REVIEW ESSAY

THE MILLIAN THOUGHTS OF LANI GUINIER

THE TYRANNY OF THE MAJORITY. By Lani Guinier. New York, New York: The Free Press, 1994. Pp. xx, 324. $24.95.

ARTHUR EISENBERG*

In 1861, John Stuart Mill explored the virtues and deficiencies of representative democracy. In his essay, *Considerations on Representative Government*,[1] Mill discussed the practice of electing legislators by majority vote within geographically defined districts. He observed that this practice can unfairly and unreasonably skew legislative outcomes in ways that both disserve the popular will and debase the political influence of ideological minorities. In this regard, he posited:

> Suppose, then, that, in a country governed by equal and universal suffrage, there is a contested election in every constituency, and every election is carried by a small majority. The Parliament thus brought together represents little more than a bare majority of the people. This Parliament proceeds to legislate, and adopts important measures by a bare majority itself. What guarantee is there that these measures accord with the wishes of a majority of the people? Nearly half of the electors, having been outvoted at the hustings, have had no influence at all in the decision; and the whole of these may be, a majority of them probably are, hostile to the measures, having voted against those by whom they have been carried. Of the remaining electors, nearly half have chosen representatives whom, by supposition, have voted against the measures. It is possible therefore and even probable, that the opinion which has prevailed was agreeable only to a minority of the nation . . . .[2]

In response to such a circumstance, Mill concluded: "Nothing but habit and old association can reconcile any reasonable being to the needless injustice. In a really equal democracy, every or any section would be represented, not disproportionately, but proportionately."[3] Mill further

* Legal Director, New York Civil Liberties Union; B.A., Johns Hopkins University, 1964; J.D., Cornell University Law School, 1968.

1. JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT (1861).
2. *Id.* at 147.
3. *Id.* at 146.

observed that equal representation could be achieved—or, at least, more closely approximated—through a variety of electoral mechanisms, including what have come to be described as *cumulative voting, limited voting,* and *proportional representation* systems.[4]

In *The Tyranny of the Majority*, Lani Guinier revisits the terrain traversed by Mill more than 140 years ago. She brings to the issue, however, the perspective of an experienced and successful litigator who has championed equal voting rights for racial and ethnic minorities. As litigator-turned-academic, Guinier first wrote a series of law review articles between 1988 and 1992 that focused on the Voting Rights Act of 1965,[5] its legislative evolution, and its litigative application. Those articles constitute the essence of *The Tyranny of the Majority*.[6]

As originally conceived, the Voting Rights Act of 1965 was principally "directed . . . at eradicating discriminatory practices that restricted blacks' ability to register and vote in the segregated South."[7] Professor Guinier

4. Cumulative voting involves elections in which all representatives are elected to a legislative body on an at-large basis. Legislators do not represent subdivisions or districts but are elected instead by the entire community or jurisdiction. Cumulative voting allows voters to cast as many votes as there are legislative seats to be filled, and to apportion or cumulate their votes in whatever manner they choose. For example, in a community in which five legislative seats need to be filled, a voter could cast a single vote for each of five legislative candidates, cast all five votes for a single candidate, or apportion her five votes among the candidates however she chooses. *See* Richard H. Pildes, *Gimme Five: Non-Gerrymandering Racial Justice; Cumulative Voting Systems*, THE NEW REPUBLIC, Mar. 1, 1993 at 16, 18; Richard Engstrom, *Modified Multi-Seat Election Systems as Remedies for Minority Vote Dilution*, 21 STETSON L. REV. 743, 749-57 (1992).

Limited voting also provides for elections on an at-large basis. Unlike the cumulative voting procedures, however, the voter is not permitted to cast as many ballots as there are available legislative seats. For example, a voter in a community in which five legislative seats need to be filled is permitted to vote for either one, two, three, or four candidates. *See* Engstrom, 21 STETSON L. REV. at 757-62; Chandler Davidson, *The Voting Rights Act: A Brief History, in* CONTROVERSIES IN MINORITY VOTING 50 (Bernard Grofman & Chandler Davidson eds., 1992).

Proportional representation contemplates, generally, that legislative representation will be fashioned in proportion to the votes cast on behalf of each political interest group that forms a political party. There are a variety of mechanisms for achieving proportional representation; *see* AREND LIJPHART, ELECTORAL SYSTEMS AND POLITICAL SYSTEMS 21, 153 (1994) (describing and clarifying various proportional representation formulas).

5. 42 U.S.C.A. §§ 1971 (34) (at-large election schemes), 1971 (43) (reapportionment), 1971 (44) (redistricting plans) (1994).

