Guinier's Poetry of Race; or, When Accepting the Reality of Difference Means Conceding Different Realities[*]

by
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Professor Guinier's *Tyranny of the Majority* constitutes a poetic re-statement, beginning with the title itself, of her studied arguments concerning the "political market failure" of American liberal democracy in handling the representation concerns of American blacks. Drawing selectively on extensive scientific resources and a deep history of legislation and litigation, Guinier creates a story of general exclusion, political impotence, and resulting social instability. Moreover, the work provides an unacknowledged attempt to construct an intellectual grounding for the *Carolene* exception.[1] The key argument appears in her first chapter:

> 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?[2]

Where *Carolene* answered Guinier's question with suspension of the "ordinary practices" of majority rule and "protected classes" taken under the special care of the courts, Guinier correctly perceives that this recourse has a value limited to the sympathy of the courts. Accordingly, she seeks for an institutional and permanent solution.

While I will mention Guinier's institutional response, it is my assumption that others will discuss that at least sufficiently to demonstrate that her response fails the test of comprehensiveness, neglecting as it does James Madison's (on whom she putatively relies) first test of democratic government, namely its iron-clad resistance to minority tyranny. What I shall treat at length, therefore, is her foundation argument, the rationale for *Carolene*, and the reasons it appears to me especially fallacious. My argument is that when the intellectual test fails to meet the crucial standard of reasonableness, deductions therefrom cannot responsibly be accorded a serious hearing.

The limited compass of this response can accomplish nothing beyond an informed characterization of her explicit *apologia*. Accordingly, much of her technical argument must remain unexplored. Perhaps it will suffice, however, to observe that her conclusion regarding the effects of replacing local at-large elections with single-district remedies are largely accurate (and have been demonstrated in litigation by substantial expert analysis, including my own). On the other hand, her recommended correctives bear little or no relation to the specific facts adduced in those demonstrations. In the place of the social and political dynamics which originally explained the defects of single-district remedies (and successfully pointed to the correctives called for in *Romero*[3]), Guinier substitutes the false and ideal conception of the "monolithic,"

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[*] Published in *The Good Society* (1995) v. 5, no. 2. A review essay of *The Tyranny of the Majority: Fundamental Fairness in Representative Democracy* by Lani Guinier (New York: Freee Press, 1994).

[1] *United States v. Carolene Products Company,* 304 U.S. 144, 152 n.4 (1938).

[2] "The Tyranny of the Majority," p. 5. This introductory statement is the explicit added element to her previous writings.

[3] "Review of Elections," *Romero et al. v. City of Pomona,* 1985-86; "Pomona's Passion for Perfection: The City's Century Long Charter Story (A Socio-Political Analysis)," *Romero et al. v. City of Pomona,* 1985-86; "Electoral Participation and Voter Registration: Pomona," *Romero et al. v. City of Pomona, 1985-86;* "California Voter Registration Laws," *Romero et al. v. City of Pomona, 1985-86;* "Review of Plaintiffs'

persistently "racist" majority. On this metaphorical ground she elaborates an account of the political significance of race which serves rather to convey personal preoccupations than accurately to describe life for others in the United States.

Justly to discuss Guinier's argument requires paying due heed to her agonistic experience. The publication of these much redacted essays is an immediate response to the rejection, on the specific basis of her ideas as expressed in the original versions of these essays, of her candidacy to become Assistant Attorney General for Civil Rights in the Administration of United States President Clinton. She (and many others) regard her ideas to have been misrepresented and herself to have been treated unjustly (the two charges are mutually interdependent). I have accordingly read this work, and the original essays in the spirit of the jury to which she appeals in this re-publication. For the juror two questions must be answered: first, what did she say and, second, were her arguments fairly represented. Neither of these is a verdict which she can render herself.

To respond to the first question, I summarize her argument in terms of the relevant elements. Then, I specifically assess the differences between the re-publicized versions and the original essays, since the critics addressed the latter rather than the former. On the basis of the conclusions derived from this exercise, we may then respond to the second question. Part I summarizes the arguments. Part II displays some significant textual discrepancies between the two versions of her argument. Part III renders a conclusion based on the analysis in Parts I and II.

I. The "Monolithic Majority" and Madison's Argument for Democracy

The fundamental premises set forth in Guinier's argument are that American "blacks, as a poor and historically oppressed group, are in greater need of government sponsored programs and solicitude,"[4] and that black representation in government in general has been denied by a monolithic, prejudiced majority. Respecting the latter she points out, for example, that "until 1993 there were no blacks in the United States Senate."[5]

These premises are sustained by a series of arguments purporting to demonstrate that, despite the success of the 1965 Voting Rights Act in exponentially increasing the number of

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Redistricting Plans for the City of Pomona," *Romero et al. v. City of Pomona, 1985-86;* "The Charter History of the City of Pomona (A Legal Analysis)," *Romero et al. v. City of Pomona, 1985-86;* "Hispanic Registration in the City of Pomona," *Romero et al. v. City of Pomona, 1985-86;* "Profile of winning Candidates in City of Pomona City Council Elections," *Romero et al. v. City of Pomona, 1985-86;* "Pomona Voter Survey," *Romero et al. v. City of Pomona, 1985-86;* "Successful Candidacies with Reference to Ethnicity and Seriousness," *Romero et al. v. City of Pomona, 1985-86;* "Report on Primary Election Results, March 5, 1985, Using Plaintiffs' District Plans," *Romero et al. v. City of Pomona, 1985-86.*

[4] Chapter two, p. 37.

