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## CONFLICTING REPRESENTATIONS: LANI GUINIER AND JAMES MADISON ON ELECTORAL SYSTEMS

Mark A. Graber\*

Lani Guinier believes “that every citizen has the right to equal legislative influence.”<sup>1</sup> For this, she has been assailed as a “Quota Queen” by politically correct conservatives more interested in sowing social discord than in promoting public deliberation about American electoral systems.<sup>2</sup> Although many, perhaps too many, passages in *The Tyranny of the Majority*<sup>3</sup> concentrate on the political problems of persons of color, the “one-vote, one-value”<sup>4</sup> voting schemes that Guinier proposes will not establish a fixed racial spoils system. Proportional representation (PR) permits persons to choose their political identities.<sup>5</sup> As Guinier notes, “[n]o one needs to decide in advance what a

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1. Lani Guinier, *The Tyranny of the Majority: Fundamental Fairness in Representative Democracy* 124 (Free Press, 1994). Guinier alternates between speaking of “an equal opportunity to influence legislative policy,” *id.* at 135, and “a fair chance to influence legislative policy-making,” Lani Guinier, *[E]racing Democracy: The Voting Rights Cases*, 108 Harv. L. Rev. 109, 126 (1994). See Guinier, *Tyranny* at 72, 74, 78, 116 (“equal” or “same”); *id.* at 40, 69, 70, 104 (“fair”).

2. See, e.g., Clint Bolick, *Clinton's Quota Queens*, Wall Street J. A12, A12 (Apr. 30, 1993). One wonders whether Bolick will label conservative populist Kevin Phillips a “Kwota King” now that Phillips has endorsed some version of proportional representation. Kevin Phillips, *Arrogant Capital: Washington, Wall Street, and the Frustration of American Politics* 191-95 (Little, Brown and Co., 1994) (“the other far-reaching reform that deserves more attention is modifying our electoral system in the direction of proportional representation. . .”). Such proponents of proportional representation as John Stuart Mill and Arend Lijphart must also be “Kwota Kings.” See John Stuart Mill, *Considerations on Representative Government* 139-64, especially 141, (Gateway Editions, Ltd., 1962) (“[i]n a really equal democracy, every or any section would be represented, not disproportionately, but proportionately”); Arend Lijphart, *Comparative Perspectives on Fair Representation: The Plurality-Majority Rule, Geographical Districting, and Alternative Electoral Arrangements*, 9 Policy Studies J. 899 (1980-81).

3. Guinier, *Tyranny* (cited in note 1).

4. *Id.* at 152.

5. Strictly speaking, the cumulative voting schemes Guinier proposes, see Guinier, *Tyranny* at 149 (cited in note 1), are semiproportional. For a discussion of the distinction between proportional and semiproportional electoral systems, see Douglas J. Amy, *Real Choices/New Voices: The Case for Proportional Representation Elections in the United States* 186-87 (Columbia U. Press, 1993).

group is. The voters make that decision by the way they cast their ballots.”<sup>6</sup> Indeed, she adds, “[n]o one needs to decide whether a minority group identity is the only or primary identity. The voters do that by the way they vote.”<sup>7</sup> When a significant number of black voters support candidates committed to serving their perceived common interests as African-Americans, that group will have the power to elect what Guinier refers to as an “authentic” black representative.<sup>8</sup> Nevertheless, cumulative voting schemes permit the same number of whites, Ku Klux Klan members, plumbers, and Brooklyn Dodger fans to elect the “authentic”<sup>9</sup> representatives of their choice.<sup>10</sup> The virtue of proportional representation is that such electoral systems minimize the voters “represented” by legislators they did not choose.<sup>11</sup>

Lost in the hue and cry over whether race-neutral cumulative voting schemes somehow amount to unwarranted special pleading for racial minorities is any serious discussion about Guinier’s notion of representation and the probable impact of proportional representation on legislative support for racial justice. Although Guinier occasionally implies that her proposals are Madisonian,<sup>12</sup> the electoral schemes set out in *The Tyranny of the Majority*<sup>13</sup> seem more inspired by Anti-Federalist thought than by *The Federalist Papers*.<sup>14</sup> *The Tyranny of the Majority*<sup>15</sup> advances a sophisticated and uncompromising theory of “interest representation.”<sup>16</sup> In sharp contrast to Madison, who thought that properly designed institutions minimize self-interested voting and allow more public-spirited motives to hold sway in both

6. Guinier, 108 Harv. L. Rev. at 134 (cited in note 1).

7. *Id.* See also Guinier, *Tyranny* at 137, 151-52 (cited in note 1).

