substantive impact is hidden. Color-blind application of the technique is important because it suggests a seemingly neutral and objective method of decision-making that avoids any consideration of race.[158]

C. *Flaws in the Process in* Shaw v. Reno

The Supreme Court's preference for "color-blind" process backfired in *Shaw*. Ultimately, the rationale behind why a district should be shaped any particular way becomes no less amorphous — probably more so — than a rationale based upon antisubordination doctrine. Congress explicitly designed the Voting Rights Act to combat race-based inequalities, but O'Connor's opinion is based upon an element that has nothing to do with race — geography. Geography belies its intended appearance of a legitimate, "neutral" benchmark for two reasons. First, O'Connor's opinion does not provide guidance for subsequent litigation.[159] She does not clarify whether all race-conscious redistricting will be subject to strict scrutiny, or only bizarre-shaped race-conscious districts. She states:

> It is unnecessary for us to decide whether or how a reapportionment plan that, on its face, can be explained in nonracial terms successfully could be challenged. Thus, we express no view as to whether "the intentional creation of majority-minority districts, without more" always gives rise to an equal protection claim.[160]

Second, her process approach in this case ignores the tradition of judicial restraint.[161] Thus, the decision itself loses legitimacy.

Numerous commentators have struggled to interpret *Shaw* and the concept of equal protection it embodies. Pildes and Niemi discover a new equal protection challenge to legislative redistricting, which they term a "district appearance claim,"

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158. *Id.* at 17 (citations omitted).

159. "In the absence of any real content to the Court's repeated invocation of the 'traditional principles of districting,' we are left with the gnawing impression that the rules of the game were changed only when minorities started to figure out how to play." Aleinikoff & Issacharoff, *supra* note 29, at 638.

160. 113 S.Ct. at 35–36.

161. In a 1993 interview, Lani Guinier expressed surprise at the Court's approach in *Shaw*, wherein it ignored an opportunity "to follow its precedent in interpreting [the Voting Rights Act], . . . despite its claim to the mantle of judicial conservatism." Richard C. Reuben, *Voting Rights in Court: Challenges to Race-Based Districts Could Shatter Minority Electoral Gains,* DAILY J., Nov. 1993. Joaquin Avila replied, "Activism, whether it's conservative or liberal, is still activism." *Id.*

grounded in a new constitutional requirement that districting accommodate both geography and interest.[162] The decision appears race-neutral only if one ignores the difficulties in requiring a geographically compact election district.[163] Pildes and Niemi offer the theory that an impulsive distrust of bizarre shapes, perhaps reflecting "untutored, unwarranted intuition," accounts for *Shaw*. Rather than being unwarranted intuition, such distrust more likely reflects a "whiteness" perspective. *Shaw* fits "transparently white" criteria. Recognizing that the districts were drawn as remedial measures for racial exclusion, the Court then practices "nonrecognition," a decision that ultimately benefits whites on an apparently race-neutral basis.

Shaw may represent a distrust of the policy-making process by which the majority-minority districts were created — a belief that the decision-making process itself was unconstitutional. Pildes and Niemi describe three models by which the Court finds constitutional flaws in governmental decision-making processes. In the first model, the flaw is that the policy has an unconstitutional purpose or contains an impermissible factor. A successful challenge under this model requires a finding of motive or purpose. In the second, the governmental policy contains legitimate factors, but grants either too little weight to constitutional rights or too much weight to insufficient justifications for the regulation. The court then applies a balancing test. In the third, the policy-making process appears corrupted; the policy-makers have reduced a process that should reflect multiple values to a one-dimensional problem, in which one value subordinates all others. This model Pildes and Niemi term "value reductionism."[164]

Value reductionism concerns the constitutional legitimacy of the decision-making process itself. In *Shaw*, race consciousness becomes the value that subordinates all other values in the redistricting process. In addition to the concerns of the Voting Rights Acts, redistricting should continue to serve a traditional set of values: "to ensure effective representation for communities of interest, to reflect the political boundaries of existing jurisdictions,

162. Pildes & Niemi, *supra* note 127, at 484.

163. Geographic compactness analysis itself is a process-based theory, focusing not on the substantive outcome of legislative process but looking only at the process through which representatives are elected. It "dovetails with the current preeminence of process theory." 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, 178 (1989).