[5] Thus is Senator Edward W. Brooke, 1967-1979, despatched, perhaps as not "authentically" black, since he served within Guinier's lifetime! Ibid., p. 38; this passage was not included in the original essay, and thus has been deliberately added, upon reflection. Moreover, in the same paragraph, the original version read: "White voters, in general, have been reluctant to support or contribute to black candidates." In the re-published version the sentenced was altered to read, "A majority of white voters, in general, has been reluctant to support or contribute to black candidates." This statement is supported by reference to a sampling result showing "one-third" of white respondents ever having contributed to a black candidate's campaign, but without even hinting at the total number ever contributing to any candidate or the ratio of black candidates to white candidates (i.e., measures of opportunity).

black elected officials, the result has not been an actual improvement in representation of black "interests," and that the absence of "actual" representation for such interests has not been supplemented by effective "virtual" representation. Now, these arguments are as important for what they do not say as for what they do say.

Guinier's claim that the Voting Right's Act is the most successfully implemented piece of civil rights legislation, though false, shows the emphasis she places on the need to recognize American blacks as a specifically protected class. For, despite the success of the Act, the desired results have not been obtained (or at least not fast enough) and remain a burden of the government. By contrast, the "public accommodations" sections of the 1964 Civil Rights Act has clearly been far more successful legislation in terms of near universal and voluntary compliance and raising no further claims for government intervention. Thus, it is the "protected class," *Carolene* argument, which is the real source of Guinier's premises, though she does not investigate the theoretical foundations of that pivotal argument.

Similarly, Guinier's discussion of "actual" versus "virtual" representation misstates the meaning of the latter, taking it to mean representation by someone with the same interests, and who may "look" the same as the constituent, while virtual representation originally referred only to representation by persons for whom one could not formally vote—as in the era of the American Revolution and as remains the case for minors today.

The misstatement is critical, for it informs her later reliance on the argument against virtual representation in order to sustain a claim to procedures that assure legislative "influence" for specifiable minorities.[6] If we stand the argument on its head, we can identify the problem with it. Let us ask just what does "actual representation" give the voter. The answer is not direct access to the representative; not an open draw on the public treasury; and not even a reliable assurance that policy preferences of the voter will be (a) accepted by the representative or (b) approved in the legislature. It seems, then, that "actual representation," on her terms, yields no more than the right to identify with the representative—to say, "I voted for her"—in which light it is hard to imagine why time is wasted on the argument against virtual representation.

Where, in fact, the real point is to secure guarantees of legislative influence (a percentage of deciding votes) for particular views or perspectives rather than for persons, Guinier requires to take up a more rigorous discussion of the *Carolene* assumption, namely that there are identifiable ("discrete and insular") minority views, which cannot survive majority rule practices but which deserve to be enacted as general legislation. That discussion is not, fundamentally, a discussion of representation but a discussion of the need for political authority beyond majority rule and, indeed, beyond democracy.[7]

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[6] *Tyranny*, pp. 130-132.

[7] I have laid out the fundamental argument in my essay, "A New Birth of Freedom: Fulfillment or Derailment," in *Slavery and its Consequences: The Constitution, Equality, and Race*, ed. by Robert A. Goldwin (Lanham, Maryland: American Enterprise Institute [with University Press of America], 1988): "The Court...accepted the perspective of the *Carolene* footnote, in 1938, that 'prejudice against discrete and insular minorities may be a special condition, which tends to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and may call for a correspondingly more searching judicial inquiry.' The *Carolene* Court strongly implied that enhanced judicial scrutiny not only remedied but supplanted the defect of recourse to ordinary political processes...

"What were those ordinary political processes? In general this must be regarded as a reference to the ordinary processes of elections, lobbying, and general participation in the formation of public opinion. In this context, however, the proper expression would be rule by the majority. The Court saw itself as the protector of minority rights against majority intransigence, in a case in which it did not conceive it possible

No one will fail to see that the model against which to measure representative democracy (the Madisonian model) is direct democracy, in which every decision for the community must be made by the community as a whole and following decision rules which all will regard as legitimate. That classical problem begins with recognizing individual (not group) consent to any arrangement—as opposed to "rational individuals" choosing at each instant.

The reason the rational choice of each individual cannot be the foundation of ephemeral legitimacy is quite simply the mathematical impossibility a consequent unanimity rule would impose. Since any question to be decided must nominally presuppose divided opinion about the correct response, it would be rational for any individual to choose "a, b..., or z" of the possibilities. Thus, unanimity could obtain only by means of the concession of rational preferences.