8. Guinier, *Tyranny* at 13 (cited in note 1).

9. *Id.*

10. Guinier, 108 Harv. L. Rev. at 125 (cited in note 1) (“in choosing remedies to guarantee representation opportunities for politically cohesive racial groups, courts should select remedies that also have the potential to empower other politically cohesive groups”); *id.* at 133 n.141; Guinier, *Tyranny* at 71, 98, 114, 117 (cited in note 1). For further discussion of how proportional representation avoids the need for racial gerrymandering, see *infra* notes 27-29 and accompanying text.

11. Guinier, *Tyranny* at 121-22, 151-52 (cited in note 1). For a detailed discussion of how votes are “wasted” in single-member districts, see Amy, *Real Choices/New Voices* at 21-26, 41 (cited in note 5). See also John R. Low-Beer, *The Constitutional Imperative of Proportional Representation*, 94 Yale L.J. 163, 172-73, 182 (1984); Mary A. Inman, *C.P.R. (Change Through Proportional Representation): Resuscitating a Federal Electoral System*, 141 U. Pa. L. Rev. 1991, 1993-95, 1999, 2010 (1993).

12. Guinier, *Tyranny* at 3-5 (cited in note 1).

13. Guinier, *Tyranny* (cited in note 1).

14. Alexander Hamilton, James Madison, and John Jay in Clinton Rossiter, ed., *The Federalist Papers* (Mentor, 1961). See *infra* notes 81-86 and accompanying text.

15. Guinier, *Tyranny* (cited in note 1).

16. *Id.* at 155.

electoral and legislative contests, Guinier prefers democratic procedures that harness representatives to the interests of their constituents. Whereas Madison advanced a trustee model of representation that gave elected officials substantial leeway to deliberate independently about justice and the public good, Guinier's works advocate "a delegate model of representation" that will "ensure substantive accountability to constituents' policy preferences. . ."<sup>17</sup>

This essay compares the ways in which Guinierian and Madisonian electoral systems purport to achieve racial justice. Although my sympathies are clearly with Madison, this paper does not make the definitive case against proportional representation. Instead, the following pages merely point out that a movement toward proportional representation in our society might weaken support for more egalitarian racial policies and suggest how the civil rights movement might benefit by less populist understandings of representation. At the very least, I hope to clarify the conditions under which different electoral systems promote racial justice and to begin a more informed dialogue about the voting schemes among which Guinier would have Americans choose.

### GUINIER AND PROPORTIONAL REPRESENTATION

Proponents of proportional representation celebrate the numerous advantages of their preferred electoral system. Most of those virtues are procedural. Douglas Amy's *Real Choices/New Voices* maintains that proportional representation "would minimize wasted votes, give minor parties fair representation in our legislatures, improve the quality of campaigns, increase the number of women and racial minority officeholders, encourage more voter participation, and increase the responsiveness and legitimacy of government."<sup>18</sup> In addition to purifying democratic

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17. *Id.* at 74. Other proponents of proportional representation similarly endorse delegate models of representation. Amy, for example, maintains "that legislatures should reflect as accurately as possible the political desires of the public . . ." In his opinion, "we possess a rule for evaluating how democratic an election system is: How well does it produce a legislature that accurately mirrors the public's political preferences?" Amy, *Real Choices/New Voices* at 27 (cited in note 5). See Jonathan W. Still, *Political Equality and Election Systems*, 91 *Ethics* 375, 384 (1981) ("the legislative body ought to be a microcosm of the electorate"); Low-Beer, 94 *Yale L.J.* at 164 n.3, 176, 182 (cited in note 11).