164. Pildes & Niemi, *supra* note 127, at 499.

and to provide a district whose geography facilitates efficient campaigning and tolerably close connections between officeholders and citizens."[165] Traditionally, geographic compactness is believed to further these values. Geographically-based political autonomy is at the heart of federalism, which ensures local self-rule within a larger nation-state.[166] "Geographic legislative districting assures residents of that region of majoritarian empowerment within their own defined yet delimited piece of the legislative world."[167]

The tension arises because geographic compactness may preserve traditional values for some citizens, but it is not a proxy by which everyone's values may be ensured:

> In fact, the very housing patterns that define the shape of the challenged districts emerged as a product of North Carolina's history. To avoid white disapprobation and violence even when not state imposed, African-Americans in North Carolina conducted their lives and settled in communities where it was thought they would minimize physical hostility by whites and maximize the few economic options permitted by racially discriminatory hiring practices. Accordingly, the dispersal of blacks throughout North Carolina demands a district shape different from that which would protect the interests of white voters. Otherwise, black voters will once again be penalized by North Carolina law and culture, which forced them to live in distinct communities.[168]

The boundaries of ethnic groups reflect not only landscape, but also, if not primarily, historical tensions between one group and another. Because one may argue that naturally shaped districts do not exist, the Court's actual concern in *Shaw* may be that the redistricting diverges from well-established "baseline expectations."[169] As Pildes and Niemi observe, "the concern for public perceptions ultimately seems central to constitutional doctrines that resist value-reductionist public policy."[170] The bizarre shape of district twelve comprised the values of political integrity and legitimacy.[171] However irrational the perception that race consciousness was corrupting politics and the Voting Rights Act

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165. *Id.* at 500.

166. James F. Blumstein, *Federalism and Civil Rights: Complementary and Competing Paradigms*, 47 VAND. L. REV. 1251, 1260 (1994).

167. *Id.* at 1265.

168. Higginbotham, Jr. et al. *supra* note 108, at 1606.

169. Pildes & Niemi, *supra* note 127, at 502.

170. *Id.* at 500.

171. *Id.* at 502.

being used to manipulate political institutions,[172] it was accepted as the norm. *Shaw* reflects a backlash resulting from "social perceptions that government has been captured by extremism in the name of race."[173]

O'Connor's language suggests that she was informed by prevailing social perceptions. She echoes the techniques by which the media attacked Guinier. The media effectively used sound bites — Guinier was the "Quota Queen;" she advocated a "racial spoils system." O'Connor refers to "political apartheid," which Judge Higginbotham argues "adds no insight but rather obscures the issues."[174] He compares the North Carolina redistricting plan to apartheid in South Africa.[175] O'Connor abuses the term political apartheid; the redistricting plan strives to include African-Americans in the political process, whereas the South African plan was a vehicle to preserve white supremacy via racial exclusion.[176] Moreover, O'Connor's suggestion that the districting remedies group together people who "may have little in common with one another but the color of their skin"[177] may have a certain ring to it, but "is insupportable in light of this country's racial history, and the past and current socio-economic conditions afflicting large segments of the African-American population, all of which uniquely inform African-American politics. Blackness is culturally and politically relevant. To suggest otherwise is not only naive, but demeaning."[178] O'Connor sacrifices the underpinnings of racial discrimination law for politically expedient sound bites.

Shaw may have been an honest effort to seize a middle ground between color-blindness and the preferential use of race,

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172. *Id.* at 516.

173. *Id.* at 518.

174. Higginbotham, Jr. et al., *supra* note 108, at 1621.

175. *Id.*

176. "The essence of South African apartheid has been the *exclusion* of vast numbers of the population — more than 85% — from having the right to vote for *any* representation in Parliament and the National Government. . . . In sharp contrast, the minority-majority districts in the United States foster *inclusion* into political life; these districts do not exclude any segment of the population. Instead, race-consciousness is used as a means of enhancing the possibility that African-Americans, who constitute a significant percentage of the population, may have responsive representation." *Id.* at 1623–24. The term "political apartheid" has "never [been] used by the Court to describe slavery, Jim Crow, poll taxes, literacy tests of white primaries." Jamin B. Raskin, *Supreme Court's Double Standard*, THE NATION, Feb. 6, 1995, at 167.