6. Chapter two of the book presents an article that appeared at 24 HARVARD C.R.-C.L. L. REV. 93 (1989) under the title *Keeping the Faith: Black Voters in the Post-Reagan Era.* Chapter three sets forth an article that appeared at 89 MICH L. REV. 1077 (1991), entitled *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success.* The essence of chapter four appeared at 77 VA. L. REV. 1413 (1991), under the title *No Two Seats: The Elusive Quest for Political Equality.* Chapter five contains an article that first appeared at 71 TEX. L. REV. 1589 (1993), under the title *Regulating the Electoral Process: Groups, Representation, and Race-Conscious Districting; A Case of the Emperor's Clothes.* Chapter six appeared at 72 TEX. L. REV. 315 (1993) (review essay of Charles Fried's *Order and Law*), entitled *Order and Law: Arguing the Reagan Revolution—A Firsthand Account.*

7. Holder v. Hall, 114 S.Ct. 2581, 2592 (1994) (Thomas, J., concurring).

recounts that, at its inception, the Act "outlawed literacy tests, brought federal registrars to troubled districts to ensure safe access to the polls, and targeted for federal administrative review many local registration procedures."[8] According to Professor Guinier, "[s]uccess under the Act was immediate and impressive" as the "number of blacks [that] registered to vote rose dramatically within five years after passage."[9]

After briefly discussing that success, Professor Guinier next sets forth what she describes as the "second generation of voting rights litigation and legislation."[10] In this regard, Professor Guinier recounts the resistance by many southern jurisdictions to the early implementation of the 1965 Voting Rights Act and to the statutory requirement that African-Americans be granted an equal opportunity to register and to vote. She observes:

> Southern states and local subdivisions responded to blacks in the electorate by switching the ways 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, or even run for office, they could not win. 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.[11]

This reaction by many southern jurisdictions prompted, in turn, a new round of initiatives by voting rights advocates. The principal thrust of these initiatives took the form of a series of lawsuits brought under the Voting

8. LANI GUINIER, THE TYRANNY OF THE MAJORITY 7 (1994). The Act focused specifically on four practices that had been commonly employed to disenfranchise African-Americans in the South and elsewhere. Thus, section four of the statute targeted those states and political subdivisions in which fewer than 50 percent of the voting-age population voted in the 1964 presidential election. It prohibited for five years any voting or registration prerequisite that required a person to "(1) demonstrate the ability to read, write, understand, or interpret any matter; (2) demonstrate any educational achievement or his knowledge of any particular subject; (3) possess good moral character; or, (4) prove his qualifications by the voucher of registered voters . . . . " 42 U.S.C. § 1973b(c) (1988 & Supp. IV). Section five of the statute prohibited the same jurisdictions from enacting any subsequent changes in their election laws without approval from either the United States Attorney General or the District Court of the District of Columbia. 42 U.S.C. § 1973c (1988 & Supp. IV). See discussion in BURT NEUBORNE & ARTHUR EISENBERG, THE RIGHTS OF CANDIDATES AND VOTERS 90-102 (2d ed. 1980).

9. GUINIER, *supra* note 8, at 7. In Mississippi, before the enactment of the 1965 Voting Rights Act, black voter registration was 6.7 percent of the total registered population in the state. By 1967, black voter registration had climbed to 59.8 percent of the total registered population. In Alabama, black registered voters jumped from 19.3 to 51.6 percent of the total registered population over the same period; in Georgia, the figure grew from 27.4 to 52.6 percent; in Louisiana, from 31.6 to 58.9 percent; and, in South Carolina, from 37.3 percent to 51.2 percent. UNITED STATES COMM'N ON CIVIL RIGHTS, POLITICAL PARTICIPATION 12 (1968).

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

11. *Id.*

Rights Act and the Fourteenth Amendment. The lawsuits challenged at-large voting systems and other mechanisms that many communities had employed to deny equal electoral opportunities to blacks and other ethnic and language minority groups.[12] This litigation strategy achieved some early success during the 1970s.[13]

However, this strategy encountered a serious setback as a result of the 1980 Supreme Court decision in *City of Mobile v. Bolden.*[14] The *Bolden* case involved a challenge to a municipal electoral system in which three City Commissioners were elected on an at-large basis. The challenge rested upon the claim that the at-large arrangement had the effect of diluting the electoral opportunities of African-American residents of Mobile—constituting approximately 35% of the municipal population—and that such dilution violated the Fourteenth and Fifteenth Amendments to the Federal Constitution as well as Section 2 of the Voting Rights Act of 1965. In rejecting this challenge, the Supreme Court reaffirmed earlier precedent holding that the Fourteenth Amendment prohibits only laws that intentionally discriminate on the basis of race; the *Bolden* court also went on to hold that neither the Fifteenth Amendment nor Section 2 of the Voting Rights Act of 1965 was intended to reach more broadly than the Fourteenth Amendment.[15] Accordingly, the *Bolden* Court refused to extend either the Constitution or the Voting Rights Act to voting practices that merely had the effect of diluting the electoral opportunities of racial minorities.[16]

In response to the *Bolden* decision, Congress enacted the Voting Rights Act Amendments of 1982.[17] Those amendments expressly mandated that the Voting Rights Act address not only intentional discrimination but also voting practices that "result[ ] in a denial or abridgement of . . . the right to vote on account of race or color."[18] Thus, Professor Guinier correctly observes that in 1982, "congressional concern openly

12. At-large voting systems were challenged in Opelika, Alabama; Port Gibson, Mississippi; Georgetown County, South Carolina; Halifax County, Virginia; and Hopewell, Virginia. *See* UNITED STATES COMM'N ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: UNFULFILLED GOALS 154 (Sept. 1981).