18. Amy, *Real Choices/New Voices* at 197 (cited in note 5). See *id.* at 1-152; Low-Beer, 94 *Yale L.J.* at 183 (cited in note 11); Inman, 141 *U. Pa. L. Rev.* at 2005-06 (cited in note 11); Edward Still, *Alternatives to Single-Member Districts* in Chandler Davidson, ed., *Minority Vote Dilution* 249, 252-53 (Howard U. Press, 1984). See also Sanford Levinson, *Gerrymandering and the Brooding Omnipresence of Proportional Representation: Why Won't It Go Away?*, 33 *UCLA L. Rev.* 257, 270-72 (1985).

processes, a goal shared by some conservative populists,<sup>19</sup> liberal proponents of proportional representation expect that the adoption of that electoral scheme would yield more desirable public policies. “[I]ncreased representation,” Amy suggests, “means minority communities can better promote their political and economic interests and focus more attention on what they see as pressing issues.” “Imagine,” he asks, “if twelve black United States senators, rather than none [or one], were pushing legislation on civil rights, affirmative action, urban renewal, and social welfare spending. Would this not make a significant difference?”<sup>20</sup>

Guinier similarly regards proportional representation as both an end in itself and a means for advancing the substantive goals of the civil rights movement. Although at times she claims that “[t]he issue here is one of procedure and process, not substantive justice,”<sup>21</sup> other passages in *The Tyranny of the Majority* declare that “the real goal” of her proposals is to “alter the material condition of the lives of America’s subjugated minorities.”<sup>22</sup> Cumulative voting will “advanc[e] . . . a progressive agenda,”<sup>23</sup> in Guinier’s opinion, by enabling significant political minorities to “assert their most salient interests and to hold their elected officials accountable for advocating those interests.”<sup>24</sup> Not only would proportional representation enable African-Americans and their political allies to elect more representatives, but that voting scheme also would inhibit those “black officials” from “defin[ing] their political agenda without reference to or consultation with a community base.”<sup>25</sup> Hence, racial minorities could be confident that the officials they choose actually would represent them in legislative debates.

Guinierian electoral institutions should serve some of their intended purposes. The cumulative voting schemes Guinier proposes probably would enable persons of color to elect more public officials committed to strengthening present civil rights laws. Amy persuasively argues that the party-list version of propor-

19. Phillips, *Arrogant Capital* at 191-95 (cited in note 2).

20. Amy, *Real Choices/New Voices* at 115 (cited in note 5). See also *id.* at 9-10, 101. See generally Low-Beer, 94 *Yale L.J.* (cited in note 11); Inman, 141 *U. Pa. L. Rev.* at 1997, 2005-06 (cited in note 11). Elsewhere in his book, Professor Amy admits that “it is clearly too soon to draw any conclusions about the final partisan implications of a move toward PR in the United States.” Amy, *Real Choices/New Voices* at 33 (cited in note 5).

21. Guinier, *Tyranny* at 187 (cited in note 1).

22. *Id.* at 54.

23. *Id.* at 44.

24. Guinier, 108 *Harv. L. Rev.* at 133 n.141 (cited in note 1).

25. Guinier, *Tyranny* at 62 (cited in note 1). See *id.* at 74, 82-83.

tional representation is partly responsible for the more equitable representation of women and minorities in European legislatures. In particular, he points to “the pressure on the parties . . . to construct lists that represent the broad electorate . . . so that their slates will have wide appeal.”<sup>26</sup> No reason exists for thinking that proportional representation would have a different impact in the United States. Significantly, proportional representation would increase the number of black legislators without any recourse to the contentious racial gerrymanders that the Supreme Court recently declared unconstitutional in *Shaw v. Reno*<sup>27</sup> and *Miller v. Johnson*.<sup>28</sup> “[T]he controversial issues of reverse discrimination and reserving seats by race become irrelevant under proportional representation,” Amy notes. “PR simply *allows* for the election of minority candidates, if they have voter support.”<sup>29</sup>

In addition to increasing the number of black elected officials, institutional mechanisms that promote interest representation also are more likely than present electoral institutions to prevent those officials from developing independent priorities when in the legislature. Proportional representation encourages new parties and more issue-oriented parties (such as the Greens in Germany). This development, in practice, reduces the capacity of elected officials to exercise their personal judgment on matters where their beliefs or interests diverge from those of their electorate.<sup>30</sup> The more parties, the more likely a voter can find candidates with whom he or she agrees on all salient issues.<sup>31</sup>

Nevertheless, the practical consequences of electoral systems that aspire to give every citizen equal legislative influence are likely to be less progressive than their advocates hope. To the extent that proportional representation ensures that the

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26. Amy, *Real Choices/New Voices* at 108, 128-29 (cited in note 5).

27. 113 S. Ct. 2816 (1993).

28. 115 S. Ct. 2475 (1995).