177. *Shaw*, 113 S. Ct. at 2827.

178. Higginbotham, Jr. et al., *supra* note 108, at 1625.

more similar to Powell's nuanced *Bakke* opinion that a *Croson*-like rejection of race-conscious measures.[179] Just as an admissions program may survive *Bakke* analysis if race consciousness is diluted by the presence of other admissions criteria, race-conscious redistricting may survive strict scrutiny if it does not appear too bizarrely shaped. Aleinikoff and Issacharoff believe that "the harsh tone of *Shaw* will be muted in subsequent districting cases," and that *Shaw* fits within the Court's movements toward a "jurisprudence of compromise."[180]

III. RACE CONSCIOUSNESS AFTER *SHAW*

Guinier's life's work challenges two assumptions which the voting public too quickly embraces: first, that a democratic system is winner-take-all and a winner-take-all system is democratic, and second, that the right to vote extends no further than the right to cast a ballot, or even to choose a representative of one's own choice.

Several premises must be in place for the first assumption to be true: (1) the majority is not monolithic, (2) the rules which determine who wins in a winner-take-all system are fair, and (3) options with the greatest popular support have the greatest legitimacy. Guinier argues that these conditions have not been fulfilled and seeks alternatives to a winner-take-all system.

Guinier opens *The Tyranny of the Majority* with a personal illustration. As a Brownie, she entered a hat-making contest only to discover that the winning entry was made by a contestant's milliner mother. She could not change the rules of the contest, so she resigned. Years later, Guinier is inspired by her son Nikolas' solution to a situation where most children want to play tag, but some want to play hide-and-seek: why not take turns? "To use Nikolas's terminology, 'it is no fair' . . . if a fixed, tyrannical majority monopolizes all the power all the time."[181] Winner-take-all majority rule is a zero-sum solution, while taking turns results in a positive-sum solution, more in line with Madisonian principles.[182] Guinier believes in cooperative democracy; her ideal "promises a fair discussion among self-defined equals about

179. Pildes & Niemi, *supra* note 127, at 502–04; *see also* Aleinikoff & Issacharoff, *supra* note 29, at 643–47.

180. Aleinikoff & Issacharoff, *supra* note 29, at 644.

181. GUINIER, *The Tyranny of the Majority, supra* note 1, at 6.

182. *Id.* at 2–3.

how to achieve our common aspirations."[183] She strives for solutions that "allow all voters to feel that they participate meaningfully in the decision-making process. This is a positive-sum solution that makes legislative outcomes more legitimate."[184]

A. *Madisonian Concerns: Monolithic Majorities*

> The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.[185]

Far from the "fringe," Guinier's ideas sprang from the traditions of James Madison. Madison feared a monolithic majority. He warned that majority tyranny remained as much a danger in constitutional democracy as in a monarchy.[186] He recognized that citizens in a heterogeneous society would form self-interested factions.[187] A majority faction, even if self-interested, could rule fairly if it followed what Guinier calls the "Golden Rule principle of reciprocity."[188] In a system of shifting majorities, "[y]ou cooperate when you lose in part because members of the current majority will cooperate when they lose."[189] If the majority does not cooperate with the minority, it may lose its power. Reciprocity, however, does not take place where there is a permanent majority. In that situation, the majority has the unfettered ability to oppress. Madison believed that a small, local majority was likely to exhibit the most dangerous tyranny. According to one scholar, Madison "was pessimistic about the possibility of removing the causes of the faction"[190] and believed the remedy was enlarging the political community beyond local gov-

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183. *Id.* at 6.

184. *Id.* at 7.

185. THE FEDERALIST, *supra* note 72.

186. "It is of great importance in a republic, not only to guard the society against the oppression of its rulers; but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure. There are but two methods of providing against this evil; the one, by creating a will in the community independent of the majority, that is, of the society itself; the other, by comprehending in the society so many separate descriptions of citizens, as will render an unjust combination of a majority of the whole very improbable, if not impracticable." THE FEDERALIST No. LI, at 238, 241 (James Madison) (Hallowell ed., 1842).