13. *See, e.g.*, White v. Regester, 412 U.S. 755 (1973) (upholding the disestablishment of two multimember districts in statewide legislative plan on the ground that the State had discriminated against resident African-Americans and Latinos); Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd per curiam sub nom.* East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976) (upholding repudiation of at-large election scheme due to past racial discrimination).

14. 446 U.S. 55 (1980).

15. *Id.* at 60-64.

16. *Id.* at 66-69.

17. PUB.L. NO. 97-205, § 3, 92 STAT. 134 (1982).

18. 42 U.S.C. § 1973(a) (1988 & Supp. IV 1992).

shifted from simply getting blacks the ability to register and vote to providing blacks a realistic opportunity to elect candidates of their choice."[19] Reinforced by the 1982 congressional amendments, voting rights advocates refocused

> 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 the decisionmaking councils.[20]

This "second generation" of litigation under the Voting Rights Act and its 1982 amendments has been the subject of much criticism.[21] This criticism has rested upon the claim that the Voting Rights Act has provided a license for courts and legislatures to engage in race-conscious districting to the political advantage of racial and ethnic minorities. The critics have argued that such race-conscious line-drawing is not only symbolically and morally offensive, but also misguided, because it rests on the faulty and patronizing assumption that all members of a particular minority group think alike and share the same political interests and ideologies; they have further asserted that race-conscious districting frustrates the goal of a pluralistic and integrated society, because it balkanizes our society and elevates to elected office those whose political self-interest depends on the perpetuation of minority voters in residentially segregated communities.

Voting rights advocates have responded to these arguments in several ways.[22] First, they have pointed to the long-standing American tradition of individuals' voting along racial, ethnic, and religious lines. They have noted that the concept of a balanced ticket, as it has been employed by political strategists and ward bosses for more than a century, has depended upon

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

20. *Id.* at 7-8.

21. *See* Report of the Committee on the Judiciary, Senate Report No. 417, 97th Cong., 2d Sess., at 1310, 1327-30 (statement of Donald Horowitz). *See also id.* at 1361 (statement of James F. Blumstein); *id.* at 1449 (statement of William Van Alstyne); Timothy G. O'Rourke, *The 1982 Amendments and the Voting Rights Paradox*, *in* CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE (Bernard Grofman & Chandler Davidson eds., 1992); *see generally*, ABIGAIL M. THERNSTROM, WHOSE VOTES COUNT?: AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS 4-5, 192-93 (1987).

22. *See generally* CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE (Bernard Grofman & Chandler Davidson eds., 1992) particularly Lauglin McDonald, *The 1982 Amendments of Section 2 and Minority Representation*, at 66-84; J. Morgan Kousser, *The Voting Rights Act and the Two Reconstructions*, at 135-76; and Bernard Grofman & Chandler Davidson, *Postscript: What Is the Best Way to a Color-Blind Society?*, at 300-17.

this common impulse and the political reality of voters preferring candidates who share the voters' ethnic, racial, or religious backgrounds. And they have argued that racial bloc voting—the strong tendency of whites to vote for whites and blacks to vote for blacks—represents little more than a contemporary version of this longstanding tradition, however unappealing that tradition may be.[23]

Thus, according to voting rights advocates, racial bloc voting is an existing reality that denies fair representation to minority voters.[24] This is especially true under a regime of at-large voting. Such a denial of fair representation is demonstrated by the following paradigm: Assume a community is 80 percent white and 20 percent black; the legislative body for such a community consists of five legislators; and legislators are elected on an at-large basis, that is to say, by all voters of the community voting for candidates for all five legislative seats. If this community experiences racial bloc voting, the white majority would almost certainly elect all five legislators and the black minority community would be deprived entirely of any capacity to elect a candidate of its choice. Moreover, even under a single-member districting system—a system in which each legislator represents a geographically defined area—black voters in a community that experiences racial bloc voting will have diluted voting power if, in drawing district lines, the black population is dispersed and fragmented among many districts.

Accordingly, voting rights advocates have urged that, as long as racial bloc voting remains a fact of political life, race-conscious remedies must serve as corrective measures to provide equal electoral opportunities. And, they have further pointed to evidence suggesting that racial-bloc voting remains a fact of political life.[25] Resting their arguments upon these two premises, such advocates call for the abandonment of at-large districting in favor of single-member districting and commonly argue as well that affirmative race-conscious map-making remains necessary to avoid unfair vote dilution created by racial bloc voting.

Professor Guinier's response to criticism of the Voting Rights Act and its interpretation and implementation diverges from the views of most voting rights practitioners. Guinier acknowledges that racial bloc voting, operating in conjunction with at-large voting systems, unfairly denies minority voters the opportunity to elect candidates of their choice. However, instead of single-member districting, she urges the retention of at-large electoral systems—but with a twist. She writes:

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23. *See* GUINIER, *supra* note 8, at 60.

24. *Id.* at 139.

