

## BOOK REVIEW

### A Review of Lani Guinier's *The Tyranny of the Majority*

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Lani Guinier, *The Tyranny of the Majority: Fundamental Fairness in Representative Democracy*. Free Press, 1994. Pp. 508, \$24.95

Almost thirty years ago, after three insufficient runs at the problem in 1957, 1960, and 1964, the Congress of the United States overwhelmingly approved a comprehensive federal law designed to eradicate racial discrimination in voting.<sup>1</sup> The Voting Rights Act of 1965 was radical, in federalism terms. It superseded basic state law in many respects, providing for direct federal supervision, indeed implementation, of the process of registration and voting in numerous localities, and required preclearance by the Justice Department, or a court, of changes in laws affecting voting rights in jurisdictions deemed by a statistical yardstick, without any other proof, to have engaged in racial discrimination in the process. The Act was directed in the first instance at voter registration, through control of which hundreds of thousands of African-Americans had been denied by state officials any entry at all into politics. It had an almost immediate impact, resulting in the registration of thousands for the 1966 and 1968 elections, particularly in the States of the Deep South.<sup>2</sup> Over a period of time this surge in registration combined with other factors to cause a stunning increase in the election of black officials to local and federal offices, from a few hundred in 1965 to over 8,000 by 1994, including thirty-nine members of the House of Representatives.<sup>3</sup>

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1. The Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1972, 1973 to 1973aa-6 (1994)).

2. See James E. Alt, *The Impact of the Voting Act on Black and White Voter Registration in the South*, in *QUIET REVOLUTION IN THE SOUTH* 351, 368 (Chandler Davidson & Bernard Grofman eds., 1994).

3. The figures compiled annually by the Voter Education Project in Atlanta are widely accepted as accurate, although differences arise because of varying judgments as to appointive as against elective offices.

## I. FROM INCREASED REPRESENTATION TO FAIRNESS IN OUTCOMES

Professor Guinier's book is a contribution to a large body of literature, both legal and political, concerned with this history. In its most significant parts<sup>4</sup> it is derived from her litigation experience, and is devoted to the problems she sees as a residue, or at least an unsolved problem, of political racism, left over from the successes in overcoming racial obstacles in registration and in electing black officials through the creation of majority-minority districts. She herself has been a major force in all important voting rights litigation since the mid-1970s, but she has also become a distinguished member of the law school academy.<sup>5</sup> The crucial chapters of her book are written in the legal academic tradition; they generalize from particular situations and categorize doctrinal fall-outs. They are therefore hard work, not because they are densely or badly written (they are very clearly written and organized, despite their reputation at the time of the debate over Guinier's nomination to the Civil Rights Division), but because they deal with important, complex and somewhat novel subject matter. It was Guinier's efforts to think through on paper possible solutions to the important residual problem she sees in voting rights law—which, in brief, is that the election of black officials does not necessarily lead to an effective or fair degree of black political power—that led to her political problems, and President Clinton's withdrawal of her nomination.<sup>6</sup>

In evaluating Guinier's work, it is critical, I believe, to articulate as precisely as possible her goal. It is not simply to increase the number of black elected officials, although that would certainly be one result of her system of cumulative voting. In fact, much of her thesis is devoted to demonstrating the inutility, at least on the local level, of rearranging district-based representation by the creation of majority-minority districts. It is that criticism of the focus on the election of black officials *simpliciter* that leads to her much-disparaged discussion of "authentic" black representation.

Rather, her goal, though described in various ways throughout the book, is to achieve, in specific contexts, "the civil rights movement's transformative vision of politics," which was "to ensure fairness in the competition for favorable policy outcomes, not just fairness in the struggle for a seat at the

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4. There is a forward by Professor Stephen L. Carter of Yale Law School, and Professor Guinier has brought the book up to date with an essay (chapter one) on her nomination to the Civil Rights Division, and its withdrawal under fire. There is also added a review of sorts of a book by former Solicitor General Charles Fried (chapter six), with whom Guinier has had continuing disagreements.