187. *Id.* at 241–42.

188. GUINIER, *The Tyranny of the Majority*, *supra* note 1, at 4.

189. *Id.*

190. Blumstein, *supra* note 166, at 1257 n.23.

ernance. He "saw the nation-state as an antidote, a safeguard to the risks of majoritarian tyranny in local decision-making units."[191]

The nation-state has moved to guard against majoritarian tyranny, but with each step forward, the majority has erected new barriers to the minority's right to an effective vote. The Fifteenth Amendment guaranteed minority citizens the right to vote,[192] but the Southern majority responded with oppressive registration procedures and outright threats. The 1965 Voting Rights Act fought these impediments. The South responded by changing its election methods to strip African-Americans' votes of power and effect. At-large elections watered down the impact of minority votes, ensuring that a majority of "[a]s little as 51 percent of the population could decide 100 percent of the elections."[193] In response, Congress passed the 1982 amendments, focused on eliminating "vote dilution." Now, majority tyranny surfaces through legislative decision-making rules and "direct democracy."

B. *Fair Plays*

According to Guinier, the way to "disaggregate the majority to ensure checks and balances or fluid, rotating interests"[194] is by assuring that the procedural rules by which the majority governs are fair. She regards outcomes as evidence of equal opportunity, but she is not striving to advance a particular agenda beyond equal opportunity itself, nor does she recommend quotas:[195] "To me, fair play means that the rules encourage everyone to play. They should reward those who win, but they must be acceptable to those who lose."[196] Guinier's solutions are grounded in an understanding that an appearance of legitimacy must underlie any workable solution. Although she would never agree that society is color-blind, interest representation ironically does not conflict with principles which are color-blind and process-oriented.

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191. *Id.*

192. The Fifteenth Amendment states:

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by an State on account of race, color, or previous condition of servitude. The Congress shall have power to enforce this article by appropriate legislation. U.S. CONST. amend. XV.

193. GUINIER, *The Tyranny of the Majority, supra* note 1, at 7.

194. *Id.* at 4.

195. *Id.* at 14.

196. *Id.* at 1.

C. *Popularity and Legitimacy*

Scholars have noted that if voting rights remain at the level of individual rights, "there is little that distinguishes a democratic electoral system from a system that engages in show elections for predetermined outcomes, such as the former Soviet Union."[197] Voting rights have shifted from individual to group-based interests. However, *Gingles* and *Shaw* resulted in a severely narrow remedial framework. While legislatures and litigators attempt to remedy race-based exclusion, the geographic remedies cannot look race-based. Furthermore, in establishing the requirement of geographic compactness, "the Court never suggested that dispersed minorities do not suffer from dilution. The Court argued to the contrary, that when minorities are dispersed, the dilution appears to be beyond correction."[198]

Guinier analyzes the problems of geographic representation in *Groups, Representation, and Race Conscious Districting*:

> Districting breeds gerrymandering as a means of allocating group benefits; the operative principle is deciding whose votes get wasted. Whether it is racially or politically motivated, gerrymandering is the inevitable by-product of an electoral system that aggregates people by virtue of assumptions about their group characteristics and then inflates the winning group's power by allowing it to represent all voters in a regional unit.[199]

Thus, districting requires deciding whose interests will be represented.

If that is true, then ideas with the greatest popular support do not have the greatest legitimacy. If the district lines were drawn differently, other ideas might emerge as the most popular. Districting might function if people whose votes were wasted were "virtually represented." Virtual representation posits that the interests of a voter who did not vote for the winning candidate are represented, by either the winner or a representative of similar interests from another district.[200] Guinier argues that virtual representation is illusory. She does not believe "one's interests can be effectively represented by someone whom the voter, when given the choice, rationally determined did not reflect her

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197. Aleinikoff & Issacharoff, *supra* note 29, at 600.

198. 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, 496 (1989).

