

analysis can hardly be taken as a reason for opposition. It is difficult to discern, within the bounds of reasonable disagreement, the basis for the conclusion that Guinier is a dangerous radical. Certainly there are legal scholars who do believe in a racial spoils system, who are certain that the right quota will solve almost any problem, who insist that those who disagree with their views are betraying the race, and these are dangerous views, but to place among them Lani Guinier, who has often been their critic, is something of a cruel joke.

Lani Guinier, in short, was badly treated, and the decision to withdraw her nomination was, as President Clinton himself has acknowledged, the low moment of his first year in office. She is a tough, experienced civil rights litigator, with a deep firsthand knowledge of both the theory and practice of her art. She might have been the finest head the Civil Rights Division has ever had. But because of our national fascination with sound bites and demonization and our national discomfort with the brute facts of racial injustice, America has been denied her services.

Of course, your reading of her work might be different from mine, which is why it is well that this book is available. Even if, as some conservatives insisted, the assault on Guinier was "payback" for the liberal attacks (some said smears) on Clarence Thomas, Robert Bork, or even William Bradford Reynolds, there was an important distinction: Each one of them had a hearing. Not having received that courtesy, Lani Guinier has produced this book.

Failed nominees have a history of shooting themselves in the proverbial foot. After the Senate rejected John Rutledge's 1795 nomination as Chief Justice, he attempted suicide, thus helping out those who had tried to ruin him with rumors of insanity. And many a defeated aspirant to appointive office has turned bitter and partisan, as though the post in question was an entitlement, cruelly snatched at the last minute.

In offering a collection of her essays, Lani Guinier has chosen a wiser path. The debate, after all, was about her written record. It is high time, then, for the record to be available for all to view. Let readers make up their own minds, without the intercession of media experts and electronic sound bites. After all, in the words of the Sanza Player in Aimé Césaire's play, *A Season in the Congo*, "Even when a man has good eyes, you have to show him some things."

STEPHEN L. CARTER

The Tyranny of the Majority

I have always wanted to be a civil rights lawyer. This lifelong ambition is based on a deep-seated commitment to democratic fair play—to playing by the rules as long as the rules are fair. When the rules seem unfair, I have worked to change them, not subvert them. When I was eight years old, I was a Brownie. I was especially proud of my uniform, which represented a commitment to good citizenship and good deeds. But one day, when my Brownie group staged a hatmaking contest, I realized that uniforms are only as honorable as the people who wear them. The contest was rigged. The winner was assisted by her milliner mother, who actually made the winning entry in full view of all the participants. At the time, I was too young to be able to change the rules, but I was old enough to resign, which I promptly did.

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. The central theme of my academic writing is that not all rules lead to elemental fair play. Some even commonplace rules work against it.

The professional milliner competing with amateur Brownies stands as an example of rules that are patently rigged or patently subverted. Yet, sometimes, even when rules are perfectly fair in form, they serve in practice to exclude particular groups from meaningful participation. When they do not encourage everyone to play, or when, over the long haul, they do not make the losers feel as good about the outcomes as the winners,

they can seem as unfair as the milliner who makes the winning hat for her daughter.

Sometimes, too, we construct rules that force us to be divided into winners and losers when we might have otherwise joined together. This idea was cogently expressed by my son, Nikolas, when he was four years old, far exceeding the thoughtfulness of his mother when she was an eight-year-old Brownie. While I was writing one of my law journal articles, Nikolas and I had a conversation about voting prompted by a *Sesame Street Magazine* exercise. The magazine pictured six children: four children had raised their hands because they wanted to play tag; two had their hands down because they wanted to play hide-and-seek. The magazine asked its readers to count the number of children whose hands were raised and then decide what game the children would play.

Nikolas quite realistically replied, "They will play both. First they will play tag. Then they will play hide-and-seek." Despite the magazine's "rules," he was right. To children, it is natural to take turns. The winner may get to play first or more often, but even the "loser" gets something. His was a positive-sum solution that many adult rule-makers ignore.

The traditional answer to the magazine's problem would have been a zero-sum solution: "The children—all the children—will play tag, and only tag." As a zero-sum solution, everything is seen in terms of "I win; you lose." The conventional answer relies on winner-take-all majority rule, in which the tag players, as the majority, win the right to decide for all the children what game to play. The hide-and-seek preference becomes irrelevant. The numerically more powerful majority choice simply subsumes minority preferences.

In the conventional case, the majority that rules gains all the power and the minority that loses gets none. For example, two years ago Brother Rice High School in Chicago held two senior proms. It was not planned that way. The prom committee at Brother Rice, a boys' Catholic high school, expected just one prom when it hired a disc jockey, picked a rock band, and selected music for the prom by consulting student preferences. Each senior was asked to list his three favorite songs, and the band would play the songs that appeared most frequently on the lists.

Seems attractively democratic. But Brother Rice is predominantly white, and the prom committee was all white. That's how they got two proms. The black seniors at Brother Rice felt so shut out by the "democratic process" that they organized their own prom. As one black student put it: "For every vote we had, there were eight votes for what they

wanted. . . . [W]ith us being in the minority we're always outvoted. It's as if we don't count."

Some embittered white seniors saw things differently. They complained that the black students should have gone along with the majority: "The majority makes a decision. That's the way it works."

In a way, both groups were right. From the white students' perspective, this was ordinary decisionmaking. To the black students, majority rule sent the message: "we don't count" is the "way it works" for minorities. In a racially divided society, majority rule may be perceived as majority tyranny.

That is a large claim, and I do not rest my case for it solely on the actions of the prom committee in one Chicago high school. To expand the range of the argument, I first consider the ideal of majority rule itself, particularly as reflected in the writings of James Madison and other founding members of our Republic. These early democrats explored the relationship between majority rule and democracy. James Madison warned, "If a majority be united by a common interest, the rights of the minority will be insecure." The tyranny of the majority, according to Madison, requires safeguards to protect "one part of the society against the injustice of the other part."

For Madison, majority tyranny represented the great danger to our early constitutional democracy. Although the American revolution was fought against the tyranny of the British monarch, it soon became clear that there was another tyranny to be avoided. The accumulations of all powers in the same hands, Madison warned, "whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."