Direct democracy, then, will operate by some rule less than unanimity by necessity. Now, whatever rule less than unanimity may be adopted, if it is direct democracy it will follow that the outcome of each vote is decisive for the question, respecting which some only will exercise the deciding judgment while others will dissent. The dissenters will be no less bound by the judgment, however. Nor can their participation in the decision be denied. Their votes were not wasted. Suppose one's vote were the equivalent of the 52d percentile in whatever system prevailed? Would that vote, in a direct democracy, be wasted? The fact is, every decision rule is

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that the minority could be incorporated directly into the political process and in which it did not conceive of any other possible protection for minorities.

"This is the famous problem set forth in Madison's tenth *Federalist* paper, in which he held that 'if a faction consists of less than a majority, relief is supplied by the republican principle,' namely, majority rule. When a faction is a majority, however, Madison acknowledged a peculiar difficulty, in that the republican form worked against an easy solution. He affirmed, however, that the end, 'the great object in view,' has to be both to 'secure the public good and private rights' and 'at the same time to preserve the spirit and the form of popular government.' Too often Madison is read as offering nothing more than 'interest group liberalism' as the solution to this great difficulty. Not only is that an inadequate reading of the limited remedy offered in *Federalist* 10; it also neglects the fully developed response that Madison offered in No. 51. That is where we find the authoritative account of the relation between the ordinary political processes...and the preservation of minority rights...

"Madison argued that the most important test of the American system would always be its ability to guarantee the freedom of minorities *without* special provisions for their protection. On that basis the optimal condition of freedom would be that degree that would allow the majority to govern without permitting it to abuse the rights of others. Every special protection for minorities, then, would be a further barrier to majority rule. Unfortunately, however, it would amount [also] to establishing a 'will independent of the society' to enforce it. Madison ruled that out as incompatible with republicanism and as the re-establishment of the aristocratic principle. He defended the specific constitutional design, the process, as accomplishing all that was desirable to achieve the end. For a process to bear that much weight calls for conscious attachment on the part of the people. And that is what was provided: to avoid the evil of majority faction while relying on majority rule, through the citizens' conscious attachment to republican principles and processes.

"The founders relied on this conclusion as the active principle of the regime...

"I am aware that there is an objection to this interpretation of the ordinary political processes from which the Court had departed in adjudicating questions of civil rights. As it is usually stated, any proposal to allow fundamental guarantees of civil rights to be enforced by the majority (not intending to eliminate private litigation) would merely be a return to rule by whites in the interest of whites... But the belief that minorities are 'protected' by laws rather than by the opinions of the people is based on a fundamental misunderstanding. The assumption is that every special protection of a minority exists in opposition to the preponderant sentiment of the community. If that were strictly true, however, such laws and programs would not remain in force." pp. 83-84.

winner-take-all within the measure of permitted decisions. Rules define winners; winners choose results. Every loser is in the minority position, even if the decision rules—or constitutional principles—make of a majority of persons a procedural minority regarding deciding power.

Guinier's response to this reality is to insist that no one should lose consistently. To make sense of this, however, we must interpret her to mean, not that, on the issues on which one loses, one should not lose once and for all (in principle), but rather that, on some occasions at least, one should win once and for all (in principle). Having said this, though, one finds in her work no ready means to discern when certain persons should win and others should lose. One might try to insert the pluralist assumption on which she relies, to imply that one should win where one's interests are concerned and one should lose where the interests of others are concerned. That applies, however, to every case, in principle!

Her misstatement of the Madisonian principle explains why she has fallen into this dilemma. Madison, she claims, argues that a majority faction is just as bad as a minority faction, and that, just as means to thwart minority faction are integral to representative democracy, so, too, must means to thwart majority faction be integral to our political procedures and institutions. Thus, Guinier finds it necessary to reject majority rule in the name of defending minority rights. *Federalist* No. 10, however, was explicit: the security against minority faction is majority rule. To qualify majority rule may well strengthen minorities, but only at the expense of weakening this security against tyranny.

Madison was clear that the security against minority faction operated in direct and indirect democracy alike. The reason for indirect, or representative, democracy, accordingly, was to sponsor securities against majority faction. Among these securities, the chief was the multiplicity of sects, interests, etc. Further, specific institutional checks—including a few, but critical, super majority provisions—added to this security. Guinier therefore believes to follow Madison, when she observes that, in the matter of race prejudice, the multiplicity of views does not exist (a "monolithic," "prejudiced," "white majority" rules), and the secondary means are insufficient to check this "tyrannical majority." Besides rendering her own account incoherent, when the question becomes, "To whom does she address her appeal for redress?", Guinier fails to observe the most essential element of Madison's design, namely, the alienation of the people in their collective capacity from direct participation in legislation (i.e., persons, not groups, are represented). Her appeal for the direct, if proportional, representation of interests, would defeat the plan of representation itself and force her to seek her defense on the grounds of direct democracy. In that event, on her premises, there is no principle to which she can appeal and in accord with which, the so-called "monolithic majority" ought voluntarily to surrender the power to decide every question.