199. GUINIER, *Groups, Representation, and Race Conscious Districting*, *supra* note 22, at 121–22.

200. *Id.* at 130.

interests."[201] She criticizes race-conscious districting. Safe districts do not encourage minority political participation; these microcosms have the same majoritarian rule problems as elsewhere. In a safe majority-minority district, there may be perennial losers. For instance, a district drawn to allow a fifty-five percent Latino population to elect a representative of its choice may effectively shut out the interests of forty-five percent of its population, who are Asian, black, and white.[202]

Guinier proposes an alternative solution in which interests and associations can be fluid. The alternative is a semi-proportional system of representation:

> Under a modified at-large system, each voter is given the same number of votes as open seats, and the voter may plump or cumulate her votes to reflect the intensity of her preferences. Depending on the exclusion threshold, politically cohesive minority groups are assured representation if they vote strategically. Similarly, all voters have the potential to form voluntary constituencies based on their own assessment of their interests. As a consequence, semiproportional systems such as cumulative voting give more voters, not just racial minorities, the opportunity to vote for a winning candidate.[203]

In such a system, "one person, one vote" means "one vote, one value,"[204] rather than merely the right to cast one formal vote. It allows minorities who are not geographically concentrated to have a voice, and allows minorities who might not be populous enough to elect a representative of their color to exert greater influence over who is elected. Cumulative voting encourages cross-racial alliances. Wasted votes are minimized; therefore, such a system is likely to foster increased voter turnout.

Critics of semi-proportional representation systems argue that such systems are less stable than majoritarian rule because there are more frequent changes in government. Also, in such systems, extremist parties make waves.[205] Finally, critics "point to the experiences of the Fourth Republic of France, in which the fragmentation of the legislature induced by proportional rules caused perpetual stalemate. Crisis was necessary to shock the system into compromise."[206]

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201. *Id.* at 133.
202. *Id.* at 142–44.
203. *Id.* at 149.
204. *Id.* at 150–54.
205. Cain, *supra* note 114, at 264.
206. *Id.*

Semi-proportional systems have met with success, both in corporate governance and as a section 2 or section 5 remedy. In 1983, Latino and black voters in the City of Alamogordo, New Mexico, objected to an electoral system which had been adopted pursuant to referendum.[207] The District Court approved a remedial cumulative voting system. For the first time since 1968, a person of Latina or Latino origin was elected to the city council. Her election was due "primarily to 'plumping' by Hispanic voters."[208] Voter turnout was "heavier than normal."[209] Since 1988, small communities in Alabama have reported success with cumulative or limited voting plans.[210]

Guinier has suggested super-majority votes as another way to disaggregate the majority and encourage coalition-building. A supermajority allows for shifting interests, because it is also a race-neutral method. The primary effect of this method is that it requires a majority greater than fifty-one percent to win; however, it retains a winner-take-all aspect.[211]

Thernstrom has criticized Guinier for proposals which "make existing affirmative action programs look tame."[212] Guinier's solutions to disfranchisement are based upon interest representation, an idea wherein electoral success requires political cohesion. While Guinier seeks to remedy racial exclusion, because her proposals do not resemble entitlements based upon race, they have greater appearance of legitimacy, and may one day be more widely accepted than the districting solution.

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207. Vega v. City of Alamogordo, Civ. No. 86-0051-C (D.N.M. Feb. 10, 1986).

208. Engstrom et al., *supra* note 198, at 489. In cumulative voting, when a voter has a set number of votes to use in any combination she wishes — for example, if an individual has five votes, she can vote once for each of five candidates, or use all five votes for one candidate she especially supports — a group of voters may choose to "plump" all their votes to ensure the election of a preferred candidate. *See* Guinier, *The Tyranny of the Majority, supra* note 1, at 14–16.

209. Engstrom et al., *supra* note 198, at 483.

210. Peter Applebome, *The Guinier Battle; Where Ideas That Hurt Guinier Thrive*, N.Y. TIMES, June 5, 1993, at 9. In an early 1980's lawsuit, minorities sought improved political participation in nearly 200 Alabamian jurisdictions. Some of those, which were either too small or in which minorities were too dispersed to create single-district remedies, adopted cumulative or limited voting plans. (In limited voting, voters cast fewer votes than the number of slots available. Limited voting has a proportional effect similar to cumulative voting.) Applebome reports general satisfaction with the plans, but reports that some black officials believe that cumulative voting causes minorities to endorse only one candidate when they would benefit from several. *Id.*

211. GUINIER, *The Tyranny of the Majority, supra* note 1, at 16.

212. Thernstrom, *Guinier Miss: Clinton's Civil Rights Blooper, supra* note 23, at 16.

Although Guinier wants all voters to feel they have a meaningful vote, the fact is that it is the minority voters who need solutions. Guinier's work continues a struggle spanning three generations of litigation, in which gaining new plateaus meant new obstacles. She emphasizes that her work continues this tradition.