29. Amy, *Real Choices/New Voices* at 132 (cited in note 5). See Low-Beer, 94 Yale L.J. at 176 n.63 (cited in note 11) (“[u]nder a PR system . . . , groups are left to define themselves—hence the term ‘voluntary constituencies’”); Inman, 141 U. Pa. L. Rev. at 2011, 2044-45, 2048 (cited in note 11); Still, *Single-Member Districts* at 263 (cited in note 18); Lijphart, 9 Policy Studies J. at 910 (cited in note 2). Indeed, by considering the electorate as a whole (or in sufficiently large blocks), proportional representation effectively prevents gerrymanders of any sort. See Amy, *Real Choices/New Voices* at 42-54 (cited in note 5); Inman, 141 U. Pa. L. Rev. at 2025, 2048 (cited in note 11).

30. See Amy, *Real Choices/New Voices* at 67-73, 76-98 (cited in note 5) (discussing how proportional representation “[a]llows [i]ssue-oriented [c]ampaigns” and “[e]ncourag[es] [p]rincipled [p]oliticians” and discussing how proportional representation encourages minor parties devoted to pursuing the policy concerns of their electorate).

31. See Inman, 141 U. Pa. L. Rev. at 2013 (cited in note 11).

political center will control public policy,<sup>32</sup> adopting that electoral system will do little to improve the lot of less fortunate citizens. Indeed, some recent public opinion polls suggest that proportional representation is more likely to augment the overall political strength of extreme racists than of persons committed to racial justice. Moreover, electoral schemes that tighten the ties between constituents and representatives reduce the probability that “authentic”<sup>33</sup> conservative white representatives will support more liberal racial policies than their conservative white constituents favor.

Hard as this may be for many left-wing academics to accept, recent opinion polls suggest that politically inefficacious white reactionaries may be more numerous than politically inefficacious progressive persons of color. Contemporary surveys find that more Americans believe that present policies unduly favor blacks than think present policy favors whites. “Voter attitudes,” the most recent *Times Mirror Center* poll found, “are punctuated by increased indifference to the problems of blacks and poor people.”<sup>34</sup> Approximately half the citizenry believes that “we have gone too far in pushing equal rights in this country,” and that “blacks who can’t get ahead in this country are mostly responsible for their own condition.”<sup>35</sup> Popular majorities also are prepared to jettison those welfare policies that disproportionately service racial minorities. Eighty-five percent of Americans agree that “poor people have become too dependent on government assistance programs,” and most disagree with claims that “the government should help more needy people even if it means going deeper in debt.”<sup>36</sup>

If these surveys are accurate, then proportional representation schemes that enable the Rainbow Coalition to elect ten more representatives also would enable the Christian Coalition (or other very conservative groups) to elect fifteen more repre-

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32. Amy notes that “PR governments are typically coalition governments, and coalition politics tends to be compromise politics. These coalition governments are thought to be less likely to adopt radical policies—of either the left or the right. . . .” Amy, *Real Choices/New Voices* at 172 (cited in note 5).

33. Guinier, *Tyranny* at 13 (cited in note 1).

34. *The People, the Press & Politics: The New Political Landscape* 4 (Times Mirror Co., 1994).

35. *Id.* at 129, 153. Overwhelming national majorities oppose affirmative action programs. *Id.* at 154.

36. *Id.* at 155, 153. Strong majorities also support two year limits on welfare and laws preventing illegal immigrants from receiving any state assistance. *Id.* at 142-43. See *Public Supports New Programs To Get People Off Welfare*, 344 *The Gallup Poll Monthly* 2, 2 (May 1994) (54% want welfare spending reduced or ended, 10% want welfare spending increased).

sentatives.<sup>37</sup> Thus, should all Americans have an equal influence on public policy, the best that persons of color could hope for is that present policies might be retained. Moreover, some survey evidence suggests that members of one racial minority would not benefit from the increased representation of members of other racial minorities. “[M]inorities,” several studies find, hold “more negative views of other minorities than do whites.”<sup>38</sup> These racial and ethnic tensions may further exacerbate existing gaps between African-Americans and other citizens, should proportional representation be adopted. Changes in electoral systems that increase the power of Asian-Americans in California, for example, are not likely to result in more affirmative action policies at state colleges and universities.