As another colonist suggested in papers published in Philadelphia, "We have been so long habituated to a jealousy of tyranny from monarchy and aristocracy, that we have yet to learn the dangers of it from democracy." Despotism had to be opposed "whether it came from Kings, Lords or the people."

The debate about majority tyranny reflected Madison's concern that the majority may not represent the whole. In a homogeneous society, the interest of the majority would likely be that of the minority also. But in a heterogeneous community, the majority may not represent all competing interests. The majority is likely to be self-interested and ignorant or indifferent to the concerns of the minority. In such case, Madison observed, the assumption that the majority represents the minority is "altogether fictitious."

Yet even a self-interested majority can govern fairly if it cooperates with

the minority. One reason for such cooperation is that the self-interested majority values the principle of reciprocity. The self-interested majority worries that the minority may attract defectors from the majority and become the next governing majority. The Golden Rule principle of reciprocity functions to check the tendency of a self-interested majority to act tyrannically.

So the argument for the majority principle connects it with the value of reciprocity: You cooperate when you lose in part because members of the current majority will cooperate when they lose. The conventional case for the fairness of majority rule is that it is not really the rule of a fixed group—The Majority—on all issues; instead it is the rule of shifting majorities, as the losers at one time or on one issue join with others and become part of the governing coalition at another time or on another issue. The result will be a fair system of mutually beneficial cooperation. I call a majority that rules but does not dominate a Madisonian Majority.

The problem of majority tyranny arises, however, when the self-interested majority does not need to worry about defectors. When the majority is fixed and permanent, there are no checks on its ability to be overbearing. A majority that does not worry about defectors is a majority with total power.

In such a case, Madison's concern about majority tyranny arises. In a heterogeneous community, any faction with total power might subject "the minority to the caprice and arbitrary decisions of the majority, who instead of consulting the interest of the whole community collectively, attend sometimes to partial and local advantages."

"What remedy can be found in a republican Government, where the majority must ultimately decide," argued Madison, but to ensure "that no one common interest or passion will be likely to unite a majority of the whole number in an unjust pursuit." The answer was to disaggregate the majority to ensure checks and balances or fluid, rotating interests. The minority needed protection against an overbearing majority, so that "a common sentiment is less likely to be felt, and the requisite concert less likely to be formed, by a majority of the whole."

Political struggles would not be simply a contest between rulers and people; the political struggles would be among the people themselves. The work of government was not to transcend different interests but to reconcile them. In an ideal democracy, the people would rule, but the minorities would also be protected against the power of majorities. Again, where the rules of decisionmaking protect the minority, the Madisonian Majority rules without dominating.

But if a group is unfairly treated, for example, when it forms a racial minority, *and* if the problems of unfairness are not cured by conventional assumptions about majority rule, then what is to be done? The answer is that we may need an *alternative* to winner-take-all majoritarianism. In this book, a collection of my law review articles, I describe the alternative, which, with Nikolas's help, I now call the "principle of taking turns." In a racially divided society, this principle does better than simple majority rule if it accommodates the values of self-government, fairness, deliberation, compromise, and consensus that lie at the heart of the democratic ideal.

In my legal writing, I follow the caveat of James Madison and other early American democrats. I explore decisionmaking rules that might work in a multi-racial society to ensure that majority rule does not become majority tyranny. I pursue voting systems that might disaggregate The Majority so that it does not exercise power unfairly or tyrannically. I aspire to a more cooperative political style of decisionmaking to enable all of the students at Brother Rice to feel comfortable attending the same prom. In looking to create Madisonian Majorities, I pursue a positive-sum, taking-turns solution.

Structuring decisionmaking to allow the minority "a turn" may be necessary to restore the reciprocity ideal when a fixed majority refuses to cooperate with the minority. If the fixed majority loses its incentive to follow the Golden Rule principle of shifting majorities, the minority never gets to take a turn. Giving the minority a turn does not mean the minority gets to rule; what it does mean is that the minority gets to influence decisionmaking and the majority rules more legitimately.

Instead of automatically rewarding the preferences of the monolithic majority, a taking-turns approach anticipates that the majority rules, but is not overbearing. Because those with 51 percent of the votes are not assured 100 percent of the power, the majority cooperates with, or at least does not tyrannize, the minority.

The sports analogy of "I win; you lose" competition within a political hierarchy makes sense when only one team can win; Nikolas's intuition that it is often possible to take turns suggests an alternative approach. Take family decisionmaking, for example. It utilizes a taking-turns approach. When parents sit around the kitchen table deciding on a vacation destination or activities for a rainy day, often they do not simply rely on a show of hands, especially if that means that the older children always prevail or if affinity groups among the children (those who prefer movies to video games, or those who prefer baseball to playing cards) never get to play their activity of choice. Instead of allowing the majority simply to rule, the

parents may propose that everyone take turns, going to the movies one night and playing video games the next. Or as Nikolas proposes, they might do both on a given night.

Taking turns attempts to build consensus while recognizing political or social differences, and it encourages everyone to play. The taking-turns approach gives those with the most support more turns, but it also legitimates the outcome from each individual's perspective, including those whose views are shared only by a minority.

In the end, I do not believe that democracy should encourage rule by the powerful—even a powerful majority. Instead, the ideal of democracy promises a fair discussion among self-defined equals about how to achieve our common aspirations. To redeem that promise, we need to put the idea of taking turns and disaggregating the majority at the center of our conception of representation. Particularly as we move into the twenty-first century as a more highly diversified citizenry, it is essential that we consider the ways in which voting and representational systems succeed or fail at encouraging Madisonian Majorities.

To use Nikolas's terminology, "it is no fair" if a fixed, tyrannical majority excludes or alienates the minority. It is no fair if a fixed, tyrannical majority monopolizes all the power all the time. It is no fair if we engage in the periodic ritual of elections, but only the permanent majority gets to choose who is elected. Where we have tyranny by The Majority, we do not have genuine democracy.