5. Between 1977 and 1981 Lani Guinier served as Special Assistant to Assistant Attorney General for the Civil Rights Division Drew S. Days III. From 1981 until 1988, she was assistant counsel at the NAACP Legal Defense and Educational Fund. She is currently professor of law at the University of Pennsylvania.

6. See, e.g., Neil A. Lewis, *Clinton Abandons His Nominee for Rights Post Amid Opposition*, N.Y. TIMES, June 4, 1993 at A1.

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bargaining table.”<sup>7</sup> Stated broadly, I suppose this goal could be said to characterize one aspiration of political democracy, so that any suggestion by Guinier as to how to achieve it would be bound to run into trouble. But she clearly does not mean to reach as far as her formulation suggests; earlier in the same essay, she speaks of the “real goal of the civil rights movement, which was to alter the material condition of the lives of America’s subjugated minorities.”<sup>8</sup> Elsewhere, she refers to “the proportionality principle,” based in turn on “the principle of political fairness or political legitimacy,”<sup>9</sup> and the failure of the election of black officials through majority-minority districts “to produce real empowerment gains for statutorily protected minorities.”<sup>10</sup> Lest any of these formulations imply too grandiose a vision, I should stress two caveats. The first is that her analysis is premised throughout on a perception of racial polarization in voting and political outcomes that I believe to be firmly grounded in fact and experience. Second, from time to time, and perhaps when she is most conscious of being characterized as “out of the mainstream,” Guinier limits her remedial suggestions—cumulative voting and minority veto of some sort—to court-ordered alternative ways of handling especially recalcitrant political bodies, or situations where redistricting plainly would not work. Thus viewed, her suggestions are far from radical, just imaginative; it is only when viewed broadly, as applicable not only to the specific contexts suggested by Guinier but also to the political system generally, and to minority groups (e.g., the Christian Coalition) which do not have the history or status of African-Americans, that they become quite vulnerable.

### II. PROPORTIONAL REPRESENTATION

The notion of some form of proportional representation, whether accomplished through the Guinier model of cumulative voting<sup>11</sup> or otherwise, has clear advantages as an alternative remedy in voting rights litigation. It has the potential to achieve black representation, or at least black-chosen representation, in jurisdictions where there is a large black minority, scattered in such a way as to make the creation of a majority-minority district difficult or even

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7. LANI GUINIER, *THE TYRANNY OF THE MAJORITY* 69 (1994).

8. *Id.* at 54.

9. *Id.* at 92.

10. *Id.* at 117.

11. Guinier calls her version an “interest representation approach,” and describes it carefully and mathematically:

For example, in the jurisdiction of 1,000 voters, 250 of whom are black, a modified at-large plan would use a threshold of exclusion of 1/11th based on the formula of one divided by one plus the number of open seats plus one. This means that 1/11th of the voters could not be denied representation. The threshold of exclusion would work out to be 91 voters (91 is 1/11th of 1,000 plus 1). Here, there are 250 black voters. Blacks are more than 2/11, but just short of 3/11th, of the population.

*Id.* at 96-97.

impossible. It preserves the at-large representational system so that black elected officials also formally represent the whites in the jurisdiction, and the white officials do so for the blacks. It avoids the dreadful dilemma created by the Supreme Court's obscure 1993 decision in *Shaw v. Reno*,<sup>12</sup> where the Court cast doubt on efforts to comply with the 1982 amendments to the Voting Rights Act by the drawing of majority-minority congressional districts looking so "bizarre" to the Court's majority as to be possibly barred by the Equal Protection Clause.<sup>13</sup> And it has an inclusionary feel to it, that we are all one people, as compared with the separatist thrust of minority-dominated districting. For example, it would deal in concept with the problems of two minorities (e.g., Latino and black) in one area.