25. *See e.g.*, J. Morgan Kousser, *The Voting Rights Act and the Two Reconstructions* and Bernard Grofman & Chandler Davidson, *Postscript: What is the Best Way to a Color-Blind Society?*, *in* CONTROVERSIES IN MINORITY VOTING at 175, 309 (Bernard Grofman & Chandler Davidson eds., 1992).

> Race in conjunction with geography is a useful but limited proxy for defining the interests of those sharing a particular racial identity. But, it is the assumption that a territorial district can accurately approximate a fixed racial-group identity—and not the assumption of a racial group identity itself—that is problematic. Race-conscious districting—as opposed to racial-group representation may be rigidly essentialist, presumptuously isolating, or politically divisive. For example, different groups may share the same residential space but not the same racial identity. A districting strategy requires these groups to compete for political power through the ability to elect only one representative.[26]

And in words reminiscent of Mill, Professor Guinier further argues:

> If voting is understood as a means of exercising policy-influence, districting tends to limit that influence. Winner-take-all districting gives the district majority all the power. It creates an incentive therefore to seek electoral control of a district. But electoral control of a district may isolate minority partisans from potential allies in other districts. In this way districting wastes votes because it forces minorities to concentrate their strength within a few electoral districts and thereby isolates them from potential legislative allies.[27]

In response to this problem, Professor Guinier advocates cumulative voting as an electoral mechanism to be employed instead of single-member districting.[28] She correctly observes that this electoral reform more fairly and accurately serves the interests of *all* ideological minorities, regardless of race. Moreover, Professor Guinier's proposal avoids reliance on race-conscious districting. It, therefore, offers the promise of defusing the most common criticism of the Voting Rights Act, namely that the statute has become a prescription for racial gerrymandering.

Professor Guinier does not, however, limit her concerns or her remedial suggestions to the problem of single-member districting. She also addresses what she regards as the "third generation" of voting rights issues and controversies. These controversies have arisen because "[e]ven in governments in which minority legislators have increased, the marginalization of minority group interests has often stubbornly remained."[29] She observes that in recent years the modest number of African-American and Latino legislators that have been elected to state and local legislative bodies have

26. *Id.* at 142.

27. *Id.* at 135.

28. *Id.* at 149. *See supra* note 4; GUINIER, *supra* note 8, at 277 n.74 (agreeing with Mill's approach but cautioning that cumulative voting is not a panacea).

29. GUINIER, *supra* note 8, at 8.

become frustrated by the inability of their constituents' interests to command majority support. According to Professor Guinier, "[t]hird 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."[30] If minority legislators find themselves consistently marginalized within legislatures, she argues, advocates may need to alter the rules under which legislatures enact public policies into law. Consequently, she proposes supermajority requirements, to provide greater "bargaining power to all numerically inferior or less powerful groups, be they black, female or Republican."[31]

The concept of supermajority requirements is also not without precedent within our political tradition. The first constitution adopted by the United States, the Articles of Confederation, imposed a supermajority requirement as a precondition to a broad range of legislative enactments. Under the Articles, "a vote of nine of the thirteen states were required for enactment"[32] of most legislative measures. Moreover, "[s]ince the principle of state equality prevailed [within the Congress], the votes of any five of the less populous states could block a measure desired by eight of the more important states and a great popular majority of the nation."[33]

This supermajority requirement was, of course, severely criticized by, among others, Alexander Hamilton and James Madison. In Federalist Number 22, Hamilton wrote:

> To give a minority a negative upon the majority (which is always the case where more than a majority is requisite to a decision) is in its tendency, to subject the sense of the greater number to that of the lesser number. Congress, from the non-attendance of a few States, have been frequently in the situation of a Polish diet, where a single veto has been sufficient to put a stop to all their movements. A sixtieth part of the Union, which is about the proportion of Delaware and Rhode Island, has several times been able to oppose an entire bar to its operations.[34]

Madison echoed a similar sentiment in Federalist Number 58, noting that there are some advantages to supermajority requirements but concluding that such requirements would wrongfully transfer power "to the minority."[35] Nevertheless, the Constitution that was adopted to replace the Articles of Confederation also imposed supermajority requirements —

30. *Id.*

31. *Id.* at 16-17.

32. Alfred H. Kelly & Winfred Harbison, The American Constitution 101 (5th ed. 1976). *See* Articles of Confederation, art. IX (1781).

33. Kelly & Harbison, *supra* note 32, at 101.

34. The Federalist No. 22, at 137 (Alexander Hamilton) (Modern Library, 1937).

35. The Federalist No. 58, at 383 (James Madison) (Modern Library, 1937).

although only in five instances: ratification of treaties, overriding a presidential veto, issuing a verdict of impeachment, expelling a member of Congress, and proposing an amendment to the Constitution.[36] However, the recent action of the Senate as it considered the enactment of President Clinton's crime bill provides ample evidence that supermajority requirements are very much a part of our national legislative process.[37] At bottom, Professor Guinier's criticism of single-member districting and her cumulative voting proposals rest upon a respectable conception of representative democracy. As noted above, reconsideration of single-member districting and the possible adoption of cumulative voting mechanisms can be traced to a longstanding critique of single-member districting dating back to at least J.S. Mill—a criticism that continues to enjoy ample support among political scientists and students of democratic systems.[38] There is also support for the occasional implementation of supermajority requirements. Notably, both of Professor Guinier's most significant proposals—the increased use of cumulative voting and supermajority requirements—while undoubtedly animated by a desire to achieve racial fairness, seek to

36. Hendrik Hertzberg, *Catch-XXII: The Filibuster Lives, and It Could Kill Off Health Care*, NEW YORKER, Aug. 22-29, 1994, at 10.