My life's work, with the essential assistance of people like Nikolas, has been to try to find the rules that can best bring us together as a democratic society. Some of my ideas about democratic fair play were grossly mischaracterized in the controversy over my nomination to be Assistant Attorney General for Civil Rights. Trying to find rules to encourage fundamental fairness inevitably raises the question posed by Harvard Professor Randall Kennedy in a summary of this controversy: "What is required to create political institutions that address the needs and aspirations of all Americans, not simply whites, who have long enjoyed racial privilege, but people of color who have long suffered racial exclusion from policymaking forums?" My answer, as Professor Kennedy suggests, varies by situation. But I have a predisposition, reflected in my son's yearning for a positive-sum solution, to seek an integrated body politic in which all perspectives are represented and in which all people work together to find common ground. I advocate empowering voters and their representatives in ways that give even minority voters a chance to influence legislative outcomes.

But those in the majority do not lose; they simply learn to take turns. This is a positive-sum solution that allows all voters to feel that they participate meaningfully in the decisionmaking process. This is a positive-sum solution that makes legislative outcomes more legitimate.

My work did not arise in a vacuum. Lost in the controversy over my nomination was the long history of those before me who have sought to change the rules in order to improve the system. There have been three generations of attempts to curb tyrannical majorities. The first generation focused directly on access to the ballot on the assumption that the right to vote by itself is "preservative of all other rights." During the civil rights movement, aggrieved citizens asserted that "tyrannical majorities" in various locales were ganging up to deny black voters access to the voting booth.

The 1965 Voting Rights Act and its amendments forcefully addressed this problem. The act outlawed literacy tests, brought federal registrars to troubled districts to ensure safe access to polls, and targeted for federal administrative review many local registration procedures. Success under the act was immediate and impressive. The number of blacks registered to vote rose dramatically within five years after passage.

The second generation of voting rights litigation and legislation focused on the Southern response to increased black registration. Southern states and local subdivisions responded to blacks in the electorate by switching the way elections were conducted to ensure that newly voting blacks could not wield any influence. By changing, for example, from neighborhood-based districts to jurisdiction-wide at-large representatives, those in power ensured that although blacks could vote, and even run for office, they could not win. At-large elections allowed a unified white bloc to control all the elected positions. As little as 51 percent of the population could decide 100 percent of the elections, and the black minority was permanently excluded from meaningful participation.

In response, the second generation of civil rights activism focused on "qualitative vote dilution." Although everyone had a vote, it was apparent that some people's votes were qualitatively less important than others. The concerns raised by the second generation of civil rights activists led Congress to amend the Voting Rights Act. In 1982, congressional concern openly shifted from simply getting blacks the ability to register and vote to providing blacks a realistic opportunity to elect candidates of their choice. Thus, the new focus was on electing more black officials, primarily through the elimination of at-large districts, and their replacement by majority-black single-member districts. Even if whites continued to

refuse to vote for blacks, there would be a few districts in which whites were in the minority and powerless to veto black candidates. The distinctive group interests of the black community, which Congress found had been ignored in the at-large, racially polarized elections, were thus given a voice within decisionmaking councils.

The second generation sought to integrate physically the body politic. It was assumed that disaggregating the winner-take-all at-large majority would create political access for black voters, who would use that access to elect black representatives.

In many places, second-generation fights continue today. A number of redistricting schemes have been challenged in court, and not all courts agree on the outcomes, let alone the enterprise itself. Nevertheless, few disagree that blacks continue to be underrepresented in federal, state, and local government.

Even in governments in which minority legislators have increased, the marginalization of minority group interests has often stubbornly remained. Third-generation cases have now begun to respond. Third-generation cases recognize that it is sometimes not enough simply to ensure that minorities have a fair opportunity to elect someone to a legislative body. 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.

The Supreme Court's recent decision in *Presley v. Etowah County* heralds the arrival of this concern. Although black representatives for the first time since Reconstruction enjoyed a seat on the local county commission in Etowah and Russell counties in Alabama, they did not enjoy much else. Because of second-generation redistricting, black county commissioners were elected to county governing bodies in the two counties. Immediately upon their election, however, the white incumbents changed the rules for allocating decisionmaking authority. Just like the grandfather clauses, the literacy tests, the white primary, and other ingenious strategies devised to enforce white supremacy in the past, rules were changed to evade the reach of the earlier federal court decree.

In one county the newly integrated commission's duties were shifted to an appointed administrator. In the other county, its duties were shifted from individual commissioners to the entire commission voting by majority rule. Because voting on the commission, like voting in the county electorate, followed racial lines, "majority rule" meant that whites controlled the outcome of every legislative decision. The incumbents defended this power grab as simply the decision of a bona-fide majority.

This happened as well in Texas when the first Latina was elected to a local school board. The white majority suddenly decided that two votes were henceforth necessary to get an item on the agenda. In Louisiana, the legislature enacted a districting plan drawn up by a group of whites in a secret meeting in the subbasement of the state capitol, a meeting from which all black legislators were excluded.

Through these three generations of problems and remedies, a long trail of activists has preceded me. In 1964, ballot access was defended eloquently by Dr. Martin Luther King, Jr., and Fannie Lou Hamer. In 1982, redistricting was the consensus solution to electoral exclusion championed by the NAACP, the League of Women Voters, the Mexican-American Legal Defense Fund, and many others.

My ideas follow in this tradition. They are not undemocratic or out of the mainstream. Between 1969 and 1993, the Justice Department under both Democratic and Republican presidents disapproved as discriminatory over one hundred sets of voting rules involving changes to majority voting. None of these rules was unfair in the abstract, but all were exclusionary in practice. President Bush's chief civil rights enforcer declared some of them to be "electoral steroids for white candidates" because they manipulated the election system to ensure that only white candidates won.

This history of struggle against tyrannical majorities enlightens us to the dangers of winner-take-all collective decisionmaking. Majority rule, which presents an efficient opportunity for determining the public good, suffers when it is not constrained by the need to bargain with minority interests. When majorities are fixed, the minority lacks any mechanism for holding the majority to account or even to listen. Nor does such majority rule promote deliberation or consensus. The permanent majority simply has its way, without reaching out to or convincing anyone else.