The reason Guinier arrived at this predicament seems to me to be two-fold, empirical and theoretical. In the first case, her reasons for imagining a monolithic white majority to exist are seriously in error. She abstracts from the diverse interests beyond race which characterize the many individuals who constitute the majorities in American politics. In the second case her treatment of "black electoral success" theory forced her to abstract completely from the underlying and determinative social dynamics of political relationships.

Her argument proceeds loosely as follows: Madison's defense of majority rule depended on the conception of majorities as fluid, shifting. When the majority hardens, it becomes a screen for injustice.[8] This "golden rule" principle no longer works, if it ever did, because the interests of whites unite them against blacks. Her reasoning is from group to group, and she ignores the

[8] *Tyranny*, p. 17.

phenomenology of the shifting majority system, most importantly the expectation that individuals, not groups per se, will be tugged at by competing allegiances, thus giving rise to varying majority formations as one or the other prevailing "interest" takes shape in individual souls. In other words, this concept can work only in proportion as individuals are subject to multiple interests and thus group identities are attenuated. That she does not apply this element of the argument rigorously is shown by her casual dismissal of any black who strays from the straight and narrow as "inauthentic."

In discussing black integrationist and black nationalist electoral strategies, she focused on the need to identify and authorize to act "authentic" black representatives who would pursue explicit goals of procedural fairness and substantive redress—especially redistributive policies and efforts to capture allocations of government benefits. It is clear that the abilities of these representatives to participate in shaping a view of the good of the whole is secondary, if it occurs to Guinier at all. The exclusive vision offered is the vision of the good of an identifiable, "cohesive" faction within the society.[9] To her credit, Guinier does argue that "black electoral success strategy" fails to accomplish its goals when articulated in this fashion. What she offers, however, is not a rearticulation, but a "third generation" attempt to achieve the narrow goal of securing black interests without making an explicit commitment to America as a whole.

The rehabilitation of <u>faction</u> as the exclusive arena of politics sustains her core theory, namely, the theory of "proportionate interest representation." While rejecting the model of proportionate representation deduced from the strategies of integrationists and nationalists, precisely because it assures only the presence and not the influence of an identifiable majority, she plumps for explicit interest representation. The difficulty—i.e., absence of assured, substantive outcomes—can be resolved on the presumption that the "real" goal of "authentic blacks" can be focused on the interest itself rather than on the mere image of representation. To this end, however, one must devise a means whereby a minority interest cannot be outvoted (in at least some percentage of the cases) by a consistent majority interest.[10]

To the end proposed Guinier needs both an institutional mechanism (she prefers legislation to litigation at this hour), and also an assured means to concentrate the power and authority thus to be directed in the hands of reliable agents of the views she embraces. The requirement for black "authenticity" is to be "politically, psychologically, and culturally black."[11] Interestingly, race need not play a role. More, the critical psychological and cultural parameters do not derive from any objectively determined factors but seem rather to emanate from an ideological posture. On these grounds, for example, discrete families are frequently and pervasively divided into the authentic black and the inauthentic black (in some cases with the former being white or of other non-black racial background and the latter being black).

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[9] Ibid., pp. 54-58. Also, see p. 61. Although many passages in the book speak of "deliberation," and especially "legislative deliberation," at no time does she envision that species of deliberation which involves deliberating about the common good or a transcending identity. At p. 63 she discussed "legislative deliberation," but there it is clearly merely a part of the game and a social interaction. She has no apparent concept of public deliberation in general. Again, see p. 107 for the "collective contract of deliberation," which is more rules of the game.

[10] While Guinier refers to the existence of "a hostile, permanent majority," technically she establishes nothing more than the <u>possibility</u> of a consistent majority (from which she inappropriately excludes supposedly "inauthentic" blacks).

[11] *Tyranny*, p. 57.

The search for authenticity is predicated on the "reality" of polarized voting—i.e., blacks demonstrate their political cohesiveness by their uniform votes in elections. What Guinier presents as "The Polarization Assumption"—that, all thing being equal, "whites and blacks vote for persons of their own racial/ethnic background"[12]—has been proved in litigation to be nothing more than the common sense observation that, as far as they may, people tend to vote for people they know more than they vote for people they do not know. This is a central, and powerful illustration of the deficiency of this theory. It presses so hard in the service of a special agenda that it is extraordinarily insensitive to generally accepted rules of independent analysis. Similarly, the so-called "general rule" that a majority of whites choose not to vote for blacks is in reality—applied at this level of generality and taking into account ordinary social dynamics—probably mathematically impossible. This is however, the basis on which Guinier establishes her title to demand representation of black interests by authentic "blacks."

She concludes, therefore, that based on such assumptions, "mechanisms to surmount this prejudice and to ensure black electoral success are justified." Given the common sense and mathematical requirements of the case, this conclusion can only be a requirement to prorogue general electoral requirements in the interest of appointing blacks (by whatever procedures) -- mandated racial representation. She seems not to be aware of this consequence, and thus devotes much time to will-o'-the-wisps such as alternatives to "winner-take-all" electoral procedures. But, in fact, no procedure could accomplish the end she prescribes except one such as Madison described as a "will independent of the society."