37. Senate Rule XXII requires a three-fifths vote of the full membership of the body to end debate. As described by Hendrik Hertzberg, "[in] practice, Rule XXII means that the real threshold for action in the Senate is not the simple majority we learned about in civics class—that is fifty-one senators if everybody is present and voting, or as few as twenty-six if there are absences or abstentions—but an irreducible supermajority of sixty." *Id.* at 9. The supermajority provision of Rule XXII was invoked by some of Professor Guinier's harshest critics, including Senate Minority Leader Robert Dole, to impede the consideration of the 1994 Crime Bill and to delay its enactment. *See* Michael Kranish, *Crime Bill is Approved in Senate; Vote is 61-38*, BOSTON GLOBE, Aug. 26, 1994, at 1; Thomas Geoghegan, *In the Senate, the Dole Filibuster Busts the Designs of the Founding Fathers*, WASH. POST, Sep. 4, 1994, at C1.

38. *See* KEVIN PHILLIPS, ARROGANT CAPITAL 191-92 (1994) ("[A] far-reaching reform that deserves more attention is modifying our electoral system in the direction of proportional representation with an eye to opening up the parties and increasing voter participation . . . Americans should at least begin thinking about how to modify our system in a proportional direction"); Seymour Martin Lipset, *Why Americans Refuse to Vote*, INSIGHT, Feb. 7, 1994 ("Another change that could have a positive outcome [on voter turnout] is the addition of more political parties and candidates . . . . [T]he one way to assure more diversity on the ballot is to change the electoral system and adopt proportional representation."). *See also* the Center for Voting and Democracy, an organization based in Washington D.C. that describes itself as a "clearinghouse on voting systems that foster responsive governance, fair representation and voter participation" and that promotes proportional representation as an electoral mechanism. The Center for Voting and Democracy publishes *Voting and Democracy Review*, a quarterly newsletter that reports on efforts to implement proportional representation in the United States and in other democratic countries.

accomplish this end without the use of race-conscious mechanisms.[39] Consequently, it was quite surprising that Professor Guinier's academic writings generated so much controversy when President Clinton nominated her to serve as the Assistant Attorney General for Civil Rights.

In *The Tyranny of the Majority*, Lani Guinier provides those who had not previously read her law review articles with an opportunity to learn what all the fuss was about. In addition to reprinting her earlier academic writings, she also provides an introductory essay, in which she argues that her critics during the appointment process seriously misinterpreted her views. A fair and open-minded reading of *The Tyranny of the Majority* confirms Professor Guinier's assertion.

During the public controversy surrounding her nomination, Professor Guinier's views were repeatedly and seriously mischaracterized. For example, Clint Bolick stated in the *Wall Street Journal* that Professor Guinier "demands equal legislative outcomes, requiring abandonment not only of the 'one person, one vote' principle, but majority rule itself."[40] Senate Majority Leader Robert Dole reportedly announced: if nothing else, Professor Guinier has been consistent in her writings—consistently hostile to the principle of one person, one vote; consistently hostile to the majority rule; and "a consistent supporter not only of quotas but of vote-rigging schemes that make quotas look mild."[41] Senator Dole advanced this criticism without any apparent sense of irony that might be occasioned by his frequent invocation of supermajority requirements to obstruct Democratic legislation when he was Senate minority leader. Such irony was similarly ignored by Senator Alan Simpson, who found Guinier's writings "disturbing" because they suggested "a kind of racism in reverse."[42]

In fact, Professor Guinier's writings do not at all attack the principle of one person, one vote. She does not call for the abandonment of majority rule; she does, however, propose electoral mechanisms designed to ameliorate the excesses of pure majoritarianism. She labors to fashion a system that is fairer to all who hold minority viewpoints regardless of race or ethnicity. Her proposed reforms focus on protecting ideological minorities, not racial minorities. Quite plainly, they avoid race-conscious districting

39. *See* GUINIER, *supra* note 8, at 14-17. Guinier proposes two major approaches as alternatives to the current winner-take-all majority rule. First, she proposes cumulative voting which allows any minority group—not just racial minorities—to use the franchise strategically. *Id.* at 15. Ultimately, if voters form coalitions and agree on how to utilize their votes, legislators will more accurately reflect voter preferences. *Id.* at 16. Guinier also argues for greater use of supermajority voting, through which "any numerically small but cohesive group" has the ability to "veto" an impending action. *Id.* Supermajority requirements raise the threshold needed to foster consensus, thus allowing fewer people—less than 50 percent—to block a measure entirely.