Any form of less-than-unanimous voting introduces the danger that some group will be in the minority and the larger group will exploit the numerically smaller group. This is especially problematic to defeated groups that do not possess a veto over proposals and acts that directly affect them or implicate concerns they value intensely. Thus, the potential for instability exists when any significant group of people ends up as permanent losers.

The fundamentally important question of political stability is how to induce losers to continue to play the game. 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. When the minority

experiences the alienation of complete and consistent defeat, they lack incentive to respect laws passed by the majority over their opposition.

As Tocqueville recognized, "[T]he power to do everything, which I should refuse to one of my equals, I will never grant to any number of them." Or as Hamilton put it, when the many are given all the power, "they will oppress the few." The problem is that majoritarian systems do not necessarily create winners who share in power. Politics becomes a battle for total victory rather than a method of governing open to all significant groups.

This is what happened in Phillips County, Arkansas, where a majority-vote runoff requirement unfairly rewarded the preferences of a white bloc-voting majority and, for more than half a century, excluded a permanent voting minority. Predominantly rural and poor, Phillips County has a history of extremely polarized voting: Whites vote exclusively for white candidates and blacks vote for black candidates whenever they can. In many elections, no white person ever publicly supports or endorses a black candidate. Although qualified, highly regarded black candidates compete, local election rules and the manipulation of those rules by a white bloc have meant that no black person in over a century had been elected to any countywide office when I brought a lawsuit in 1987. Yet blacks were just less than half of the voting-age population.

Reverend Julius McGruder, a black political candidate and a former school board member, testified on the basis of fifteen years of working in elections that "no white candidate or white person has come out and supported [a] black." Black attorney Sam Whitfield won a primary and requested support in the runoff from Kenneth Stoner, a white candidate he had defeated in the first round. In a private conversation, Stoner told Whitfield that he personally thought Whitfield was the better remaining candidate but that he could not support him. As Whitfield recounted the conversation at trial, Stoner said, "He could not support a black man. He lives in this town. He is a farmer. His wife teaches school here and that there is just no way that he could support a black candidate."

Racially polarized voting is only one of the political disadvantages for blacks in Phillips County. Blacks, whose median income is less than three thousand dollars annually, also suffer disproportionately from poverty, which works to impede their effective participation in the political process. For example, 42 percent of blacks have no car or truck, while only 9 percent of the white population are similarly encumbered; and 30 percent of blacks, compared to 11 percent of whites, have no telephone. Thus isolated by poverty, black voters are less able to maneuver around such

obstacles as frequent, last-minute changes in polling places. County officials have moved polling places ten times in as many elections, often without prior notice and sometimes to locations up to twelve to fifteen miles away, over dirt and gravel roads. Moreover, because of the relative scarcity of cars, the lack of public transportation in the county, and the expense of taxis, the election campaigns of black candidates must include a get-out-and-vote kind of funding effort that a poor black community simply cannot afford.

Black candidates who win the first round come up against one particular local election rule—the majority vote runoff law—that doubles the access problem, by requiring people to get to the polls two times within a two-week period. Because this rule combines with local racism, almost half the voters for over a century never enjoyed any opportunity to choose who represents them. As a numerical, stigmatized, and racially isolated minority, blacks regarded the majority vote requirement as simply a tool to "steal the election"—a tool that had the effect of demobilizing black political participation, enhancing polarization rather than fostering debate, and in general excluding black interests from the political process. As Rev. McGruder testified, running twice to win once "*just kill[s] all the momentum, all of the hope, all of the faith, the belief in the system.*" Many voters "really can't understand the situation where you say 'You know, Brother Whitfield won last night' and then come up to a grandma or my uncle, auntie and say 'Hey, you know, we're going to have to run again in the next 10 days and—because we've got a runoff.'"

In fact, between the first and second elections, turnout drops precipitously, so that the so-called majority winner in the runoff may receive fewer votes than the plurality winner in the first primary. In fact, in all three black-white runoff contests in 1986, the white runoff victor's majority occurred only because the number of people who came out to vote in the second primary went down.

Indeed, the district court that heard the challenge in 1988 to the Arkansas law did not dispute the facts: that no black candidate had ever been elected to countywide or state legislative office from Phillips County and that "race has frequently dominated over qualifications and issues" in elections. The court, nonetheless, preferred to stick with this obviously unfair electoral scheme, reasoning that The Majority should prevail even when The Majority is the product of a completely artificial and racially exclusionary runoff system. It is decisions like this one that continue to inspire me to work for a better way.

The court failed to see that the unfairness wrought by winner-take-all

majority rule was inconsistent with democratic fair play in this county. At first blush, the unfairness of 51 percent of the people winning 100 percent of the power may not seem obvious. It certainly seems to be much less than the unfairness of a professional hatmaker's competing against kids. But in some ways it is worse. For example, when voters are drawn into participation by seemingly fair rules, only to discover that the rules systematically work against their interests, they are likely to feel seduced and abandoned. Moreover, those Brownies who made their own hats could at least be assured that others would sympathize with their having been taken advantage of. People who have been systematically victimized by winner-take-all majority rules usually get little sympathy from a society that wrongfully equates majority tyranny with democracy.

As the plaintiffs' evidence demonstrated, this was precisely the situation in Phillips County, where the fairness of the majority requirement was destroyed by extreme racial polarization, the absence of reciprocity, and the artificial majorities created in the runoffs. Judge Richard Arnold put it simply in a related case: Implementation of the majority vote requirement in eastern Arkansas represented a pattern of actions in which "a systematic and deliberate attempt" was made to "close off" avenues of opportunity to blacks in the affected jurisdictions.

In other words, my project has been to return the inquiry to its most authoritative source—the voters themselves. For example, Milagros Robledo, a Latino voter in Philadelphia, is one of many voters who say they are angry, confused and more cynical than ever about the political process. After a recent scandal involving the solicitation of absentee ballots in a hotly contested local election, Mr. Robledo lamented, "After going through this whole thing, I now really know the value of my vote. It means nothing to me, and it means a lot to the politicians." For Mr. Robledo, his community has continuously been shortchanged by elected officials who are more interested in getting elected than in representing the people.