Guinier limits her "wholly exploratory suggestions . . . to extreme cases of racial discrimination at the local level."[213] However, since *Shaw* there has been interest in avoiding divisive litigation by implementing alternative voting practices. While we wait and see how broadly *Shaw* will reach, the case "not only vindicates many of the concerns that Guinier expressed, but . . . may propel many electoral jurisdictions to follow her encouragement of nondistricted voting-rights remedies as a way of avoiding redistricting battles."[214]

CONCLUSION

In an environment hostile to race-consciousness, Lani Guinier was and continues to be unapologetic about one belief: "Race still matters."[215] Although this belief places her opposite Justice O'Connor, she shares O'Connor's concerns for political integrity and legitimacy. Guinier's quest for legitimacy is driven by her larger goal of encouraging participation in the political process. "Political stability depends on the perception that the system is fair to induce losers to continue to work within the system rather than to try to overthrow it."[216]

If the rules are unfair, people will not play the game. Who has not heard a friend say that she does not bother to vote because her vote is meaningless? In a recent article in the *Los Angeles Times Magazine*, the author states, "[w]e divide between the vast majority of us who — out of futility, confusion or indifference — are so disengaged from democracy we never vote at all, and those of us who vote not to thoughtfully resolve complicated issues but to express our rage."[217] Clearly, civic participation is not an issue solely for disfranchised minorities.

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213. GUINIER, *No Two Seats, supra* note 20, at 109.

214. Aleinikoff & Issacharoff, *supra* note 29, at 628.

215. Guinier, *Don't Scapegoat the Gerrymander, supra* note 18, at 36.

216. GUINIER, *The Tyranny of the Majority, supra* note 1, at 9.

217. Steve Erickson, *The Battle for Washington; American Weimar,* L.A. TIMES, Jan. 8, 1995, (Magazine), at 20.

Guinier has suggested alternatives for extreme situations, which would ordinarily call for judicial intervention. Other scholars believe semi-proportionate voting systems such as cumulative voting should be implemented on a much wider scale."[218] Paradoxically, to do so, the majority must already be disaggregated to the extent that it will accept an alternative system as legitimate. A monolithic majority will resist changes if current voting practices have served it well.[219] America must learn that a democracy does not need to be winner-take-all and that an election system which encourages minority participation and consensus solutions is more fundamentally fair. In view of the trend towards "color-blindness," teaching these lessons is a heavy task. Guinier's contributions to the quest for voting equality may ultimately reflect her role as an educator, not a litigator. Her work begins "to lower the decibel level but increase the information level on public discussion that surrounds race."[220]

218. One goal of semi-proportional interest representation is to encourage cross-racial coalition building. Litigation, which produces a winner and a loser, increases divisiveness when divisiveness is a problem to be solved. In the future, civil rights advocates may return to alternative methods of dispute resolution.

219. At present, the Justice Department is suing California, Illinois, and Pennsylvania, which have resisted the "motor voter" law. The law allows citizens to register to vote at state motor vehicle departments and other agencies. Its implementation will increase the number of minority and poor voters, who are likely to vote Democratic. California Governor Pete Wilson has blocked the law, claiming that it is unconstitutional and costly. *Governor's Transparent Motor Voter Maneuvers*, S.F. CHRON., Dec. 22, 1994, at A26. Deval Patrick, assistant attorney general for civil rights, responds, "[w]e have not in this country traditionally put a price tag on civil rights." Ronald J. Ostrow, *U.S. Sues California Over "Motor Voter" Law*, L.A. TIMES, Jan. 24, 1995, at 3.

220. GUINIER, *The Tyranny of the Majority*, *supra* note 1, at 20.