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### **Author**

Brown, George H.

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# ARTICLES

## THE MYTHS AND PROMISE OF AMERICAN DEMOCRACY

George H. Brown

### INTRODUCTION: LEGITIMACY, LEGITIMATION, AND THE POLITICAL PROCESS

Any system of government must seek and attain legitimacy if it is to survive over time.<sup>1</sup> In this context, legitimacy means the willful granting of political authority to others to act on behalf of the people.<sup>2</sup> Attaining legitimacy would seem to be the most effective method of maintaining a stable government since people are unlikely to revolt against a regime whom they approved.

Political systems historically have used a wide variety of methods to obtain legitimate authority from their constituents. For example, some feudal societies were based on the concept of the divine king or the philosopher king.<sup>3</sup> Whereas in modern times popular elections have become the predominant criterion of legitimacy.<sup>4</sup> Indeed the existence of an electoral system combined with constitutional restraints on political authority is often thought to be the strongest evidence of a morally legitimate system of government.<sup>5</sup>

While the above constructs appear to be quite rational, it would be naive to assume that a particular political system is morally legitimate merely because it holds elections and purports to operate under constitutional constraints. Instead one must carefully analyze the underlying institutional structures and belief systems to determine whether a particular system is indeed legitimate. Here again we must contextually define the concept of legitimacy. If, after careful analysis, a conclusion can be reached that the political system is a true and fair manifestation of the will of all of its constituents then that system can be considered legitimate.

On the other hand, if the analysis finds that the people are operating under false belief systems, or that the institutional structures for manifesting the people's will are unfair, then a conclusion must be reached that the political system is not legitimate. If such a conclusion is reached then informed individuals have a moral responsibility to expose the false belief systems and

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1. This point is fundamental, and deeply rooted in human societies. Indeed, as one commentator put it, "it is hard to discover any historical government that did not enjoy widespread authentic recognition or try to win such recognition." Sternberger, *Legitimacy*, 9 INT'L ENCYC. OF SOC. SCI. 244 (1968); see also, G. Kateb, *The Moral Distinctiveness Of Representative Democracy*, 91 ETHICS 356 (1981).

2. *Id.*

3. *Id.*; see also, T. LAVINE, *FROM SOCRATES TO SARTE: THE PHILOSOPHICAL QUEST* (1984).

4. *Id.*, at 246. Almost every nation professes to have such elections regardless of its system of government.

5. See, Kateb, *supra* note 1, at 361.

work for change towards governmental structures that will be a more fair representation of the will of the people. In a society as large and complex as the United States, the task of analyzing, criticizing and moving our political system forward is an unceasing challenge.

Fortunately America has never suffered from a lack of individuals willing to face this challenge. As social commentators throughout our history have exposed myths and false belief systems, they have pushed our society to change in ways that benefit all of us. This process of critique and change can be thought of as delegitimation and legitimation. The critiques delegitimize existing beliefs and structures that result in societal injustice. After delegitimation our political system is forced to adopt new beliefs and/or institutional structures to regain its legitimate authority. This step in the process can be thought of as legitimation.<sup>6</sup> As the legitimation process occurs the critics must continue to analyze the new beliefs and structures that arise.

A commonly cited example of this process is the entire period of social change that was ushered in beginning with *Brown v. Board of Education*.<sup>7</sup> A combination of social critics, protesters, and litigants worked to delegitimize the concepts of "separate but equal," state-sponsored discrimination, and widespread open oppression of Blacks.<sup>8</sup> This successful delegitimation resulted in an inconsistency in America's image as the "leader of the free world," and ultimately led to significant changes in civil rights laws.<sup>9</sup> The resulting changes made formal segregation, discrimination and oppression illegitimate. In other words, our political system's attempt to maintain its legitimacy has resulted in laws that make it illegal to discriminate, as well as social norms that make open racial discrimination unacceptable conduct.<sup>10</sup>

The final dynamic of legitimation that must be understood is that it is often used to maintain existing forces of oppression instead of moving our society towards fairness and justice. In the case of Black participation in American society, the changes discussed above have helped to maintain the hegemonic relationship of whites over Blacks.<sup>11</sup>

Many critical commentators believe that the sole purpose of legitimation in America has been to maintain the dominant position of the ruling class over racial minorities and other working class individuals.<sup>12</sup> For example the concepts of formal equality and equal opportunity now serve as limiting principles in the attempt of Blacks to achieve parity in American society.<sup>13</sup> This unfortunate aspect of legitimation has led many critics to suggest that civil rights

6. This process, of course, does not occur in a vacuum. The social critique is merely the catalyst in the complex delegitimation process. Change does not ultimately occur until people are informed on a widespread basis and are moved to act upon the structures to cause change.

7. 347 U.S. 483 (1954).

8. See, e.g., M. MARABLE, *RACE, REFORM, AND REBELLION: THE SECOND RECONSTRUCTION IN BLACK AMERICA, 1945-1982* (1984).

9. See generally, D. BELL, *RACE, RACISM AND AMERICAN LAW* (2d ed. 1980).

10. Crenshaw, *Race, Reform and Retrenchment*, 101 HARV. L. REV. 1331 (1988).

11. See *id.*

12. See e.g., Burns, *Law and Race in America*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 89 (D. Kairys ed. 1982), and Freeman, *Anti-discrimination Law: A Critical Review*, in *id.*

13. See Crenshaw, *supra* note 10. Essentially, formal equality has had the result of declaring Blacks instantaneously equal while ignoring the historical reality that Blacks have been made unequal by economic, political, and cultural repression. Having been declared equal, Blacks can no longer demand compensation for the historical inequality without being accused by whites of seeking special treatment.

constituents should abandon traditional approaches to seeking legal/institutional reforms, although they disagree on alternative approaches.<sup>14</sup>

This paper analyzes several traditional elements of American electoral systems in the context of these ideas of legitimacy. The next section reviews three commonly accepted principles of American democracy to ascertain whether these principles facilitate the fair representation of the will of its constituents. The analysis also reviews the underlying beliefs that support the principles to see if they are valid. The section concludes that these traditional principles appear to be unfair and based upon erroneous beliefs. Therefore changes are required for our electoral system to remain legitimate.