I take my cue from people like Milagros Robledo. I seek to keep their faith that votes should not count more than voters. I struggle to conceptualize the representatives' relationship with voters to make that relationship more dynamic and interactive.

It is in the course of this struggle that I made my much maligned references to "the authenticity assumption." Authenticity is a concept I describe within my general criticism of conventional empowerment strategies. The Voting Rights Act expressly provides that black and Latino voters must be afforded an equal opportunity "to participate in the political process and to elect representatives of their choice." The question is:

which candidates are the representatives of choice of black or Latino voters?

Authenticity subsumes two related but competing views to answer that question. The first version of authenticity seeks information from election results to learn how the voters perceive elected officials. In this view, voting behavior is key. Authentic representatives are simply those truly chosen by the people. The second authenticity assumption is that voters trust elected officials who "look like" or act like the voters themselves. In this view, authenticity refers to a candidate who shares common physical or cultural traits with constituents. In this aspect of authenticity, the nominally cultural becomes political.

Despite the importance of voter choice in assessing minority preferred or minority sponsored candidates, those who support the second authenticity assumption substitute the concept of presumptive or descriptive representativeness in which candidates who look like their constituents are on that basis alone presumed to be representative. In the name of authenticity, these observers have argued that the current voting rights litigation model is effective because it provides blacks or Latinos an opportunity to elect physically black or culturally Latino representatives. This is an understandable position, and I present it as such, but it is not *my* position. Indeed, I term it "a limited empowerment concept."

My preference is for the first view of authenticity, the one that focuses on the voter, not the candidate. In *Thornburg v. Gingles*, a 1986 Supreme Court opinion, Justice William Brennan stressed that it is the "status of the candidate as the chosen representative of a particular racial group, not the race of the candidate, that is important."

This leads to two complementary conclusions that are firmly embedded in the caselaw and the literature. First, white candidates can legitimately represent nonwhite voters if those voters elected them. I state this explicitly in my Michigan Law Review article, reproduced here in chapter 3. And second, the election of a black or Latino candidate or two will not defeat a voting rights lawsuit, especially if those black or Latino elected officials did not receive electoral support from their community. Just because a candidate is black does not mean that he or she is the candidate of choice of the black community.

Borrowing from the language of the statute, I say voters, not politicians, should count. And voters count most when voters can exercise a real choice based on what the candidates think and do rather than what the candidates look like.

As I wrote these law review articles, my thinking evolved. New ideas

emerged and old ones were rejected as I struggled to understand the tyranny of different majorities. But one idea remained constant: I am a democratic idealist, committed to making American politics open to genuine participation by all voters. It is as part of this life-long commitment to democratic fair play that I explore the many dimensions of majority tyranny.

Concern over majority tyranny has typically focused on the need to monitor and constrain the substantive policy outputs of the decisionmaking process. In my articles, however, I look at the *procedural* rules by which preferences are identified and counted. Procedural rules govern the process by which outcomes are decided. They are the rules by which the game is played.

I have been roundly, and falsely, criticized for focusing on outcomes. Outcomes are indeed relevant, but *not* because I seek to advance particular ends, such as whether the children play tag or hide-and-seek, or whether the band at Brother Rice plays rock music or rap. Rather, I look to outcomes as *evidence* of whether all the children—or all the high school seniors—feel that their choice is represented and considered. The purpose is not to guarantee “equal legislative outcomes”; equal opportunity to *influence* legislative outcomes regardless of race is more like it.

For these reasons, I sometimes explore alternatives to simple, winner-take-all majority rule. I do not advocate any one procedural rule as a universal panacea for unfairness. Nor do I propose these remedies primarily as judicial solutions. They can be adopted only in the context of litigation after the court first finds a legal violation.

Outside of litigation, I propose these approaches as political solutions if, depending on the local context, they better approximate the goals of democratic fair play. One such decisionmaking alternative is called cumulative voting, which could give all the students at Brother Rice multiple votes and allow them to distribute their votes in any combination of their choice. If each student could vote for ten songs, the students could plump or aggregate their votes to reflect the intensity of their preferences. They could put ten votes on one song; they could put five votes on two songs. If a tenth of the students opted to “cumulate” or plump all their votes for one song, they would be able to select one of every ten or so songs played at the prom. The black seniors could have done this if they chose to, but so could any other cohesive group of sufficient size. In this way, the songs preferred by a majority would be played most often, but the songs the minority enjoyed would also show up on the play list.

Under cumulative voting, voters get the same number of votes as there

are seats or options to vote for, and they can then distribute their votes in any combination to reflect their preferences. Like-minded voters can vote as a solid bloc or, instead, form strategic, cross-racial coalitions to gain mutual benefits. This system is emphatically not racially based; it allows voters to organize themselves on whatever basis they wish.

Corporations use this system to ensure representation of minority shareholders on corporate boards of directors. Similarly, some local municipal and county governments have adopted cumulative voting to ensure representation of minority voters. Instead of awarding political power to geographic units called districts, cumulative voting allows voters to cast ballots based on what they think rather than where they live.

Cumulative voting is based on the principle of one person—one vote because each voter gets the same total number of votes. Everyone's preferences are counted equally. It is not a particularly radical idea; thirty states either require or permit corporations to use this election system. Cumulative voting is certainly not antidemocratic because it emphasizes the importance of voter choice in selecting public or social policy. And it is neither liberal nor conservative. Both the Reagan and Bush administrations approved cumulative voting schemes pursuant to the Voting Rights Act to protect the rights of racial- and language-minority voters.

But, as in Chilton County, Alabama, which now uses cumulative voting to elect both the school board and the county commission, any politically cohesive group can vote strategically to win representation. Groups of voters win representation depending on the exclusion threshold, meaning the percentage of votes needed to win one seat or have the band play one song. That threshold can be set case by case, jurisdiction by jurisdiction, based on the size of minority groups that make compelling claims for representation.