40. Clint Bolick, *Clinton's Quota Queens*, WALL ST. J., Apr. 30, 1993, at A12.

41. Neil A. Lewis, *Clinton Faces Battle Over a Civil Rights Nominee*, N.Y. TIMES, May 21, 1993, at B9.

42. *Id.*

and quotas. Thus, her proposals—emerging from her experience as an advocate and litigator on behalf of racial and ethnic minority groups—can hardly be as regarded as "reverse racism."

This is not to say that Professor Guinier's proposals are entirely flawless. Her suggestion that the political interests of minority groups—including racial minorities—can best be protected by abandoning single-member districting and by adopting cumulative voting mechanisms fails to account for some of the serious difficulties inherent in cumulative voting. Two such difficulties are immediately apparent. First, cumulative voting remains an infrequently employed electoral mechanism. Consequently, most voters in this country will, at least at first, find themselves unfamiliar with the techniques of cumulative voting and with its strategic opportunities. This may be especially true for less sophisticated voters who may find this unfamiliar system confusing. As a result, cumulative voting may not yield the results promised by Professor Guinier. Indeed, it is unlikely that such a mechanism will provide minority interest groups with fair opportunities for representation unless such groups can organize politically and thereby use the electoral mechanism in a strategically sophisticated manner.

Second, the adoption of cumulative voting mechanisms may well result in a system in which legislators are less accountable to voters than they would be under a single-member districting scheme. For example, under a single-member districting arrangement, the voters in a particular geographic community know whom to call if they want a traffic signal placed at their corner or if they are unhappy with the garbage collection in their community. But, under a cumulative voting system, legislators would be elected on an at-large basis. Such legislators would sit together in a legislative body and would represent the entire geographic area of the jurisdiction. No one legislator would be responsible for a discrete geographic district. Thus, under a cumulative voting system, if the voters in a community were to complain about the absence of a traffic signal at an intersection or about the deficient manner of garbage collection, they would not have a specific legislator to whom they could direct their complaints. Under such circumstances—and with respect to the many issues that are not ideological in any important sense—a cumulative voting system may yield less accountability by legislators, not more.

Professor Guinier's suggestion that supermajority requirements be utilized more frequently during the legislative process is a proposal that is even more problematical than is her proposal respecting cumulative voting. Supermajority requirements make a great deal of sense with respect to certain extraordinary judgments that legislators must consider. They serve to prevent the casual adoption of legislative measures by a bare majority. In so doing, they generally promote more serious deliberations for critically important decisions by requiring that such decisions be supported by a substantial segment of the polity. But to propose that supermajority requirements be imposed as a matter of routine legislative decisionmaking is to offer a prescription for governmental gridlock. By elevating the threshold of support for legislative enactments, supermajority requirements inevitably erect additional barriers which effectively serve to deter legislative action. Accordingly, persons who believe that our society suffers from an excess of legislative tinkering might well endorse supermajority requirements. But, for those who regard democratic government as a necessary instrument for the maintenance of our communal order and for the implementation of much needed social reforms, supermajority mechanisms are not commonly greeted with enthusiasm.

It is one thing to suggest that Professor Guinier's two major proposals are flawed in specific respects; it is quite another thing to suggest that Professor Guinier's recommendations are so radical and so extreme as to disqualify her for the position of Assistant Attorney General. Consequently, the question that remains unanswered is why Professor Guinier's writings provoked such hostility and why such writings forced the withdrawal of so impressive and capable a nominee.

One simple answer may be that Professor Guinier's nomination provided partisan opponents of President Clinton with an opportunity to embarrass the President by attacking his nominee. By characterizing Professor Guinier as a radical and a "quota-queen," critics might well have believed that President Clinton's stature would be tarnished along with his nominee. For such critics, it may not have been necessary even to read Professor Guinier's writings. Or, if such critics did, in fact, read her writings, it may not have been necessary to understand them fully or to grapple with the ideas presented in them. In an era when twenty-second sound bites pass for political discourse, it was sufficient to label Professor Guinier a "quota queen" and attack the President for choosing so unacceptable a nominee.

This explanation, however, cannot fully explain the Guinier confirmation controversy. For undoubtedly some of her critics did read her writings and did try to grapple with her views. The response of these critics may be harder to understand. The writings of Professor Charles Fried on the subject suggest one possible explanation. Fried undoubtedly read Guinier's writings. And after doing so, he plainly acknowledged that "Guinier's views on cumulative voting are important and offer a better way than the gross racial gerrymanders."[43] Nevertheless, Fried still found her unsuited to the position of Assistant Attorney General.