The subsequent section then presents recent phenomena of Black electoral successes and examines whether these phenomena represent the type of legitimation that will move our society towards fairness and justice or whether the phenomena are merely the type of legitimation that perpetuates racial domination and oppression.

While criticisms of our electoral processes have been debated by scholars since this country's inception, and current levels of apathy and non-participation in the political process by the masses of Americans demonstrate widespread skepticism on the part of the people, Americans have not acted vigorously to change our current political structures.

Much of this lack of action on the part of the people is inexplicable in light of the extreme stakes on the table on election day. [Witness for example, the fact that Ronald Reagan has had the opportunity to name three of nine Supreme Court Justices during his term of office.] Perhaps the best explanation is that our society, through the use of legitimizing myths about democracy, has lulled the electorate to sleep. These same legitimizing myths may have convinced the majority of people that either the system works generally in their favor, or that they are relatively powerless to bring about change in any meaningful manner. If the latter is true than it suggests that our electoral process is of questionable legitimacy, by its very definition.

Another possible explanation for the widespread unwillingness to make political changes is that the dominant group does believe that the system works to their favor and has been convinced by a further series of legitimizing myths that the racial problem has been solved in America. This explanation is particularly true in the area of electoral systems, where the dominant group can point to the Voting Rights Act as symbolic of Black progress in gaining the franchise. Thus when Black people are clamoring for additional changes to an electoral system that works to our disfavor, the dominant group raises a questioning eyebrow—citing the myths as support.

Black Americans and other racial minorities are also not immune to the legitimizing myths that oppress them. Many develop apathetic and cynical behavior towards politics because they too have been convinced that the dominant system is either fair or too powerful to change.<sup>15</sup>

This paper attempts to identify some of these myths and compare them

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14. Compare *id.*, at 1356-66 (analysis and critique of critical reformers) with Freeman, *supra* note 12, at 97, 110 (critique of antidiscrimination law as class legitimation, but offers no alternative approach).

15. Even with this cynicism, Black voter participation tends to be significantly higher than whites of similar socio-economic status. See, e.g., Cavanaugh, *infra* note 31.

with the reality of domination that exists in today's society. By citing real examples of today's massive urban centers this paper will demonstrate the falseness of these myths. The paper will then discuss the concepts and values that need to be recognized in order to redesign and restructure our current society into one where racial minorities will be full and equal participants.

## I. LEGITIMATING MYTHS IN AMERICAN DEMOCRACY

Ronald Reagan generally refers to America's enemies as undemocratic.<sup>16</sup> In contrast he refers to groups of insurgents supported by the United States as those fighting for "freedom and peace."<sup>17</sup> This rhetoric has an emotionally stirring impact on followers of Reagan because the ideas of democracy and freedom seem worthy of fighting a war over. Unfortunately for Black Americans, such rhetoric rings hollow as another cruel hoax on an oppressed people. While Reagan bemoans the plight of the oppressed peasants of Nicaragua who have never participated in a democracy which has fairly served their interests, Blacks in America realize as well that they have never participated in a democracy that has been fair to their interests.

What are the values and concepts that are evoked in the minds of the American public when a politician speaks of Democracy? It seems that the concept of democracy stirs up ideas of fairness and of a system of government controlled by the people. For many people, democracy means a system where each person is entitled to one meaningful vote, where any person can enter a political contest, where coalitions of minority interests combine along common goals to defeat entrenched majorities, and where after a fair fight, the winner takes the political spoils yet holds office for the common good.<sup>18</sup>

Yet none of the above images of democracy hold true for racial minorities in America. Many Americans, first of all, are ignorant of the history of racial domination that Blacks have endured since the slavery era. Since the end of the first Black Reconstruction in America, Black people have been systematically denied the opportunity to participate in electoral politics in any meaningful way.<sup>19</sup> The history of this domination and exclusion from the political process is well established and hardly debatable.<sup>20</sup>

This section of the paper will analyze several traditional principles of our democratic system. The principles of winner-take-all elections, one-person, one-vote, and coalition building to defeat entrenched majorities, will be examined in this part of the paper. The analysis concludes that even after the establishment of formal equality in electoral politics, Black Americans will be continually excluded from fair and effective political participation unless major structural changes are made in our political process.

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16. See, e.g., R. Reagan, No Communist Colonies in America (May 9, 1984), reprinted in 50 VITAL SPEECHES OF THE DAY 482 (1984).

17. *Id.* at 483.

18. See, e.g., Davis v. Bandemer, 478 U.S. 109, 127-33 (1986).

19. See generally Jordan, *Taking Voting Rights Seriously: Rediscovering the Fifteenth Amendment*, 64 NEB. L. REV. 389 (1985).

20. *Id.*; see also BELL, *supra* note 9, at 126-206; Defner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523 (1973).

### A. *Winner-Take-All Elections*

The concept of winner-take-all in electoral contests is perhaps the most significant political factor that works to the detriment of Black Americans. The terms "majority rule" and "winner-take-all" [WTA] are virtually synonymous and refer to the situation where 100% of the political spoils go to the "winner" of a majority of the votes cast. The two intermingled problems with WTA are first that they tend to overrepresent the majority and second that they result in severe disadvantages for permanently excluded racial minorities.