Guinier suggests that the application of cumulative voting schemes in legislative decisionmaking might enable racial minorities to win some votes on matters of lower priority to racist whites.<sup>39</sup> Both the history of the populist movement and contemporary voting studies, however, indicate that many less fortunate whites place higher priority on measures that maintain the racial status quo than on redistributive measures that might improve the lot of most lower-middle and lower class citizens. “Just as race was used, between 1880 and 1964, by the planter-textile-banking elite of the South to rupture class solidarity at the bottom of the income ladder,” Thomas and Mary Edsall note, “race as a national issue over the past twenty-five years has broken the Democratic New Deal ‘bottom-up’ coalition—a coalition dependent on substantial support from all voters, white and black, at or below the median income.”<sup>40</sup>

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37. David Plotke suggests that proportional representation in the United States would probably result in the following political alignment: “left party, 3-5 percent; black party, 5-10 percent; center-left party, 30-35 percent; independent center party, 5 percent; right-center party, 35-40 percent; Christian right party, 10-15 percent.” David Plotke, *David Plotke Replies*, 42 *Dissent* 526, 529 (1995). See Levinson, 33 *UCLA L. Rev.* at 274 (cited in note 18) (noting how the Klan might be one beneficiary of proportional representation). Amy recognizes that PR would “allow for the election of a few white supremacists,” Amy, *Real Choices/New Voices* at 176 (cited in note 5), but he underestimates, in my view, the relative gains such political movements might make under PR.

38. Steven A. Holmes, *Survey Finds Minorities Resent One Another Almost as Much as They Do Whites*, *N.Y. Times* B8, B8 (Mar. 3, 1994).

39. Guinier, *Tyranny* at 108 (cited in note 1).

40. Thomas Byrne Edsall and Mary D. Edsall, *Chain Reaction: The Impact of Race, Rights, and Taxes on American Politics* 5-6 (W.W. Norton & Co., 1992). See Lawrence Goodwyn, *Democratic Promise: The Populist Moment in America* 299 (Oxford U. Press, 1976) (“the received cultural inheritance of white supremacy continued to hold a greater sway over Southern whites than issues of economic reform did, however ably such issues were articulated by Populist spokesmen”).



Of course, public opinion polls are not always the most reliable indicators of popular sentiment. People respond in different ways over short time intervals to the same question,<sup>41</sup> and slight changes in the wording of survey questions may yield dramatic changes in responses.<sup>42</sup> Studies no doubt exist that offer a more liberal assessment of contemporary public attitudes toward race and poverty than those discussed in this essay.<sup>43</sup> The great danger, however, is that the most favorable public opinion polls will be deemed authoritative by progressive proponents of proportional representation simply because they *are* favorable. For those who admit they lack the expertise necessary to determine whether the Times Mirror Poll is a more accurate barometer of public opinion than, say, the Gallup Poll, the best conclusion seems to be that the average American may have more liberal attitudes toward race and poverty than the average Republican member of the 104th Congress<sup>44</sup> but that American race and welfare policies would not become much more liberal and might become more conservative should all citizens have an equal influence on the making of those policies.<sup>45</sup>

When the probable consequences of proportional representation are fully acknowledged, Guinier's hope that representatives will not deviate from their constituents' interests seems less attractive. The very forces that yoke authentic black representatives to their black constituencies presumably will yoke "authentic"<sup>46</sup> conservative white representatives to their conservative white constituencies. A system that maximizes the incentives for elected officials to act as delegates rather than trustees would, for

41. See Richard Morin, *Poll Finds Disapproval of GOP's Budget Plans*, Washington Post A1, A4 (May 16, 1995) (noting an 18 percent increase over several months in public opposition to further cuts in welfare).

42. One survey found that "average support for more assistance for the poor is 39 percentage points higher than for welfare." Tom W. Smith, *That Which We Call Welfare by Any Other Name Would Smell Sweeter: An Analysis of the Impact of Question Wording on Response Patterns*, 51 *Pub. Op. Q.* 75, 76 (1987). See Fay Lomax Cook and Edith J. Barrett, *Support for the American Welfare State: The Views of Congress and the Public* 27 (Columbia U. Press, 1992). For a more general discussion of "response instability," see John R. Zaller, *The Nature and Origins of Mass Opinion* 53-96 (Cambridge U. Press, 1992).

43. See, e.g., Nancy Lewis, *Survey at Odds With Welfare Reform Plans; According to Poll, People Want More Social Spending, Officials of Sponsoring Group Say*, Washington Post A3, A3 (July 18, 1995).