43. Charles Fried, *President Clinton Won't Give Me A Job Either*, 2 RECONSTRUCTION 127, 130 (1994).

Professor Fried's view rested, in part, upon the conclusion that "her discussion of supermajorities is . . . chilling."[44] But, Professor Fried's central criticism was that "Guinier's views . . . bespeak a sympathy for the hard-bitten view that racism in this country is far worse, far more pervasive, and far more ineradicable than many of us would like to think."[45] This may well be the issue over which Guinier and many of her critics divided. And it may well be that the sharpness of this division explains the heated nature of the controversy surrounding Professor Guinier's nomination. A full exploration of this divide must remain beyond the scope of this essay. Yet, in considering the controversy surrounding Professor Guinier's nomination, one cannot avoid the dramatically different perspectives that seem to be advanced by Guinier as compared with critics like Fried regarding the condition of black America and the causes and consequences of this condition.

On the issue of current conditions there should not be a serious disagreement. In 1968, the National Advisory Commission on Civil Disorders chaired by then-Illinois Governor Otto Kerner warned that "[o]ur nation is moving toward two societies, one black, one white—separate and unequal."[46] Sadly, a quarter of a century after the Kerner Commission completed its inquiry and issued its conclusions and recommendations, the systemic problems identified by the Commission are, if anything, more severe and entrenched. The prophecy of polarization and disadvantage has, twenty-five years later, become a reality. And the promise of reform and reconciliation seems now, more than ever, a dream deferred. This is particularly evident in the aftermath of twelve years of Reagan-Bush policies, where the disparity between rich and poor has widened and the gulf between whites and blacks has become wider still.[47]

Harvard sociologist Gary Orfield has studied and described the causes and consequences of such disparity and he has concluded that

> [r]ace is still the most basic divider in our cities, and racial inequalities cannot be solved through economic policies that do not address questions of ghettoization. . . . to a considerable extent the residents of city ghettos are now living in separate and deteriorating societies, with separate economics, diverging family structures and basic institutions, and even growing linguistic separation within the core ghettos. The scale of their isolation by race, class

44. *Id.*

45. *Id.* at 128.

46. NATIONAL ADVISORY COMM'N ON CIVIL DISORDER, THE KERNER REPORT 1 (1968).

47. *See generally*, ANDREW HATCHER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL 93-106 (1992) (noting than while black Americans comprised 12.1 of the population tabulated by the 1990 census, "they ended up with only 7.8 percent of the monetary pie"); KEVIN PHILLIPS, THE POLITICS OF RICH AND POOR: WEALTH AND THE AMERICAN ELECTORATE IN THE REAGAN AFTERMATH 202-09 (1990) (arguing that women, young people, and minorities all suffered negative effects of economic polarization during the 1980s).

and economic situation is much greater than it was in the 1960's, impoverishment, joblessness, educational inequality, and housing insufficiency even more severe.[48]

Though the deplorable conditions suffered by substantial numbers of African-Americans should not be the subject of serious dispute, conclusions about the causes, consequences, and remedies for such suffering remain deeply contested. Had Professor Guinier's confirmation turned explicitly upon this debate, the confirmation process at least would have provided a serious opportunity for public discourse upon these critical issues. Sadly, discussion of these matters during the Guinier confirmation process was conducted only in the most elliptical manner.

Finally, it may be the case that Professor Guinier was so vehemently attacked not so much because of her specific ideas or proposals but because of the general subject matter of her writings. The current debate surrounding the appropriate reach of the federal Voting Rights Act in providing equal electoral opportunities for racial and ethnic minorities remains intensely controversial. That controversy is reflected in the decisions rendered by the Supreme Court in *United Jewish Organizations of Williamsburgh, Inc. (UJO) v. Carey*[49] and in *Shaw v. Reno*.[50]

48. Gary Orfield, *Separate Societies: Have the Kerner Warnings Come True?*, *in* QUIET RIOTS, RACE AND POVERTY IN THE UNITED STATES 102 (Fred R. Harris & Roger Wilkins eds., 1988). The demographic data fully support Orfield's conclusions. In public schools, a national pattern of segregation on the basis of race and ethnicity exists. This pattern is especially severe in the inner cities of urban America. In our nation's largest urban centers, "[fifteen] out of every 16 African-American and Latino students are in schools where most of the students are non-white." William Celis 3d, *Study Finds Rising Concentration of Black and Hispanic Students*, N.Y. TIMES, Dec. 14, 1993, at A1.

The pattern of racial and ethnic segregation is also reflected in patterns of joblessness, poverty and health deficiencies. According to data reported by the Bureau of Labor Statistics, the 1993 unemployment rate for African-Americans was 13.6 percent, for Latinos, it was 14.3 percent. U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, CENSUS POPULATION SURVEY, NEW YORK CITY, 1981-1993 ANNUAL AVERAGES, Tables 3-4 (1993). The average unemployment rate for African-Americans and Latinos was 59 percent higher than the 8.8 percent unemployment rate for whites. When one looks at the unemployment figures among men, the disparities are more severe: 16.5 of African-American males and 15.3 percent of Latino males were unemployed in 1993. The corresponding rate for white males during that time period was 9.4 percent. *Id.* at Tables 2, 4.