Normally the exclusion threshold in a head-to-head contest is 50 percent, which means that only groups that can organize a majority can get elected. But if multiple seats (or multiple songs) are considered simultaneously, the exclusion threshold is considerably reduced. For example, in Chilton County, with seven seats elected simultaneously on each governing body, the threshold of exclusion is now one-eighth. Any group with the solid support of one-eighth the voting population cannot be denied representation. This is because any self-identified minority can plump or cumulate all its votes for one candidate. Again, minorities are not defined solely in racial terms.

As it turned out in Chilton County, both blacks and Republicans benefited from this new system. The school board and commission now each

have three white Democrats, three white Republicans, and one black Democrat. Previously, when each seat was decided in a head-to-head contest, the majority not only ruled but monopolized. Only white Democrats were elected at every prior election during this century.

Similarly, if the black and white students at Brother Rice have very different musical taste, cumulative voting permits a positive-sum solution to enable both groups to enjoy one prom. The majority's preferences would be respected in that their songs would be played most often, but the black students could express the intensity of their preferences too. If the black students chose to plump all their votes on a few songs, their minority preferences would be recognized and played. Essentially, cumulative voting structures the band's repertoire to enable the students to take turns.

As a solution that permits voters to self-select their identities, cumulative voting also encourages cross-racial coalition building. No one is locked into a minority identity. Nor is anyone necessarily isolated by the identity they choose. Voters can strengthen their influence by forming coalitions to elect more than one representative or to select a range of music more compatible with the entire student body's preferences.

Women too can use cumulative voting to gain greater representation. Indeed, in other countries with similar, alternative voting systems, women are more likely to be represented in the national legislature. For example, in some Western European democracies, the national legislatures have as many as 37 percent female members compared to a little more than 5 percent in our Congress.

There is a final benefit from cumulative voting. It eliminates gerrymandering. By denying protected incumbents safe seats in gerrymandered districts, cumulative voting might encourage more voter participation. With greater interest-based electoral competition, cumulative voting could promote the political turnover sought by advocates of term limits. In this way, cumulative voting serves many of the same ends as periodic elections or rotation in office, a solution that Madison and others advocated as a means of protecting against permanent majority factions.

A different remedial voting tool, one that I have explored more cautiously, is supermajority voting. It modifies winner-take-all majority rule to require that something more than a bare majority of voters must approve or concur before action is taken. As a uniform decisional rule, a supermajority empowers any numerically small but cohesive group of voters. Like cumulative voting, it is race-neutral. Depending on the issue, different members of the voting body can "veto" impending action.

Supermajority remedies give bargaining power to all numerically infe-

rior or less powerful groups, be they black, female, or Republican. Supermajority rules empower the minority Republicans in the Senate who used the Senate filibuster procedure in the spring of 1993 to "veto" the President's proposed economic stimulus package. The same concept of a minority veto yielded the Great Compromise in which small-population states are equally represented in the Senate.

I have never advocated (or imagined) giving an individual member of a legislative body a personal veto. Moreover, I have discussed these kinds of exceptional remedies as the subject of court-imposed solutions only when there has been a violation of the statute and only when they make sense in the context of a particular case. I discuss supermajority rules as a judicial remedy only in cases where the court finds proof of consistent and deeply engrained polarization. It was never my intent that supermajority requirements should be the norm for all legislative bodies, or that simple majority voting would ever in itself constitute a statutory or constitutional violation.

Both the Reagan and Bush administrations took a similar remedial approach to enforcement of the Voting Rights Act. In fact, it was the Reagan administration that *approved* the use of supermajority rules as a remedial measure in places like Mobile, Alabama, where the special five-out-of-seven supermajority threshold is still in place today and is credited with increasing racial harmony in that community.

But—and here I come directly to the claims of my critics—some apparently fear that remedies for extreme voting abuses, remedies like cumulative voting or the Mobile supermajority, constitute "quotas"—racial preferences to ensure minority rule. While cumulative voting, or a supermajority, is quite conventional in many cases and race neutral, to order it as a remedy apparently opens up possibilities of nonmajoritarianism that many seem to find quite threatening.

Indeed, while my nomination was pending, I was called "antidemocratic" for suggesting that majority voting rules may not fairly resolve conflict when the majority and minority are permanently divided. But alternatives to majority voting rules in a racially polarized environment are too easily dismissed by this label. As Chief Justice Burger wrote for the Supreme Court, "There is nothing in the language of the Constitution, our history, or our cases that requires that a majority always prevail on every issue." In other words, there is *nothing inherent in democracy that requires majority rule*. It is simply a custom that works efficiently when the majority and minority are fluid, are not monolithic, and are not permanent.

Other democracies frequently employ alternatives to winner-take-all

its evaluation of the internal legislative processes, interest representation focuses not on guaranteeing that minorities achieve the substantive results desired, but on adopting voting procedures that enhance the quality of the deliberative process. These voting rules help ensure that minority concerns will not be ignored in the deliberative process and that permanent, homogeneous majorities will not dominate by encouraging coalition-building and consensus decisions, perhaps by linking bills of interest to minorities to bills of interest to the majority.

This chapter is part of an ongoing effort to reconceptualize political equality to ensure effective representation of interests, not just voters or territory. At this stage of its incarnation—and in this political climate—neither my emphasis on fair and effective representation nor its attempted statutory application may persuade judicial actors. Nor should my effort be understood primarily as a litigation tool. Nevertheless, it is my hope that the concept of proportionate interest representation will focus attention on the failure of the current voting rights strategy for achieving political empowerment. Once that realization has been made, I hope that interest representation will be seen as a superior ideal for realizing the statutory norms of political equality and empowerment.

Groups, Representation, and Race Conscious Districting

A Case of the Emperor's Clothes

This essay analyzes the dominant theory of representation in this country in which the unit of representation is geographic rather than political. Geographic constituencies, which are created through the use of single-member districts, are a form of group representation in which common territory is a proxy for common interests. I argue that the representation of racial groups is valid and desirable given our history and our acceptance of group representation in other forms, although, as argued in previous essays, I claim that representation of either groups or individuals is not well accomplished by single-member districting. I also expand my exploration of cumulative voting, arguing that it is not only consistent with one-person, one-vote, but even better, it embodies one-person, one-vote, one-value in a way that districting systems do not. Yet, cumulative voting is not, in itself, the basis for a grand moral theory of representation or even a panacea for across-the-board voting problems. Instead, I use the idea of cumulative voting as a way to explore and define the unfairness and incoherence of indirect representation of geographic constituencies within winner-take-all territorial units. This essay was written in 1992, and first published in 1993.