The problem of overrepresentation of the majority can best be illustrated by three common examples. The first is the Presidential elections. During 1984 Ronald Reagan received approximately 60% of the popular vote.<sup>21</sup> However based on the electoral college's WTA rules, Reagan received 95% of the votes of the college members and was elected President of the United States.<sup>22</sup> Thus less than 50% of the eligible voting population was able to choose the person that would have the power to command the military forces, appoint four Supreme Court justices, appoint hundreds of federal judges, and exercise the discretionary authority of the massive executive branch of our nation with little or no influence from the losing political parties and factions.<sup>23</sup>

The second situation arises in state legislatures. A combination of political or racial gerrymandering of districts along with a widely distributed majority can lead to majority capture of 100% of the legislature with a bare majority of votes.<sup>24</sup> Finally, the same overrepresentation can occur at the local level where multi-member districts are used for election of city-council members.

The fact that WTA systems overrepresent the majority was not as significant during the early years of American history, when the population was relatively homogeneous. Now the division between racial groups that exists in large urban areas has resulted in severe consequences to the minority group that consistently loses on election day.<sup>25</sup>

#### 1. *Homogeneous Societies*

As a hypothetical example, imagine a city which is racially homogeneous and has no identifiable ethnic minority. Imagine that this city has two fiercely competitive political parties engaged in a battle for control of the three-member city council. Assume that the city council is the sole political authority for the city and wields all city power. If party X wins, then we can assume that many favors and appointments will flow from the council to party members. For example, in our hypothetical city the council would appoint the School board, the Police Chief, the City Manager, City Attorney, Transportation

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21. Levinson, *Gerrymandering and the Brooding Omnipresence of Proportional Representation*, 33 UCLA L. REV. 257, 267 (1985).

22. *Id.*

23. Many persons accept this as a legitimate right of the winner of Presidential elections under our constitution. This example is used however, to show the significant control and influence a small majority of the actual voters can have over the remaining population. A similar situation would not occur under a parliamentary or proportional representation based system.

24. See, e.g., Note, *The Constitutional Imperative of Proportional Representation*, 94 YALE L.J. 163, 172 (1984).

25. See M. BALINSKI and H. YOUNG, FAIR REPRESENTATION 87-93 (1982).

Chief and so on. These appointees in turn will set policy in line with party X's philosophy.

Under a WTA system, such as an at-large election, the losing party has no policy-making power. However, in this racially homogeneous city, the losers are not segregated into one part of town. They are not immediately identifiable by others, save for the "Y" bumper stickers on the backs of their automobiles. Thus when Police Chief X makes her decisions on allocating police protection among neighborhoods, she will not be able to ignore the population who voted against her party. When the School Board decides which schools get new facilities, new computers, and innovative educational programs, the "Y" voters will not be punished. They are neither identifiable nor segregated into one area. When the City Manager improves a street, the Y residents will benefit along with the X residents. When the City Mass-transit Chief decides which neighborhoods will get the best transit routes, one of the factors in his analysis will not be the location of the Y neighborhood.

As seen in this hypothetical example, population homogeneity reduces the significance of the political gains available on election day. Of course this homogeneity would need to go beyond race to be completely accurate. The population of this fictitious city would also need to be in the same economic class in order for this example to be complete.<sup>26</sup>

## 2. *Reality of Urban America*

Unfortunately for social-political harmony, but perhaps fortunately for our diverse culture, we do not live in a racially and economically homogeneous society. To the contrary, one's life chances are influenced greatly by the economic class and race of their parents.<sup>27</sup>

Race separation has been and continues to be a persistent problem in our modern society. Most large urban areas are highly segregated based on race.<sup>28</sup> In such cities, almost any resident will be able to tell you the relative boundaries that make up each racial neighborhood. In older cities, the Black neighborhoods are typically bounded by freeways or railroad tracks, and located near the heavy industrial areas. This reflects the history of black migration from the rural south to fill the labor shortages of the newly industrialized north. It also reflects the totality of the domination of Black people throughout our country. Instead of reflecting the residential patterns of immigrant groups as they progressed through the class structures with each succeeding generation, Blacks have been trapped in the same social class, and the same depressed economic locations, from generation to generation.<sup>29</sup> The methods used to dominate Black people, from racist housing policies to violent attacks on school children have been well documented.<sup>30</sup>

These basic facts, set forth in contrast to our hypothetical racially homo-

26. Even if some class bias existed, the consequences to "Y" voters would not be severe so long as "Y"s were not readily identifiable and not segregated into a separate geographic area.

27. Race and class seem to be inextricably intertwined, making it difficult to separate the analysis of life chances. Many commentators, as well as the author's personal experience, would suggest that race, particularly in the case of Blacks, is the predominant factor in predicting future socioeconomic class of an individual. See, e.g., A. PINCKNEY, MYTH OF BLACK PROGRESS (1984).

28. See generally Chicago Tribune Staff, THE AMERICAN MILLSTONE (1986).

29. *Id.*

30. See, e.g., Bell, *supra* note 9; see also, Marable, *supra* note 8.

geneous city, reveal that in our real, everyday cities there are significant divisions between the races. History shows us that this division leads to hotly contested political contests where voting is distributed largely along racial lines.<sup>31</sup> In contrast to the hypothetical homogeneous city, our real American cities present tremendous stakes to be won or lost on election day.

Black voting patterns are consistent, and as we all know, being Black is an immutable characteristic. Thus when Blacks persistently lose elections, the political winners can easily ignore them. A disproportionate share of the city's resources can be diverted to the non-Black areas, including road improvements, new school facilities, frequent and extensive public transportation, and increased police patrols. The Blacks, an identifiable political outgroup, then inhabit a henceforth ignored community. Worse yet, the Black neighborhoods inherit the less desirable elements of a functioning city such as prisons, landfill and sewage facilities, freeways that gut communities, airport noise, smoggy industrial facilities, and the like. In short when Black people lose on election day, they lose in a big way.<sup>32</sup>

The above facts present stark contrast to the legitimizing myth that WTA is a fair method of democratic rule. The picture above does not sound like the land of opportunity that we all know and love. It is not the great melting pot that America purports to be, because the groups do not "melt." Given these tremendous stakes, winner take all systems are unfair and inconsistent with the concept of equal citizenship and representative democracy.