44. See Morin, Washington Post at A1 (cited in note 41); Richard L. Berke, *Poll Finds Public Doubts Key Parts of G.O.P.'s Agenda*, N.Y. Times A1, A1 (Feb. 28, 1995).

45. Significantly, perhaps, even studies that find opposition to draconian cuts in welfare find that most Americans oppose affirmative action, even in cases where past race discrimination exists. See Berke, N.Y. Times at A1 (cited in note 44).

46. Guinier, *Tyranny* at 13 (cited in note 1).

these reasons, yield no more racial justice than the median voter demands. As the above surveys suggest, that is not a lot of racial justice.

The crucial question that proponents of strong civil rights laws must therefore ask is whether refining or abandoning delegate models of representation would best promote racial justice. Unfortunately, *The Tyranny of the Majority*<sup>47</sup> sidesteps this difficult issue. This omission is partly explained by Guinier's dubious assumption that proportional representation primarily would empower marginalized voters on the left.<sup>48</sup> Hence, designing institutions that enable those representatives to use their independent judgment seems a bad idea. More significantly, Guinier consistently maintains that geographical districting is a primitive form of interest representation.<sup>49</sup> This mistake leads her to overlook the alternative way in which the Madisonian model of representation purports to achieve racial justice.

#### THE MADISONIAN ALTERNATIVE

In sharp contrast to the electoral schemes proposed by *The Tyranny of the Majority*,<sup>50</sup> *The Federalist Papers*<sup>51</sup> advocates institutions that minimize self-interested behavior at every step of the political process. "Madison," Stephen Elkin notes, "did not think that law-making should substantially revolve around preference aggregation and bargaining among interests. It was instead to be deliberative in form, looking toward legislating in the public interest."<sup>52</sup> Regarding "politics [as] a process . . . of creating a collective order with a shared vision and sense of public interest[.]" Madison and his constitutional collaborators disdained any "electoral scheme" that would "implicitly encourag[e] more partial, single-issue stances, vis-à-vis the rest [of] the fellow members of the electoral marketplace."<sup>53</sup> Elections, in

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47. Guinier, *Tyranny* (cited in note 1).

48. Thus, she suggests that feminists are the other likely beneficiary of cumulative voting schemes. See Guinier, 108 Harv. L. Rev. at 134 (cited in note 1); Guinier, *Tyranny* at 100-01 (cited in note 1). See generally *id.* at 114 (suggesting that left-wing groups in general will benefit from her electoral proposals); Guinier, 108 Harv. L. Rev. at 137 (cited in note 1).

49. Guinier, 108 Harv. L. Rev. at 127 (cited in note 1); Guinier, *Tyranny* at 127, 151-52 (cited in note 1).

50. Guinier, *Tyranny* (cited in note 1).

51. *The Federalist Papers* (cited in note 14).

52. Stephen L. Elkin, *Pigs & Wholes*, 5 Good Society 11, 12 (Fall 1995).

53. Levinson, 33 UCLA L. Rev. at 274-75 (cited in note 18). See Nancy L. Schwartz, *The Blue Guitar: Political Representation and Community* 5-6 (U. of Chicago Press, 1988); Rogers M. Smith, *Liberalism and American Constitutional Law* 122 (Harvard U. Press, 1985); Mark E. Rush, *In Search of a Coherent Theory of Voting Rights:*

Madison's opinion, served to identify those persons who could best transcend the parochial concerns of their electorates. "The aim of every political constitution," he wrote, "is . . . first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society."<sup>54</sup> Fortunately, the American Constitution was well designed from that perspective. Ratification, John Jay declared, would guarantee that "the best men in the country will not only consent to serve, but also will generally be appointed to manage [the polity]."<sup>55</sup>

Large voting districts were crucial to the Madisonian quest for public-spirited representatives. Publius defended vast geographic legislative districts because he thought that such electoral units increased the number of worthy candidates<sup>56</sup> and forced voters to transcend parochial concerns when making electoral choices. Because no person could "authentically"<sup>57</sup> represent a heterogenous district, Madison assumed that voters in the constitutional order would select the person with the best reputation for political judgment. Elections, he thought, would "center on men who possess the most attractive merit and the most diffusive and established characters."<sup>58</sup>

Those representatives were expected to exercise their independent judgment on most issues and not to be tethered to the

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*Challenges to the Supreme Court's Vision of Fair and Effective Representation*, 56 *Rev. of Pol.* 503, 508 (1994).