[N]ow that the first round of reapportionment has been accomplished, there is need to talk "one man-one vote" a little less and to talk a little more of "political equity," and of functional components of effective representation. A mathematically equal vote which is politically worthless because

of gerrymandering or winner-take-all districting is as deceiving as "emperor's clothes."¹

With voices pitched in the high decibel range, critics of race-conscious districting² are blasting the Voting Rights Act and its 1982 amendments. A recent *Wall Street Journal* headline declares that voting is now "rigged by race."³ Ethnic activists, the writer asserts, are collaborating with GOP operatives in an unholy political alliance to herd minorities into their own convoluted urban districts in order to improve GOP prospects in majority white suburban areas. According to such critics, this is a "political one-night stand" made possible by misguided federal courts and Department of Justice officials construing the 1982 Act to create majority minority districts, the newest form of "racial packaging."⁴

My students inform me that Cokie Roberts, as part of ABC News's election night coverage, dramatically illustrated the concerns of critics when she traced on a map of the Chicago area the "earmuff" district, allegedly carved out of two noncontiguous Chicago neighborhoods joined by a narrow rod to maximize the possibility that the Latino residents would be able to elect a representative of their choice to Congress.⁵ And in June 1993, the Supreme Court discovered a new constitutional right enabling white voters in North Carolina to challenge, based on its odd and irregular shapes, a "highway" district that narrowly tracks the path of an interstate, creating a swatch of voters on either side of the highway from one end of the state to the other.⁶ This fifty-four percent black district, the most integrated in the state, elected Melvin Watt, one of the first two blacks elected to Congress from that state in this century.⁷

The Voting Rights Act codified the right of protected minority groups to an equal opportunity to elect candidates of their choice, although its language disclaims the right to racial representation by members of the racial group in direct proportion to population. The critics now claim this is special and unwarranted protection for racial and language minority groups. In the name of liberal individualism, these critics assert that the statute effected a radical transformation in the allocation and nature of representation.⁸

Although race-conscious districting is their apparent target, these critics have fixed their aim on a deeper message—that pressing claims of racial identity and racial disadvantage diminish democracy. We all lose, the theory goes, when some of us identify in racial or ethnic group terms.

In my view, critics of race-conscious districting have misdirected their fire. Their emperor has no clothes. Their dissatisfaction with racial-group

representation ignores the essentially group nature of political participation. In this regard, the critics fail to confront directly the group nature of representation itself, especially in a system of geographic districting. Perhaps unwittingly they also reveal a bias toward the representation of a particular racial group rather than their discomfort with group representation itself.⁹ In a society as deeply cleaved by issues of racial identity as ours, there is no one race. In the presence of such racial differences, a system of representation that fails to provide group representation loses legitimacy.¹⁰

Yet these critics have, in fact, accurately identified a problem with a system of representation based on winner-take-all territorial districts. There is an emperor wearing his clothes, but not as they describe. Rather than expressing a fundamental failure of democratic theory based on group representation *per se*, the critics have identified a problem with one particular solution. It is districting in general—not race-conscious districting in particular—that is the problem.

Winner-take-all territorial districting imperfectly distributes representation based on group attributes and disproportionately rewards those who win the representational lottery. Territorial districting uses an aggregating rule that inevitably groups people by virtue of some set of externally observed characteristics such as geographic proximity or racial identity. In addition, the winner-take-all principle inevitably wastes some votes. The dominant group within the district gets all the power; the votes of supporters of nondominant groups or of disaffected voters within the dominant group are wasted. Their votes lose significance because they are consistently cast for political losers.

The essential unfairness of districting is a result, therefore, of two assumptions: (1) that a majority of voters within a given geographic community can be configured to constitute a "group"; and (2) that incumbent politicians, federal courts, or some other independent set of actors can fairly determine which group to advantage by giving it all the power within the district. When either of these assumptions is not accurate, as is most often the case, the districting is necessarily unfair.

Another effect of these assumptions is gerrymandering, which results from the arbitrary allocation of disproportionate political power to one group.¹¹ 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 win-

ning group's power by allowing it to represent *all* voters in a regional unit.

Given a system of winner-take-all territorial districts and working within the limitations of this particular election method, the courts have sought to achieve political fairness for racial minorities. As a result, there is some truth to the assertion that minority groups, unlike other voters, enjoy a special representational relationship under the Voting Rights Act's 1982 amendments to remedy their continued exclusion from effective political participation in some jurisdictions. But the proper response is not to deny minority voters that protection. The answer should be to extend that special relationship to *all* voters by endorsing the *equal opportunity to vote for a winning candidate* as a universal principle of political fairness.

I use the term "one-vote, one-value" to describe the principle of political fairness that as many votes as possible should count in the election of representatives. Each voter should be able to choose, by the way she casts her votes, who represents her. One-vote, one-value is realized when everyone's vote counts for someone's election. The only system with the potential to realize this principle for *all* voters is one in which the unit of representation is political rather than regional, and the aggregating rule is proportionality rather than winner-take-all. Semiproportional systems, such as cumulative voting, can approximate the one-vote, one-value principle by minimizing the problem of wasted votes.

One-vote, one-value systems transcend the gerrymandering problem because each vote has an equal worth independent of decisions made by those who drew district lines. Votes are allocated based on decisions made by the voters themselves. These systems revive the connection between voting and representation, whether the participant consciously associates with a group of voters or chooses to participate on a fiercely individual basis. Candidates are elected in proportion to the intensity of their political support within the electorate itself rather than as a result of decisions made by incumbent politicians or federal courts once every ten years.¹²

My project in this chapter is to defend the representation of racial groups while reconsidering whether race-conscious districting is the most effective way of representing these groups or their interests.¹³ My claim is that racial-group representation is important, but it is only imperfectly realized through the electoral system based on territorial districting or through the limited concept of racially "descriptive" representation.