As discussed earlier, in order for an element of an electoral system to be legitimate it must be both fair, and representative of the collective will of its constituents. Both of these ideas are embodied in the Constitutional principle of equal citizenship. One constitutional scholar has suggested that the 14th Amendment principle of equal citizenship requires us to use an inclusive view of our national community.<sup>33</sup> Under this view, laws, social structures, and electoral systems which deny a person the ability to effectively become a responsible participating citizen would be presumptively invalid under our Constitution.<sup>34</sup>

Since WTA electoral systems are unfair and result in exclusion of Blacks

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31. See generally, S. Lawson, IN PURSUIT OF POWER (1985); JOINT CENTER FOR POLITICAL STUDIES, STRATEGIES FOR MOBILIZING BLACK VOTERS, (T. Cavanaugh, ed.) (1987); see, e.g., Collins v. City of Norfolk, Va., 605 F. Supp. 377 (D.C. Va. 1984); Dionne, *Voting Produces Strong Evidence of Importance of Racial Politics*, N.Y. Times, Nov. 5, 1987, § I at 1. This proposition is also demonstrated by the history of mayoral contests in America's largest cities. The 1968 mayoral contest between Sam Yorty and Tom Bradley was largely fought along racial lines, with Bradley losing. More recently the cities of Philadelphia and Chicago have witnessed fierce mayoral contests along racial lines. See *infra* notes 56-72 and accompanying text. Also, in the city of Boston, an entire Black neighborhood sought to secede from the city, evidencing Black despair over ineffectual race politics.

32. All of these fact patterns have been readily apparent in America's largest cities in recent decades. The cities of New York, Chicago, Philadelphia, and Los Angeles are among this country's most prosperous areas. These cities are often thought to be centers of global economic activity and large concentrations of wealth. Yet these same cities are the precise locations of the so-called Black underclass in America. The majority of Blacks in these wealthy cities suffer from high unemployment, poor housing conditions, poor education and all of the other negative elements that accompany these conditions. Thus when Blacks persistently lose elections they have no power to effect positive changes through the political process, and are excluded from participating in the economic success of the city.

33. Karst, *Why Equality Matters*, 17 GEORGIA L. REV. 245 (1983).

34. *Id.*, at 248.

from the political process they should be presumed illegitimate. Alternative electoral processes are available that are both fair and consistent with democratic principles.<sup>35</sup> For example, many political scientists believe that proportional representation is the only system that can give equal representation to all groups while still allowing for majority rule.<sup>36</sup> All potential alternatives should be debated and explored, so that we can move our electoral system in the direction of fairness and effective participation by all.

### B. *Individual vs. Group Voting Rights: One-Person, One-Vote*

The principle of voting as an individual right to cast a ballot instead of a group right to group representation has dominated voting rights legal discourse over the past few decades. The emphasis on an individual right is most commonly articulated as the rule of one-person, one-vote [OPOV]. Under this rule state legislatures are required to use equal population districts for election of their own members as well as for congressional districting.

To determine whether the emphasis on individual voting rights is a legitimate element of our electoral process, an analysis must decide whether the principle promotes fairness, reflects the will of the populous, and is based on valid beliefs and underlying assumptions.

Individual voting rights and the principle of OPOV was most fully articulated by the Supreme Court in *Reynolds v. Sims*.<sup>37</sup> The case arose because the Alabama legislature had refused to reapportion the state electoral districts since 1901 and there existed a large population disparity between rural districts and cities due to shifting population patterns.<sup>38</sup> An underlying racial tension also existed in that Blacks were on the verge of obtaining the right to vote and represented a majority in many of the rural districts.<sup>39</sup> Thus the case was brought as much out of a fear of Black rule as it was out of a fear of the overinfluence of rural Alabamans on state politics.<sup>40</sup>

Two constitutional problems had to be surmounted before the Court could reach the merits of the case. First, traditional constitutional interpretation of 14th and 15th Amendment rights had been construed in terms of protecting individuals' claims of constitutional injury and not group rights.<sup>41</sup> Second, the Court had to devise "judicially manageable standards" for deciding reapportionment cases, otherwise this case would be classified as a non-

35. See, e.g., Note, *supra* note 24.

36. *Id.*, at 182.

37. 377 U.S. 533 (1964).

38. *Id.*

39. See, e.g., Blacksher and Meneefe, *At-Large Elections and One Person, One Vote: The Search for the Meaning of Racial Vote Dilution*, in *MINORITY VOTE DILUTION* 203 (C. Davidson ed. 1984).

40. The evidence showed that under existing districting borders, less than 26% of the state's population controlled majorities in both houses of the state legislature. *Reynolds*, 377 U.S. at 545. As a further example *Bullock* and *Henry* counties had populations of 13,482 and 15,286 respectively and had 2 seats each; whereas *Mobile* county had 314,301 residents with only 3 representative seats. *Id.* According to the 1970 Census, Blacks outnumbered whites almost 2 to 1 in *Bullock* county, and were barely outnumbered by whites in *Henry* county. See 1970 AND 1980 CENSUS POPULATION OF ALABAMA COUNTIES BY RACE, SEX AND AGE, 16,100 (1983). By contrast Blacks represented only one-third of the population in *Mobile* county in 1970. *Id.*, at 145.

41. A more expansive view of group rights would have been welcome, but perhaps the Court was concerned about opening a new theory of rights that would result in group claims in other areas. See, e.g., Note, *supra* note 24, at 177 n.67. For a more complete discussion of an expansive view of antidiscrimination law, see Crenshaw, *supra* note 10.

justiciable political question.<sup>42</sup>

Both of these issues were resolved by the Court by articulating the rule of OPOV. As the Court asserted, “. . . the rights impaired are individual and personal in nature . . . Legislatures represent people not trees or acres. Legislators are elected by voters, not farms or cities or economic interests.”<sup>43</sup> In completion of the OPOV principle the Court held that the overriding objective of apportionment must be the substantial equality of population districts.<sup>44</sup>

The idea of OPOV has a certain intuitive appeal and seems fair on its face. However a closer analysis reveals several problems that lead to the conclusion that OPOV is perhaps not a legitimate principal of representative democracy from the perspective of Black Americans. The analysis shows that, when taken in its applied context, the OPOV principle is unfair and based upon faulty assumptions.