The proposal for "cumulative voting" in a "modified at-large electoral system," accordingly, is a fairly tepid institutional response to the far more fundamental claim Guinier makes. She recognizes this, for she insists that employing it to elect representatives will not, in and of itself, be sufficient; similar rules of voting must apply to the legislative bodies themselves, in order to provide the kinds of guarantees she seeks. Her argument aims to move beyond "equality of opportunity."

What has in part occasioned this move has been the realization that much of the voting rights activism of the 1980s has either backfired or been inconclusive. The litigants attacked at-large districts and succeeded in substituting single-member districts in their stead in municipalities across the United States. They often found themselves, however, isolating the newly chosen representatives in majority dominated councils and also isolating their constituents from the attentions of other office holders no longer formally bound to their interests. This experience has not been uniform, but it has occurred sufficiently to persuade Guinier that a change in strategy is required.

The defects of single-member districts in these circumstances have far more to do with principles of constitutional or institutional design than with racial dynamics. Add to that reality the fact that social dynamics have moved inconsistently with the assumed dynamics of single-member districts, and it will not be difficult to discern why many of the ills Guinier complains of have occurred. The argument for single-member districts, however, was founded on putative demonstrations of the existence of polarized voting in these many jurisdictions. If one is not to abandon the claim of polarized voting, while nevertheless wanting to expand the range of political opportunities beyond what single-member districting will typically offer (at the local level), then it becomes necessary to seek new effects from the same cause. Guinier's "proportionate interest representation" is the result, the institutional response which alters the calculus without requiring an altered view of the reality.

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[12] Ibid., p. 60.

To conclude this summary, therefore, we should ask directly just how accurate is the assumption of the monolithic majority? The ills of single-member plans have been carefully described in litigation for a long time, with predictions of the very results Guinier now reprehends. Much of that record insists that the single-member strategy pursued by activists represented a missed opportunity, precisely because in many cases majorities were not monolithic and there were identifiable and easily convertible correlates to the historical pattern of voting that could meaningfully repair the circumstances of minority voters.

For example, so-called cumulative voting itself is but a cousin to the informal process of bullet voting, which enables minorities in at-large, multiple seat elections often to increase their chances of election. Guinier is aware of this, but regrets the "loss" of votes involved, which seems inconsistent with her view, otherwise expressed, that every vote not cast for a winning candidate or issue is a "wasted" vote.[13] More importantly, however, this process incontestably demands organization, communication, and involvement in the community at large, results for which Guinier piously prays on behalf of her cumulative voting proposal but which are not at all necessary consequences. Still more importantly, given a persistent trend toward dispersion in all populations, always led by the most educated and the most successful within the domestic population, single-member districting not only ghettoizes representatives and constituents,[14] but it often cuts off by exclusion highly desirable candidacies which at-large elections could still capture. Add the fact that most at-large elections (with significant exceptions) are plurality rather than majority elections, and one will see that these are elections which concede enormous advantages to organized campaigns. It is rare throughout the United States that more than 15% of the electorate participate in these elections. Hence, far from expressing the will of a monolithic majority, they typically would be ripe for the picking at the hands of any "identifiable, cohesive minority" which is at the same time organized for political action.

Of course, though, Guinier does not depend on the political organization of American blacks. Hence, she can segue from race to the "unit of disempowerment," which can become <u>any</u> "voluntary interest constituency[y]". At the outset it was said that government must sponsor programs for blacks; it should not surprise, therefore, that Guinier places little reliance upon American blacks displaying that political fortitude that would enable them to take advantage of the political opportunities open to them. That is the reason she appeals for institutional changes. to render even those effective, however, she adds the additional prospect of well-intentioned partisans who will be the true "authentic blacks" who will carry out the reforms. Her paradigm, at length, is partisan, making natural the appeal to "progressive interests," "reform interests," etc. That explains as well, perhaps, why she never entertains the thought that the design of institutions should foster community over opposition.[15]

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[13] Ibid., pp. 125, 127. The concept that a vote is wasted when cast on the losing side or beyond the margin required for victory is tied to the concept that a district is proxy, and a poor one at that, for interest representation. Each ignores the vital elements of scales of participation and communication and the reciprocal effects of political participation and political representation. Nor does Guinier use the term simply within the technical limits of game theory.

[14] A not altogether undesirable result when along with it comes the concentration of the plenary power of the jurisdiction in question within the districts thus set aside. Problems emerge when such districts are merely a few of many which share in exercising the general powers of the jurisdiction.

[15] She employs the analogy of the jury to bolster her claim for extraordinary measures, but the analogy is inapt for someone seeking to escape zero-sum accounts. While the rule of unanimity or near-unanimity requires consensus and mutual respect of majority and minority, there are no split the difference options, in principle, on juries, any more than Solomon really enjoyed. At p. 107 she says: "My proposal envisions restructuring the legislative decision making process on the model of jury deliberations."