In Part I, I describe current doctrinal approaches, such as the jurisprudence of one-person, one-vote, on which some critics of race-conscious districting rely to emphasize the individual rather than the group nature of voting. I suggest that the one-person, one-vote doctrine is consistent

with both group and individual conceptions of voting, but in the context of winner-take-all territorial districting, it is a limited principle of political equality. In Part II, I argue that racial-group representation is a natural response to historical and current reality, but it is one best realized in electoral systems employing proportional or semiproportional aggregating rules. Proportional or semiproportional aggregating rules serve as a proxy for the aspirational concept of procedural or political fairness. In such systems, the unit of representation is political rather than regional, and almost all votes count in the election of officials. In this way, systems such as cumulative voting are consistent with principles of both one-person, one-vote *and* one-vote, one-value.

In contrast to winner-take-all districting systems, cumulative voting may—in appropriate, fact-specific circumstances—be an expedient, and more politically fair, election method. Cumulative voting promotes a concept of racial group identity that is interest-based rather than biological.¹⁴ In light of the controversy surrounding race-conscious districting, where circumstances dictate, it is at least worth considering this alternative, thereby attempting to tailor the emperor with some real clothes by putting the principles of political equality into practice.

I

For many liberal reformers, the one-person, one-vote principle is politically fair because its ideal of universal suffrage incorporates the respect due and the responsibilities owed to each citizen in a democracy. The one-person, one-vote cases attempt to equalize the purely formal opportunity to cast a ballot through a system of population-based apportionment. Under this rationale, each district contains approximately the same number of people; each person within the district has the same opportunity to vote for someone to represent the district; and each district representative represents the same number of constituents.

The one-person, one-vote principle thus assures all voters the right to cast a theoretically equal ballot. In this Part, I argue that this theoretical possibility is unlikely to be realized in an electoral system using winner-take-all districts. I further suggest that neither groups of voters nor individuals are fairly represented under such a system.

There are two issues at stake. One raises the question of whether voting is constitutionally protected because it implicates individual rights. If voting is an individual right, the second question asks whether the one-person, one-vote principles that operate within the confines of geographic

districts adequately protect the right to vote. I concede that voting has garnered its highest constitutional protection when presented as an individual rights issue, but the widespread use of winner-take-all districts undermines the validity of this characterization. The fact that constitutional rules about voting evolved within a system of regional representation suggests that posing the problem as one of individual rather than group rights has been a distraction. I claim that the heavy reliance on one-person, one-vote jurisprudence to develop a theory of democracy fails both as a theory and as an adequate doctrinal protection of either individual or group rights.

A. *One-Person, One-Vote and the Limits of Liberal Individualism*

In this subpart, I examine the assumption that allocation of representatives through winner-take-all districting is a form of representation of individuals. The heart of this assumption is that citizenship is the ultimate reflection of individual dignity and autonomy and that voting is the means for individual citizens to realize this personal and social standing. Under this theory, voters realize the fullest meaning of citizenship by the individual act of voting for representatives who, once elected, participate on the voters' behalf in the process of self-government.¹⁵ Indeed the very terminology employed in the Supreme Court's one-person, one-vote constitutional principle suggests that voting is an individual right.¹⁶ For these reasons, some assume that the right at stake is the individual right to an equally weighted vote or an equally powerful vote.¹⁷

The assumption is that constitutional protection for voting is exclusively about protecting an individual right, not necessarily about ensuring equal voting rights. At first, the connection between the two concepts seems plausible because every citizen has the right to vote and every citizen has the right to an equally weighted vote. But the one-person, one-vote principle of voting is primarily about equal, not individual, representation.¹⁸ Under this equality norm, the right to "fair and effective representation" subsumes concerns about equal voting and equal access. As the Court stated in one of its early reapportionment cases, the principle of equal representation for equal numbers of people is "designed to prevent debasement of voting power and diminution of access to elected representatives."¹⁹ Implicit in this equality norm is the moral proposition that every citizen has the right to equal legislative influence. This means an equal opportunity to influence legislative policy.

The assumption that voting is an individual right is also unnecessary for

the view that voting rights are a means of political empowerment. One-person, one-vote rules emerged in response to claims about population-based malapportionment and about the right of the majority of people to elect a proportionate share of representatives.²⁰ In announcing this principle, the Supreme Court recognized that the growing urban majority of the 1960s would never command its *fair share* of legislative power unless the Court intervened. In conjunction with concern about both a fair share of power and developments in the law of minority vote dilution, the Court also adopted an instrumental view of voting. People would participate when and if they thought their vote mattered. Under this empowerment norm, the primary purpose of voting rights is to empower citizens to participate in the political process.

I take the position that the right of the individual to participate politically is a right best realized in association with other individuals, *i.e.*, as a group.²¹ As Justice Powell recognized, "[t]he concept of 'representation' necessarily applies to groups: groups of voters elect representatives, individual voters do not."²² This is a bottom-up view of representation in which voters are empowered by their collective participation in the process of self-government. Under this view, voters engage in collective action to choose someone to represent their interests within the governing body. The representative is charged with influencing public policy on behalf of constituents' collective interests.

The Court's jurisprudence does not consistently express a bottom-up view of representation within either the equality or the empowerment norms. On occasion, though, the Court implicitly assumes the value of collective participation and influence in opinions that do not articulate the bottom-up view. For example, the Court's decision in *Reynolds v. Sims* granting a fair share of representation to population majorities suggests that by equalizing the number of people for whom each representative is responsible, the election of a single individual can fairly represent what are in essence collective interests. Another example is *Baker v. Carr*, where the plaintiffs' original complaint alleged a systematic plan to "discriminate against a *geographical class* of persons."²³

The bottom-up view of representation is reflected in some of the Court's early language about the importance of having a voice—meaning a public policy vote—in the process of self-government. It also is the basis for the Court's 1986 decision in *Davis v. Bandemer* that political gerrymandering claims are justiciable. In his plurality opinion for the Court in *Davis*, Justice White suggests that the policy decision to represent groups fairly already had been made in the context of racial minorities.²⁴