Proponents of OPOV suggest that its appeal is that OPOV promotes majority rule. By requiring equally populated election districts the rule assures that state legislatures will be elected by a majority of the voters. The problems encountered by racial minorities when faced with majority rule were discussed in the prior section, however the addition of equal population districts as a constitutional standard creates an additional constraint that precludes experimentation with creative alternatives such as proportional representation.<sup>45</sup>

Another problem is the *Reynolds* and subsequent reapportionment cases have limited their analysis of equality to geographic districting only. All the other forms of underrepresentation have been “left in the political thicket . . . subject only to more deferential judicial prohibitions of capriciousness and invidious intent.”<sup>46</sup> An example of this is minority vote dilution claims against the use of at-large districting schemes. Black plaintiffs must still prove invidious intent under the constitutional standards set forth in *Mobile v. Bolden*.<sup>47</sup> Even under the results test of the Voting Rights Act, Black plaintiffs have a more difficult standard to meet than the mere mathematical inequality required in political reapportionment cases.

In fact the requirement of mathematical equality acts as a barrier to affirmative gerrymandering efforts intended to remedy historical deprivation of political rights.<sup>48</sup> Such affirmative remedies are thus limited to situations that don't violate the equal population rule.

The above distinctions between constitutional standards applied to reapportionment versus those applied to gerrymandering or dilution cases results in a strange paradox. Groups of white suburban Alabamans were able to use the Civil War amendments for protection against diminution of their political rights, while Blacks, for whom the amendments were designed to protect, are held to a higher standard.<sup>49</sup>

Another problem with OPOV is that it ignores the reality that people vote with a group consciousness. This is particularly true with respect to race.

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42. Note, *supra* note 24 at 177 n.66.

43. *Reynolds*, 377 U.S. at 561, 562.

44. *Id.*, at 578.

45. See e.g., Blacksher and Meneefe, *supra* note 39, at 209.

46. *Id.*, at 231.

47. *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

48. Note, *supra* note 24, at 172.

49. Blacksher and Meneefe, *supra* note 39, at 204.

The individual, in casting a ballot, is attempting to elect a representative who will reflect the interests of the group with whom she identifies. Due to the history of acrimonious race relations in America, whites seldom vote for the Black candidate; they don't seem to consider a Black as the person most likely to represent their best interests. Black people often feel the same about voting for white candidates but haven't always had the luxury of choosing a Black candidate. It is well established however, that Americans vote heavily along racial lines in most of the country, especially where substantial populations of different racial groups exist within the same political subdivision.<sup>50</sup>

Yet another problem is that the *Reynolds* Court's conclusion was not based on sound underlying assumptions. The majority used some language that was quite encouraging, at one point stating that "Each and every citizen has an *inalienable right to full and effective participation* in the political processes of their state's legislative bodies. . ."<sup>51</sup> This statement alone would generate widespread agreement. Indeed this statement is one of the fundamental premises of this paper. However the Court did not reach a broad conclusion that all systems that deny effective political participation create justiciable claims for federal courts. The inherent limitations of our judicial system prevented the Court from reaching beyond the matter at hand. The point here is that the Court's use of the rhetoric and promise of a just society, when it is not ultimately deliverable, serves to legitimate the resulting system and pacify the general public while continuing to frustrate the needs of the disempowered.

The Court's use of rhetoric was not limited to eloquent statements of a just society, they also used some untruths. One of the justifications used for the Court's result was that ". . . the democratic ideals of equality and majority rule, which have served this Nation so well in the past, are hardly of any less significance for the present and the future."<sup>52</sup> The problem with this statement is that it is a broad legitimating assertion that is demonstrably false. Such assertions of majestic platitudes read well in Supreme Court opinions, yet one wonders what the majority was referring to by majority rule. Certainly the Court could not have been referring to the first 100 years of this country's history, when only white male property holders were allowed to vote. Even after the Civil War Amendments Blacks were systematically denied the vote, and women did not gain the franchise until adoption of the Nineteenth Amendment to the U.S. Constitution in 1920. Even assuming for sake of argument that white males somehow represented the majority viewpoint it is hard to see how their reign in power had "served the nation well" given the long torturous history of treatment towards nonwhites.

Given the above characteristics, the benefits of OPOV as a fair system for Blacks is questionable. OPOV merely equalizes the population of various districts. Combined with other techniques such as racial and political gerrymandering and the simplistic notion of majority rule/WTA systems, Blacks as a group and as individuals are effectively excluded from the political process. The OPOV principle, with its faulty assumptions and potential for unfair re-

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50. See *supra* note 31 and accompanying text.

51. *Reynolds*, 377 U.S. at 565 (emphasis added).

52. *Id.*, at 566.

sults, should be scrapped in favor of a principle that will result in a more fair and inclusive system that reflects the interests of all of the people.

These examples are not meant to question the sincerity of the Warren Court in its vigorous defense of the rights of minority groups and its egalitarian attempt to move us towards a more just society. Rather, the examples are cited to point out how the uses of legitimating but untrue rhetoric about our political system can eventually frustrate attempts by minority groups to make effective change. The opinion must be recognized as a significant attempt to create fair electoral systems. The problem is that the Court used eloquent and legitimating rhetoric to reach a narrow conclusion. One-person one-vote sounds nice as a rule of formal equality, but reflects a narrow and unrealistic view of our present day society.