The foundation of this partisanship is a standard of political equality, which Guinier founds on two points:

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[16]

which I propose we test, by first substituting for "each," "any;" namely:

1. that **any** group has a right to have its interests represented, and

2. that **any** group has a right to have its interests satisfied a fair proportion of the time

and then weighing its implications in light of the negations:

1. that **no** group has a right to have its interests represented, and

2. that **no** group has a right to have its interests satisfied a fair proportion of the time.

This experiment, I suggest, indicates in what way Guinier's theory imposes a false understanding of reality. Where she asks that we concede the reality of differences, by recognizing group rights, it is plain that doing so would lead to accepting different realities. She makes this clear, in response to the dangers inherent in the reformulations of her two principles, by explicitly indicating that not every group could qualify for this treatment. Rather, only groups that have been victims of the "arbitrary allocation" of power and wealth may qualify for this special treatment.[17] Here, too, of course, is a contradiction: any resource which is consistently allocated "disproportionally" is not "arbitrarily allocated." Nevertheless, her fundamental claim remains: representation is fundamentally group political participation.[18] This is qualified only to the extent that Guinier recognizes that interests may shift (as race may not) in the way that majorities have been thought to shift. Thus, she calls for "modified at-large election systems" which will sponsor a "continuous redistricting by the voters themselves" as a direct result of their political participation from election to election.[19] The fact that Guinier had to detach her institutional response from race, strictly speaking, testifies sufficiently to the inadequacy of her original formulations. The fact that she has had to recur to shifting "majorities" both overturns the polemical argument about a "monolithic majority" and returns her to the grounds of "Madisonian democracy."

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[16] Ibid., p. 104. [Emphasis added]

[17] Ibid., p. 119.

[18] Ibid., p. 121. Cf., my essay, "The Promise of America," in *Second Thoughts About Race in America*, Peter Collier and David Horowitz, eds. (New York: Madison Books), pp. 142-143.

[19] Ibid., p. 153.

II. Le plus ça change...

Guinier made several changes in her original text in order to produce a published book; that is, she eliminated redundancies and made the flow of text from one essay to another much smoother (given they were originally published as separate productions in separate venues). She made other changes, however, which can in no way be explained in those editorial terms. Some of them suggest less than a spirit of robust disclosure, which one expects in an *apologia.* I here simply enumerate some of these changes, with minimal commentary, and invite the reader to regard the enumeration as the basis of the judgment I will render in the conclusion.

1. *Harvard Civil Rights-Civil Liberties Law Review*, "Keeping the Faith"[20]

An elision noted by three dots in the re-publication is neither irrelevant nor redundant:

> "Congressional legislation is pending which would establish uniform standards for voter registration in federal elections, encourage state and local governments to assume the burdens of canvassing eligible voters by mail or through citizens' contacts with government agencies, and allow voters to register on election day. Yet, eliminating registration and other discriminatory barriers only increases black turn-out where blacks have someone, and something, to vote for. And that someone, for most blacks, is often a 'black representative.' While this term suggests a black person, it can also apply to any minority-sponsored candidate who was elected by black voters in a black majority electoral constituency."[21]

The argument that having "someone to vote for" is a key to black turn-out is often repeated throughout the book. Earlier, in the "Introduction," however, Guinier argued that "Reagan's perceived anti-civil rights agenda" had increased "black registration and turn out." While this is incompatible with the pseudo technical role model argument just made, she doubtlessly believes the latter to be the correct argument, while using the former only as a metaphor for her own mercurial reactions.

2. *Harvard Civil Rights-Civil Liberties Law Review*[22]

An elision without indication:

"The following suggests a framework for responding to black concerns."

What follows is an enumeration of sub-sections "A., B., C."

Then, an elision without indication following "A. Immediate Action" paragraph:

> "[Long paragraph attacking Bush for failing to develop 'a realistic plan for meaningful black representation,' she continues:] Nor has he determined to use the full resources of the federal government in partnership with the courts, Congress and public interest

[20] 24:420 [1989].

[21] Compare *Tyranny*, p. 33. The hypothetical district described here is the real Los Angeles County Supervisorial District, in which Supervisor Kenneth Hahn served for more than thirty years a district long overwhelmingly black in voter registration.

[22] 24:430; cf., *Tyranny*, p. 38.

> institutions to further the national goal of eradicating the effects of racial discrimination from our national landscape. At minimum, Bush, the president of the white electorate, needs to confront directly the racial divisions within the body politic and announce a new, concrete policy of actual inclusiveness and not symbolic outreach."[23]

A further elision without indication, same essay [especially meaningful since she later criticizes the Bush Justice Department for doing exactly what is here prescribed]:

> "In particular, the Department should now begin to prepare for the vigilant monitoring of the 1990 redistrictings which present the continuous threat of racial gerrymandering to dilute black voter strength. Here, the Department of Justice must also embrace the concept of 'meaningful,' actual representation through race conscious remedies."[24]

About the time this was being written I authored a resolution for the United States Commission on Civil Rights calling for such vigilance on the grounds that any race conscious gerrymandering would constitute a partisan screen for augmenting Republican representation by means of fragmenting Democratic constituencies.