Such advantages are powerfully presented by Guinier in chapter four, which is evocatively entitled "No Two Seats," from Fannie Lou Hammer's dramatic speech on behalf of the Mississippi Freedom Democratic Party at the 1964 Democratic Convention in Atlantic City.<sup>14</sup> In the academic tradition, Guinier creates a phrase to describe what she has in mind, and then uses it repeatedly to make its content her own. The phrase is "interest representation,"<sup>15</sup> used to achieve "the principle of political fairness or political legitimacy"<sup>16</sup> as a means to "the right to fair representation"<sup>17</sup> by ensuring minority populations "a meaningful voice in government."<sup>18</sup> All this is presented as remedial under the Voting Rights Act and therefore applicable to jurisdictions found to have violated Section 2 of the Act, and possibly also those filing under Section 5.

The core difficulty is this: Guinier is concerned at bottom with political outcomes, or at the very least a potential for political outcomes, which fit the black political agenda. (The specific content of that agenda is undefined in the book, and appears to be taken for granted, except insofar as the second and sixth chapters—neither a central element in Guinier's substantive scheme—constitute an attack on the legal policies of the Reagan Administration.) The key adjective in her account of "interest representation" is the word "meaningful." Yet the idea of cumulative voting, or proportional representation, is to achieve the election of black-constituency representatives—something also accomplished by majority-minority districting, and something not leading

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12. *Shaw v. Reno*, 113 S. Ct. 2816 (1993). Litigation about the meaning of this decision is going on in North Carolina, Georgia, and Louisiana, and perhaps other places, with the issue in Louisiana apparently in the lead for consideration by the Supreme Court.

13. U.S. CONST. amend. XIV, §2.

14. See GUINIER, *supra* note 7, at 71 n. 5.

15. *Id.* at 94.

16. *Id.* at 92.

17. *Id.*

18. *Id.* at 9.

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to fair proportional political power in Guinier's experience, that is at least in "extreme cases of racial discrimination at the local level."<sup>19</sup>

Guinier, of course, realizes this. The body of her work, starting with the title of the book, reflects her perception (based on her voting rights litigation work) that the election of black officials—whether through majority-minority distrusting or cumulative voting—does not automatically or even normally, given the persistence of racial polarization, result in a "fair" degree of political power.<sup>20</sup> Hence she is led inexorably to the two notions that I believe caused her the greatest political trouble in 1993, and led to the withdrawal of her nomination as Assistant Attorney General for the Civil Rights Division. One is that there exist such politicians as "unauthentic" black representatives.<sup>21</sup> The other is that voting rules *within the legislative body* may well themselves require modification, a notion that in some forms leads to the concept of a minority veto,<sup>22</sup> to counter what Guinier calls the "collective decisionmaking component of vote dilution."<sup>23</sup>

### III. THE UNDERLYING BASIS FOR A MINORITY VETO

The policy basis which Guinier relies on for the idea of a minority veto is stated at one point as follows:

1. That each group has a right to have its *interests* represented, and
2. That each group has a right to have its interests satisfied a fair proportion of the time.<sup>24</sup>

In an endnote to these propositions, she says: "In a subsequent Article, I intend to argue that political equality also contains a political justice component that could be summarized as '3. Everyone has a right to have basic interests acted upon.'"<sup>25</sup> Although this is all put in the context of jurisdictions found to have violated the Voting Rights Act, and is therefore contextually limited to racial (black) groups, it is not so qualified in terms, and it is difficult to see how a court, or anyone, could devise a model of minority veto (one example she uses is jury deliberations)<sup>26</sup> which applied only to African-Americans.

There is an important statutory limitation here under the Voting Rights Act, which is the decision of the Supreme Court in *Presley v. Etowah County Commission*,<sup>27</sup> holding that a change in the voting rules used by a local county commission after the election of black members did not violate the statute.

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19. *Id.* at 109.

20. *See id.* at 103.

21. *See id.* at 55-56.

22. *See id.* at 8, 101.