### C. *Using Coalitions Of Minority Interests To Defeat Entrenched Majorities*

Another common myth about our political system is the notion that minority interest groups have legitimate access to power by forming coalitions with other groups to defeat entrenched majorities. This theoretical process is most often attributed to James Madison and is thought to be insurance against majority tyranny.<sup>53</sup> Once again this myth fails to maintain its validity when confronted with the reality of race politics. Obviously if coalition-building occurs freely across racial lines, then a politically cohesive, geographically insular minority may have great political influence.<sup>54</sup> However, it is well documented that racial bloc voting is a common characteristic throughout America and thus coalition-building across racial lines is rare.<sup>55</sup>

One of the most striking examples of how race politics affect Blacks when they consistently lose elections can be seen in the city of Chicago. Until the election of Harold Washington in 1983, the city of Chicago was dominated by what is commonly known as machine politics. This was an extensive system of political patronage that was so complete that one needed to have political ties to have a street lamp fixed. The major problem with the machine for Blacks, other than its general corruptness, was that it was dominated by whites for decades in this city of extreme racial tensions. Blacks had virtually no chance of overpowering the political process on their own, and whites had no incentive to form coalitions with them. This structure led to decades of domination and neglect in Chicago's Black communities.

The important point here is that the inability to form effective coalitions with other political factions leaves Black Americans without a political remedy. Yet the widespread belief in the feasibility of coalition building as the primary remedy to political ineffectiveness leads to a misunderstanding of the political plight of Blacks. This leaves the Black community with quite a dilemma. Blacks are painfully aware of the failure of many efforts to build coalitions, but complaints about this ineffectiveness fall on deaf ears, while Blacks remain politically powerless.

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53. See, e.g., M. EDELMAN, *DEMOCRATIC THEORIES AND THE CONSTITUTION* 15 (1984).

54. See Comment, *Vote Dilution, Discriminatory Results, and Proportional Representation: What is the Appropriate Remedy for a Violation of Section 2 of the Voting Rights Act?*, 32 *UCLA L. REV.* 1203, 1249 (1985).

55. See *supra* note 31 and accompanying text.

## II. BLACK ELECTORAL SUCCESSES: PROOF OF THE LEGITIMACY OF THE ELECTORAL PROCESS?

Recently there have been a number of striking examples of Blacks winning elections in major cities, and otherwise having substantial influence over election outcomes. The 1980's have seen the election of Black mayors in the racially tense cities of Chicago and Philadelphia, a Black Democratic candidate for President of the United States, a Black Democratic candidate for governor of California, and the powerful impact of the southern Black vote helping to defeat a Reagan Supreme Court nominee. This raises the question of whether America is coming into a new age in racial politics. Are these successes on the part of Blacks evidence that Madison was right after all? Or do the victories merely serve the legitimating interests of the dominant political group and further frustrate the needs of Black people? If the successes indicate the former then what weight should be given to the earlier critique of American electoral processes? The remainder of this paper will address this issue by looking at several specific instances in detail.

### A. *Mayors of Major Cities*

In 1983 Harold Washington became the first Black mayor in Chicago history. During that same year Wilson Goode became the first Black mayor in Philadelphia history. The following year, 1984, witnessed reelection of Mayor Tom Bradley in Los Angeles for an unprecedented fourth term. These election victories present a curious question: are they symbols of a working electoral system and a precursor of a new era in Black political effectiveness, or are they merely the natural manifestations of a system seeking to legitimate itself? In short, are the critiques set forth above made invalid by the existence of these electoral successes?

Chicago is the third largest city in the United States. It has characteristics typical of the old industrial cities of the north.<sup>56</sup> Chicago also has a history of extreme racial divisiveness.<sup>57</sup> Blacks and whites live in highly segregated neighborhoods.<sup>58</sup> Crime, unemployment, and slum housing conditions are disproportionately prevalent in the Black communities.<sup>59</sup> Chicago has also been known as a very political city. The history of Mayor Daley and Democratic machine politics are well known. During pre-Washington days, Blacks had little political power in Chicago.<sup>60</sup> These days Black Chicagoans feel much more optimistic about their future.<sup>61</sup>

Chicago city government is a city council/mayoral system with 50 city councilpersons representing the city's 50 wards. Each ward represents approximately 60,000 persons. The mayor is elected at large by winning a majority of the city's wards.

Mayor Washington's victory was achieved by receiving an overwhelming majority of the Black vote, combined with a majority of Latino voters and a

56. See, e.g., THE AMERICAN MILLSTONE, *supra* note 28.

57. *Id.*

58. *Id.*

59. *Id.*

60. JOINT CENTER FOR POLITICAL STUDIES, *supra* note 31, at 4.

61. The picture has tragically changed with Mayor Washington's sudden death on November 25, 1987. See *infra* note 69.

small percentage of the white liberal vote.<sup>62</sup> Commentators attribute three main factors that led to a tremendous increase in Black voter awareness and registration, and the ultimate electoral victory.

First, there were several incidents of insensitivity on the part of Mayor Jane Byrne. Mayor Byrne had received a strong majority of the Black vote in the 1979 mayoral election yet she acted with a surprising lack of deference to her Black constituents.<sup>63</sup> She appointed two anti-desegregationists to the Board of Education; she went along with a city council ward redistricting plan which lessened the electoral chances of Black and Latino candidates; and she appointed three whites to the Chicago Housing Authority, reducing Black representation to 3 out of ten members although Blacks constituted 85% of the public housing population.<sup>64</sup> This is a classic example of how an entrenched majority can ignore the interests of Blacks as discussed above.

A second factor is that the Black population had grown in Chicago. Blacks in 1980 constituted 40% of the city's total population and 36% of its voting age population. These two factors combined with a massive voter education and registration drive by a coalition of Black community organizations led to record levels of Black registration and voting, and ultimately to the election of Mayor Washington.<sup>65</sup> Voting in the general mayoral election largely followed racial lines. Washington received 97-99% of the vote in Black wards, whereas his Republican opponent received 93-96% of the vote in the heavily white wards.<sup>66</sup> The white vote is particularly telling in that these white wards had a long standing history of voting overwhelmingly democratic.<sup>67</sup> Thus we see the white voters' preference for a white representative over a Black one even though that meant voting outside of their traditional class and political interests.