Additions, expanding the original text in the same essay:

"In light of the Reagan Record... if the Bush Administration continued the exclusionary litmus tests of its predecessors..."[25]

These qualifications formed no part of the original essay.

A final addition to this essay, expanding the original:

from "twenty-four" to "twenty-nine years ago..." and the addition of "and Bush" to "Reagan Administration[s]."[26]

3. *University of Virginia Law Review,* "No Two Seats"[27]

> "Blacks and other statutorily protected minorities are groups whose interests historically were unprotected yet were considered by Congress worthy of government attention. To remedy the political system's unresponsiveness the case law under both Sections 2 and 5 [Voting Rights Act] evolved to protect the group right to vote."

This republished version compares with the following original version:

> "Precisely because blacks and other statutorily protected minorities have group interests that Congress considered worthy of government attention, the case law under both Sections 2 and 5 evolved to protect the group right to vote."[28]

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[23] 24:431; cf., *Tyranny*, p. 38. All emphases added.

[24] 24:432; cf., *Tyranny*, p. 39.

[25] Ibid.

[26] *Tyranny*, p. 40, cf., 24:434.

[27] 77:1413 [1991].

Must not she assume every action directed toward inclusion and assimilation to have been extorted, since they run counter to the "pervasively prejudiced preferences" of whites?

The following language was added in the republished version:

> "The right to a meaningful vote requires extending the statutory inquiry to examine legislative decisional rules.
>
> "In this sense, the right to vote is a claim about the fundamental right to express and represent ideas. Voting is not just about winning elections. People participate in politics to have their ideas and interests represented, not simply to win contested seats.
>
> "Thus, the right to a meaningful voice does not measure participation simply by counting competitive votes; it examines the extent to which a system mobilizes broad based voter participation, fosters substantive debate from a range of view points, and provides and reinforces opportunities for all voters to exercise meaningful choice throughout the process of decision-making and governance."[29]

Elided passage from original:

> "The right at stake would be the right at all stages of the political process to recognition of distinctive group interests that numbers alone would presumptively give black voters or their representatives in a constituency not polarized by race."[30]

The underlying theory at work here, an analysis of coalitional decision making possibilities, applies to all numbers and not just masses and hence to one citizen as much as to many. Thus, the true foundation of the argument remains the old rule of aggregation, "discrete and insular minority," now to be identified as a "politically cohesive (and hence voluntary), statutorily protected minority." This argument relates to a change occurring in the essay, "Triumph of Tokenism."

4. *University of Michigan Law Review*, "The Triumph of Tokenism"[31]

> "This conception [systematic bias excluding minority preferences] borrows liberally from the work of Charles Beitz, who contends: 'Everyone has an equal right to have his or her political preferences satisfied; but since it will normally be impossible to satisfy all political preferences simultaneously [presumably by a rule of contradiction or exclusion], some compromise is necessary, and the only compromise consistent with equality is that political decisions should satisfy the [legitimate (Guinier)] preferences of each member of the population an equal proportion of the time'."[32]

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[28] 77:1418; cf., *Tyranny*, p. 72.

[29] *Tyranny, p. 93;* cf., 77:1418ff.

[30] 77:1496; cf., *Tyranny*, pp. 107-109.

[31] 89:1077 [1991].

[32] Ibid., p. 1137, n. 291.

Guinier adds, however, that "Remediation of inequalities in preference satisfaction also involves equality of respect to cleanse pluralist polities of racist preferences. This is an intermediary, but more just version of pluralism, from which a civic republican model may follow." Here, then, is a frank embrace of the notion that political freedom can be accorded only in proportion as specifiable moral perfections are attained. Proposed constitutional principles to restrict the exercise of political freedom are, in this system, as much punishments for the offenders as protections for the victims.[33] The wonder remains, throughout this analysis, the total abstraction from consideration of the agency by which these fundamental political designs are to be installed.

5. *University of Virginia Law Review*, "No Two Seats"

An elision:

> "The ultimate goal of fair and effective representation would be to encourage the implementation of decision making structures or procedures that ensure minority representatives an equal opportunity to choose how to participate and cast a decisive vote."[34]

Of these two choices, it is clear that, for anyone, a fair chance to perform the former (choose how to participate) has implications for the latter (casting a decisive vote), inasmuch as there is a reasonable causal connection between the two. In other words, guaranteeing the opportunity to choose how to participate, in some definite number of cases, will necessarily preclude a power to cast a deciding vote insofar as unwise choice defeats opportunity.

> "...only a representative sponsored by the black community and electorally accountable to it would count [as black] for purposes of a legislative bloc voting analysis."[35]

Thus a non-black representative may be black for purposes of proportional representation analysis.