Statistics reported by the New York City Health Department are similarly distressing. The incidence of infant mortality in 1990 was 18.6 for African-American and 19.8 for Latinos per 1,000 live — over twice the infant mortality rate for whites (7.9 per 1,000 births). The maternal mortality rate in 1990 was 5.6 for African-Americans and 2.1 for Latinos per 10,000 live births — between 7 and 17 times the maternal mortality rates for whites. The incidents also disproportionately impacts African-Americans and Latinos. For the 3-year period between 1988 and 1990, more than 60 percent of those who died from AIDS were African-American or Latino. Thirty-five percent of those who died from AIDS were African-American and 27 percent were Latino. NEW YORK CITY DEP'T OF HEALTH, OFFICE OF VITAL STATISTICS AND EPIDEMIOLOGY, SUMMARY OF VITAL STATISTICS, Tables 12-22 (1990).

49. 430 U.S. 144 (1977).

50. 113 S. Ct. 2816 (1993).

In *UJO*, the Court reviewed the constitutionality of race-conscious districting in connection with a state legislative reapportionment plan. The plaintiffs in that case contended that the use of racial criteria in fashioning the districting plan violated the Fourteenth and Fifteenth Amendments. In response to this claim, a fractured Court was unable to agree on an opinion. Nevertheless, seven members of the court did manage to conclude—although with differing explanations—that race-conscious districting did not violate the Federal Constitution.

In *Shaw*, the Court revisited the issue of race-conscious districting. At issue was a North Carolina congressional districting plan that created two districts designed to provide African-Americans with a fair opportunity to elect candidates of their choice. One of these districts meandered from the northeastern to the central to the southern part of the State. This districting arrangement was challenged as violative of the Fourteenth Amendment. The challenge was dismissed by a federal three-judge district court on the basis of the Supreme Court's earlier decision in *UJO*.

On appeal to the Supreme Court, the Court was again deeply divided on this issue. But, in a five to four decision, the Supreme Court concluded that the district court was wrong to dismiss the plaintiffs' claim; that intentional race-conscious districting could be inferred from the bizarre shape of a district; and that race-conscious districting should be subjected to "close judicial scrutiny."[51] Accordingly, the Court remanded the case to the District Court for further proceedings. In so doing, the *Shaw* Court claimed that the analysis that is was employing was not at all inconsistent with the Court's prior decision in *UJO*. In fact, the Court's decision suggested a marked departure from the holding in *UJO*. Justice White, in dissent, correctly concluded that in *Shaw*, the Court chose merely to "sidestep *UJO*."[52]

The divisions on the Court[53] as reflected in *UJO* and *Shaw* may well represent the differences of opinion that prevail in society as a whole with

51. 113 S. Ct. at 2825, 2829, 2832. The principal focus of the *Shaw* opinion was directed, however, at the question of whether and under what circumstances a finding of intentional race-based districting could be inferred from the geographic contours of a districting arrangement. Accordingly, in *Shaw*, this Court did not explore, in any great detail, the precise dimensions of "close judicial scrutiny" other than to suggest, generally, that intentional race-conscious districting must be "narrowly tailored to further a compelling governmental interest", *id.* at 2832, and to suggest more particularly that "a reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression." *Id.* at 2831.

52. 113 S. Ct. at 2834.

53. On the remand of *Shaw*, a three-judge district court panel found the congressional district in question to be the product of a "racial gerrymander", but one that survived strict scrutiny in light of the state's compelling interest in complying with the Voting Rights Act. Shaw v. Hunt, 861 F.Supp. 408, 417 (E.D.N.C. 1994) (three-judge court).

For other post-*Shaw* holdings in which racially-conscious districts were upheld, *see, e.g.*, Cane v. Worcester County, Maryland, 35 F.3d 921, 927 n.6 (4th Cir. 1994) (finding proposed majority African-American district not a violation of *Shaw* because it was not "geographically bizarre" and because it was based on "other traditional districting principles" besides race); Bridgeport Coalition for Fair Representation v. City of Bridgeport, 26 F.3d 271, 277 respect to race-conscious districting under the Voting Rights Act. The issue remains a complex and controversial one. It is one to which many Americans respond with discomfort born out of uncertainty regarding the wisdom, efficacy, and necessity of such an approach. To her great credit, Professor Guinier's articles address this difficult issue just as they address broader questions regarding the fundamental nature of our democratic system, as well as the political disadvantages experienced by racial and ethnic minorities within that system and the consequences of such disadvantages.

Professor Guinier's nomination to serve as Assistant Attorney General for Civil Rights presented an opportunity for a serious national discussion of racial discrimination and its remediation. Instead, the nomination process dissolved into one of name-calling and mischaracterization with very little serious discussion of what are concededly difficult and painful issues. So understood, the attack on Professor Guinier represented an attack upon the bearer of difficult and discomforting news. By withdrawing Professor Guinier's nomination, President Clinton joined the critics and killed the messenger. Fortunately, the message survives on the pages of *The Tyranny of the Majority.*

(2d Cir. 1994) (holding plan ordered by district court permissible under *Shaw* because it was not based solely on racial grounds); and Hines v. Mayor and Town Council of Ahoskie, 998 F.2d 1266, 1274 (4th Cir. 1993) (rejecting black voters' proposed districting plan as based on race without sufficient justification).