These facts do not support the idea that coalition building to beat entrenched majorities is feasible for Blacks. Instead they demonstrate a clear political power struggle along racial lines. Both Chicago's white and Black citizens have working class roots, and one would think that they would have some convergent interests along class lines. For example, under the Madisonian view, we would expect to see coalitions of interest groups that were concerned about better quality schools, or attracting jobs to the city. Instead we see an expression by whites that their first goal is separate schools and exclusion of Blacks from participation in policy-making. We do not see attempts by whites or Blacks to find common interests and defeat the entrenched Democratic machine.

During Mayor Washington's first term the political administration of the city of Chicago was deadlocked across racial lines. The city council was usually deadlocked, preventing Washington from carrying out his policies. During the most recent term, the Mayor gained an additional Latino ward which

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62. Woods, *The Chicago Crusade*, in STRATEGIES FOR MOBILIZING BLACK VOTERS 11, 31 (T. Cavanaugh ed. 1987).

63. *Id.*, at 13.

64. *Id.*

65. *Id.*, at 28. Despite efforts by the entrenched majority to make it difficult for Blacks to register, approximately 90% of eligible voters in Black wards were registered, compared with 83.5% of eligible voters in white wards.

66. *Id.*, at 31-34.

67. *Id.*

has given his faction a majority control on the council. Thus Washington can finally move forward with his programs and policies.

However, the mere fact that Blacks gained control of Chicago politics does not mean that the electoral process is legitimate. The Blacks in Chicago won only after an extraordinary effort by community organizations to mobilize the Black vote. If the next several decades in Chicago represented an era of Black domination and oppression of whites, this would not make WTA any more legitimate.<sup>68</sup>

The fact that Blacks must make such extraordinary efforts to achieve even small political gains means that their control of the mayor's office is likely to be temporary. This proposition seems to be coming true even more quickly since the tragic death of Mayor Washington.<sup>69</sup> Within a few days after his death, white councilpersons had mobilized to appoint a Black replacement who would answer to their interests. Twenty-three out of twenty-eight white city council persons supported Eugene Sawyer, a Black, along with only six of nineteen Black city councilpersons.<sup>70</sup> Meanwhile the heir apparent to Mayor Washington, Tim Evans, was ignored.<sup>71</sup> This occurred even though Evans appears to have the support of most Black Chicagoans.<sup>72</sup> Evans will likely run for Mayor during the next election. Meanwhile a crowd of over 10,000 Black protestors waived dollar bills at Sawyer, symbolizing their thoughts about selling out.

Chicago is a good example of the extreme consequences of winner take all election systems when great racial divisiveness is present. It demonstrates the falseness of the myths set forth above. Individuals vote with a group [race-based] consciousness, winner-take-all is extremely unfair to groups that consistently lose, and coalition building is nonexistent in any meaningful fashion. If Chicago is to end this volatile and unfair system then major reconceptualizations are needed. For example, a modified form of proportional representation may be useful in Chicago. Under such a system competing factions, here Blacks and whites, could share in the benefits and burdens of living in the city. This would reduce the volatility and move our society towards a system of fair representation of all of its constituents.

#### B. *Black Southern Voting Power and The Bork Nomination*

America has witnessed an unprecedented phenomenon in 1987. A conservative Supreme Court nominee was rejected by the Senate largely due to the failure of the Reagan administration to command the votes of conservative southern senators. It was widely reported that the reason for the senators' hesitation to vote for Bork was their Black constituents' concern over Bork's

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68. Black oppression of whites is unlikely to occur in Chicago. This is because there are numerous other advantages that whites have obtained over their years of domination. These advantages include economic strength, educational advantages and strong cultural values, among other things.

69. On November 25, 1987 Mayor Harold Washington was found slumped over at his desk, apparently having suffered a heart attack. It was a sad day for Black Chicagoans as well as Blacks nationwide. Mayor Washington was a strong charismatic leader with the power to lead strong competing factions among Blacks in the same direction.

70. *Sawyer Wins Wild Fight to be Chicago Mayor*, L.A. Times, December 3, 1987, § 1, at 1, col. 4.

71. *Id.*

72. *Id.*

views on race.<sup>73</sup> The southern Democratic senators were concerned enough over the possibility of upsetting Black voters that they refused to vote for a candidate that they would likely have overwhelmingly approved just a few short years ago.<sup>74</sup> Sixteen of the seventeen southern Democratic senators voted against Bork.<sup>75</sup>

Since 1983 at least 2 million new Black voters were registered in the south.<sup>76</sup> Some political consultants say that the change in voter demographics in the south is the biggest political change in the past 25 years of American politics.<sup>77</sup> "The still-dominant Southern Democrats have become the nation's swing voters on a whole range of issues . . . but they are a shaky coalition of Blacks and moderate-to-conservative white voters."<sup>78</sup> The percentage of Black voters is higher in the south than in any other region of the country.<sup>79</sup> Over 37% of the voting age population in Mississippi is Black.<sup>80</sup>

This new Black voting strength is an interesting test of whether Blacks can legitimately participate in the political process. It seems clear that as long as Blacks and whites continue to vote along racial lines and not along lines of particular political or class interests, then we have not reached the coalition-building pluralism put forth by Madisonians. Just as in Chicago, the Black voting strength is power politics along racial lines.