6. *Michigan Law Review*, "Triumph of Tokenism"

The substitution for a passage in the original of a new version in chapter 3 of *Tyranny*:

> "While at one level such an inquiry might explore basic issues of democratic principle, the scope of this article is more limited. I simply invite voting rights activists and litigators to consider on behalf of the Act's intended beneficiaries a different conceptual, remedial, and pragmatic approach to the immediate problem of legislative responsiveness within the statutory framework of the 1982 Voting Rights Act. To achieve this limited but important objective, I propose the concept of 'proportionate interest' representation. Proportionate interest representation is a general term subsuming a number of implementation strategies. Proportionate interest representation addresses the black

[33] The citation to Charles Beitz is *Equal Opportunity in Political Representation*, 155, 167-68 (N. Bowie, ed., 1988).

[34] 77:1497.

[35] Ibid., p. 1500, n. 299.

> electoral success model's failure to develop a realistic enforcement mechanism for achieving legislative responsiveness."[36]
>
> While, in chapter 3, one reads:
>
> "In the next chapter, I re-examine the more general theory of majority rule, for we must ask the question that black electoral success theory has ignored at its peril: When does majority rule become the tyranny of the majority?"

III. When Marriage Fails, Can Politics Be Far Behind?

A question lurking throughout this inquiry informs the general conclusions that follow: Why, if it is sufficient for the representative only to "think black," can not one also construct the constituency of a majority of folk who "think black" as opposed to being "descriptively black"? If we fail to find an answer to that question, I believe the reason is that Guinier does not provide or enable an answer to that question, even though she relies far more on "thinking black" than on being black.

Her theory is correctly called "proportionate majority rule" and incorrectly called "cumulative majority rule." Nor is it a Calhounian "concurrent majority," though she borrows from the father of the Confederacy for her theoretical grounding. The differences are best revealed by showing what Calhoun and Guinier share. Both believe the United States to consist of plural nations. Calhoun's response to that is that each nation should be ruled by its own will, and on any question each should express itself separately. When all concur a national rule results; otherwise each rules itself conformably to its own views. In either case, this is concurrent majority rule.

Guinier, on the other hand, insists that, though there are plural nations, there must at all times be only one national rule for all of them, respecting which each must get to cast a deciding vote in its relative turn. Since mutually exclusive views cannot produce a single rule operating conjointly, then they must take turns, making this "sequential majority rule," which becomes proportional when turns are weighted by relative population numbers. Nor could sequential majority rule function if every ephemeral will, once stated, were beyond repeal. Thus what was decided one way yesterday may be decided another way today, meaning that this is distinctly <u>not</u> "cumulative majority rule," technical considerations aside.

To answer the question I posed at the outset, I would say that Professor Guinier's views have not been mischaracterized in their essential thrust. What she said originally, and continues to say in the republished version, honestly and forthrightly proposes to abandon a vision of republican institutions in the United States which may arguably be said to be a necessary ground of community in the society. Of course, she argues that history has demonstrated the error of that view. History, however, is not a moral principle. Yesterday's wrong does not reveal today's right, let alone tomorrow's further wrong. That Ned raped Mary yesterday cannot of itself prove that George will rape Sally tomorrow. Nor can it justify Mary raping Ned today.

Though moral confusion is a consequence of Guinier's argument, I do not believe that it is the essence of her argument. In the last analysis I believe her difficulties are theoretical. She believes to have detached, for example, from majority rule as a standard. In fact, however, she seems only to have buried it beneath wrenching concerns for a partisan agenda. It is still majority rule as the sole legitimating principle of political choice which she relies upon to discount the votes and opinions of that minority among American blacks whom she knows to have voted for

[36] Ibid., p. 1136.

"the president of the white electorate." She does this exclusively on the grounds that the overwhelming majority of blacks, a consistent, monolithic, prejudiced majority in her view, ought alone to determine the representational fate of blacks. Because this argument mirrors in inverse the argument against the supposed consistent, monolithic, prejudiced majority of American citizens (who are white), Guinier obviously needs something beyond the supposed defect of majority rule to ground her moral claims. For those defects, if they existed, could not be turned on and off at will.

What grounds her moral claims is a view about community in America which delegitimizes the claims of the larger community in favor of the "discrete and insular minority." For her not only does that not require an argument that the broader community must include the narrower community. It is rather an argument that the narrower community ought to construct a self-sufficing and perduring separate identity.

If we follow teachings as old as Aristotle, namely that political community requires a supporting dynamic of social unity, the institutional designs that would engage our attentions on Guinier's reading of the facts would be measures to foster mutual interdependence and concourse rather than political measures to highlight group independence. As it happens, the course wisdom would counsel has been the course the United States has been fitfully pursuing, albeit entirely without assistance from theoretically informed elites. Intermarriage would be a far more effective counsel than political isolation and, if broadly embraced by opinion leaders, would doubtless change the society more swiftly.

If such an evolution occurs in the United States, as it has been doing slowly, it will doubtless occur despite the reservations of thoughtful critics, who have failed to address the matter publicly and sensibly ever since the hand-wringing of Thomas Jefferson in *Notes on the State of Virginia* in 1783. It is fair to conclude, rather, that such folk, who are now more likely to pose as defenders of black rights, will go to the end kicking and screaming, claiming to be what they're not, which is merely black. The rest of us owe to recognize this story for what it is, which is not a genetics but, rather, merely a poetry of race.