23. *Id.* at 105.

24. *Id.* at 104.

25. *Id.* at 258 n.107.

26. *Id.* at 107.

27. *Presley v. Etowah County Comm'n*, 502 U.S. 491 (1992).

That case held that neither Section 2 nor Section 5 covers transfers of authority in the jobs of elected officials, even though the transfers in question subtracted authority from the portfolios of recently elected black officials who had been able to be elected only as a result of litigation under the Act. Guinier, and I believe others, refer to this decision as one of the "third-generation" cases arising under the Act.<sup>28</sup> It seems likely that no court would order relief affecting the power (as against the election) of black officials after the *Presley* decision without a further amendment to the Act.<sup>29</sup>

In any event, unlike proportional representation systems, which seem conceptually fair to everyone, and which work in practice in at least some places,<sup>30</sup> minority veto rules imposed by the judiciary would be certain to be perceived as grossly unfair, and operationally paralyzing, by many people. Such systems are, of course, far from unknown in political practice. The rules of the Senate, for instance, provide the minority with a veto. Indeed, the Voting Rights Act itself was passed only after the required two-thirds vote in the Senate imposed cloture and thereby defeated an attempt of the minority to impose a veto by filibuster. Nevertheless, this part of Guinier's thesis seems to me to be the most vulnerable to the charge that she has not sufficiently developed her analysis of possible unintended consequences, in terms of actually realizing any black agenda over even minority opposition, as well as in other ways. The difficulty is, of course, that minority veto rules would enable a minority of officials in hostile opposition to a black political agenda to block all legislation relevant to that agenda, even as they at the same time empowered a black minority to block all legislation aimed the other way. On the other hand it seems inconceivable, at least to me, that a court would order, or a political jurisdiction would consent to, minority veto rules that empowered only black officials, even if limited to legislation on the black political agenda, if indeed that could be defined.

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28. GUINIER, *supra* note 7, at 8.

29. Such an amendment, entitled the Voting Rights Extension Act of 1993, was indeed introduced (but not passed) in the 103d Congress. It would have amended Sections 2 and 5 of the Voting Rights Act to cover transfers of authority that offset the authority of elected officials. The potential for success of a similar bill in the 104th Congress appear to me to be slight.

30. There is a proportional representation system, known as the "single, transferable vote" system, currently in practice in Cambridge, Massachusetts. I am informed that it was also widely used in other American cities early in the 20th Century, and is now used in community board elections in New York City. See Matthew Hoffman, *Of Many Colors: Remedying Multi-Ethnic Vote Dilution in the Wake of Shaw v. Reno* (1993) (unpublished paper, on file with author). For published materials, see Leon Weaver, *The Rise, Decline, and Resurrection of Proportional Representation in the United States*, in ELECTORAL LAWS AND THEIR POLITICAL CONSEQUENCES 139 (Bernard Grofman & Arend Lijphart eds., 1986); Dana R. Carstarphen, *The Single Transferable Vote*, 9 YALE L. & POL'Y REV. 405 (1991); Richard L. Engstrom, *The Single Transferable Vote*, 27 U.S.F. L. REV. 781 (1993).

#### IV. CONCLUSION

Professor Guinier's book is more of a political event than a publishing event, since the substance of it had been published before, and widely discussed (if not read) in connection with her nomination to the Civil Rights Division. The notion of some form of proportional representation as a road to fair black political participation under the Voting Rights Act had been quite explicitly rejected by Congress at the time of the 1982 amendments to the Act, and so was at least perceived to be unacceptable in 1993 (although I think it will be seen on a local basis, as an alternative to majority-minority districting, in scattered litigation, which is really the core of Guinier's suggestion). The notion of minority vetoes raised in 1993 an even greater political uproar, and to me create, in addition, the law-based reservations outlined above. As the law presently exists, creating such a veto would require an amendment to the Act. Such an amendment has already been rejected even for jurisdictions found to be in violation of the Act.