### C. *Jesse Jackson: Legitimate Candidate or Candidate for Legitimacy*

Perhaps no other political event in recent history better symbolizes the issue of political legitimacy for Black Americans than the Presidential campaign of the Reverend Jesse Jackson. On the one hand the Jackson campaign was a phenomenal success. Despite great skepticism from the major media, lack of support from prominent Black politicians, and a great disparity in fund raising ability, the Jackson campaign mobilized millions of voters throughout America and presented the first serious challenge for the Democratic Party Presidential Nomination by a Black person in the history of this nation. On the other hand, during the primary campaign most respected political commentators candidly admitted that Jackson was unlikely to have a very good chance of winning a national presidential election. Also, Jackson has been virtually ignored (along with his Black constituents) during the post Convention campaign of Michael Dukakis. What symbols or messages should Black Americans receive from the treatment of Reverend Jackson during the recent campaign?

Blacks could interpret these events as the ultimate example of false legitimization of their ability to participate in the electoral process. The electoral structure appeared to be legitimate in many ways. There were many Black delegates to the Democratic Convention — perhaps more than ever. There was a Black candidate who had survived the primary process over five other respected challengers. Reverend Jackson delivered one of the most stirring,

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73. See, e.g., *South Had Key Role in Bork Rejection*, L.A. Times, Oct. 24, 1987, § I at 30.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

compassionate speeches ever delivered at a Democratic Convention. The symbols of legitimate participation were all in place. Yet under the surface Blacks were being ignored and defeated. Negotiations for party platform positions appeared at first to be smoothly progressing. However it was clear that the Dukakis representatives had the power to override many of the positions desired by the Jackson representatives without serious negotiations. Jackson himself received a political slap in the face when the Dukakis campaign announced the selection of Lloyd Bentsen to the media prior to contacting Jackson, who allegedly was being given serious consideration. A facade of unity between Jackson and Dukakis was maintained because Dukakis could not afford to risk alienating Black voters. But, as can be seen from the subsequent events, the Dukakis campaign effectively ignored Jackson throughout the balance of the campaign. In fact it was reported that Dukakis actually requested that Jackson avoid certain states so that Jackson's positions would not be associated with Dukakis among Dukakis' target voting group — conservative white "Reagan" Democrats. The effect of this conduct towards Black participants in the Democratic primary was to nullify the tremendous efforts made by the Jackson campaign and the people who supported him. This seems to be a tremendous blow to Black hopes of participating in the political process in a meaningful manner.

Are there any alternative explanations for the failure to include Black interests in this year's Presidential campaigns and the failure to include Jesse Jackson in the campaign process? One argument that may be advanced is that this election campaign has been fought over the moderate-to-conservative vote and that Jackson, and perhaps Blacks, are too far to the left to be included in this year's campaign. The problem with that argument is that elections are about delivering votes and it is clear that a charismatic figure such as Jackson could have delivered millions of votes, from such diverse groups as Midwestern farmers, Black urban dwellers, highly educated whites, and college students. Many of these potential voters may either stay home on election day or end up in the undecided pool. Another problem with that middle of the road approach is that Black Americans actually are quite conservative on many social issues such as drugs and crime, so that the failure to target Black voters on these issues is a mistake even under that strategy. Yet another problem with the Dukakis strategy is that existing conservatives are likely to vote Republican in the absence of a compelling reason to do otherwise. Thus it seems that a more logical alternative would have been to set forth an alternative ideology and vision to capture the hearts and minds of the voters, and to use the growing coalition identified by Jackson to build upon traditional Democratic Party traditions and principles.

Another reason for ignoring Jackson may have been the rationale that Jackson is "too controversial." After all, Jackson's participation in the civil rights movement and his long-standing history of advocacy for the damned, despised and the downtrodden has created much resentment among those supporting the status quo. Yet if struggle for social change and justice for the disadvantaged disqualifies one from political participation, what signals should Black people derive from this conclusion?

Despite the frustration and disappointment felt by Jackson supporters there still appears to be reason for hope from the Jackson candidacy. Jackson

has perhaps been the catalyst for a new movement among voters with common economic interests that cross racial lines. This new movement may be in its infant stages but may have already progressed too far to be stopped by traditional means. The success that Jackson did attain was achieved in the face of tremendous odds. Yet a social movement that has a true base in the people of America can overcome such odds. Finally, the vision and hope that Jackson has instilled in a new generation of Black Americans may have planted the seeds for a future political landscape where Blacks can form true coalitions along economic and social interests and crossing the traditional racial barriers.

### III. CONCLUSION

The recent significant influence that Blacks have had on mayoral elections, Supreme Court confirmations, and presidential election campaigns should be viewed with care. These events may be indicating that the day has finally arrived when Black Americans will have a representative voice in the management of this nation. Yet there are many troublesome aspects to the recent successes. The voting still occurs largely along racial lines, Black control does not automatically result from gaining the electoral office, and many of the hard fought gains can be easily lost. In addition it seems that the amount of change that may be required to move the Black population towards parity with whites could lead to further racial strains and ultimately a backlash against Black voting rights gains.

The continuing extraordinary electoral efforts by Black Americans is symbolic of their unending faith and willingness to strive toward the ideals that created this nation. Blacks have repeatedly attempted to participate in the promise of America through legitimate means. If this nation is to successfully be preserved for future generations then it must wake up and welcome the legitimate participation of Blacks with open arms.

Blacks should continue the long standing debate over whether to attempt to participate in American society through legitimate means or to seek other solutions. In addition, we should continue the political efforts and vigorously pursue strategies that will result in electoral successes. Even though such electoral success will not alone lead to the uplifting of Black people we must pursue each and every strategy. Our ultimate vision must be a long term one that we always strive towards. As one Black scholar has recently put it:

the only effective human goal for black people—and for all who would work with them—is “to transform this country into a truly democratic society of liberated men and women, all of whom are endowed with dignity and self-respect and enjoy equal opportunity unhindered by race, or religion, or class discrimination.”<sup>81</sup>

Achievement of this lofty ideal will require more than electoral successes based on power politics. Yet we must take each opportunity as it comes to us and remain willing to seek change to accomplish these high ideals.

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81. Harding, *Equality is Not Enough* (reviewing D. BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1988)), N.Y. Times, Oct. 11, 1987, § 7, at 7, col. 1.