54. Federalist 57 (Madison) in *The Federalist Papers* 350, 350 (cited in note 14).

55. Federalist 3 (Jay) in *The Federalist Papers* 41, 43 (cited in note 14). See Federalist 4 (Jay) in *The Federalist Papers* 45, 47 (cited in note 14); Federalist 64 (Jay) in *The Federalist Papers* 390, 391 (cited in note 14) (explaining why the presidential appointment system will secure "those men only who have become the most distinguished by their abilities and virtue"); Federalist 64 (Jay) in *The Federalist Papers* 391, 396 (cited in note 14); Federalist 68 (Hamilton) in *The Federalist Papers* 411, 412 (cited in note 14) (explaining why the presidential selection system will result in the election of the best person); Federalist 76 (Hamilton) in *The Federalist Papers* 454, 455, 458-59. For a fuller discussion of this claim and the claims made in the next four paragraphs, see Gordon S. Wood, *The Creation of the American Republic 1776-1787* at 499-518 (U. of North Carolina Press, 1969); Edmund S. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* 237-306 (W.W. Norton & Co., 1988).

56. Federalist 10 (Madison) in *The Federalist Papers* 77, 82 (cited in note 14); Federalist 27 (Hamilton) in *The Federalist Papers* 174, 174 (cited in note 14).

57. Guinier, *Tyranny* at 13 (cited in note 1).

58. Federalist 10 (Madison) in *The Federalist Papers* 77, 83 (cited in note 14). See Federalist 57 (Madison) in *The Federalist Papers* 350, 354 (cited in note 14) (explaining why a large electorate is more likely than a small one to choose a "fit representative"). As Professor Nancy Schwartz points out, Madison opposed single-member districts because he thought they were too small. Instead, Madison preferred to elect all representatives at large from each state. "[T]he way to have representatives give 'an attention to the interest of the whole Society,'" the Father of the Constitution wrote, was "'by making them the choice of the whole Society.'" Schwartz, *Blue Guitar* at 5 (cited in note 53) (quoting Madison).

particular interests of their electorates. The very point of representation, Publius asserted, was "to refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country. . . ."59 "[I]t may well happen," he declared, "that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves. . . ."60 Because he regarded public officials in a well-ordered regime as having special capacities to ascertain the public good, Hamilton believed that "[t]he republican principle . . . does not require an unqualified complaisance to every sudden breeze of passion, or to every transient impulse which the people may receive from the arts of men, who flatter their prejudices to betray their interests."<sup>61</sup> When public opinion and public interest conflict, Hamilton maintained that it is "the duty of the persons whom [the people] have appointed to be the guardians of those interests to withstand the temporary delusion [of the people] in order to give them time and opportunity for more cool and sedate reflection."<sup>62</sup> Madison similarly thought that the Senate "may be sometimes necessary as a defense to the people against their own temporary errors and delusions."<sup>63</sup>

*The Federalist Papers*<sup>64</sup> provides institutional support for this firmness by insisting that elected officials serve terms long enough to ensure that representatives will not be immediately accountable to their constituents for every unpopular vote.<sup>65</sup> The length of the presidential and senatorial terms, in particular, were expected to give the people's representatives the leeway necessary to exercise their judgment rather than to defer to the immediate policy demands of their less informed constituents. The Senate, Madison wrote, "ought to hold its authority by a tenure of considerable duration" owing to "the propensity of all single and numerous assemblies to yield to the impulse of sudden

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59. Federalist 10 (Madison) in *The Federalist Papers* 77, 82 (cited in note 14).

60. *Id.*

61. Federalist 71 (Hamilton) in *The Federalist Papers* 431, 432 (cited in note 14).

62. *Id.*

63. Federalist 63 (Madison) in *The Federalist Papers* 382, 384 (cited in note 14). See Jonathan Elliot, ed., 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 40 (J.B. Lippincott Co., 1941) (quoting James Iredell) ("the Senate should not be at the mercy of every popular clamor").

64. *The Federalist Papers* (cited in note 14).

65. Lengthy terms of office also were thought necessary to give representatives the "practical knowledge requisite to the due performance" of their duties, Federalist 53 (Madison) in *The Federalist Papers* 330, 332 (cited in note 14), a consideration that would not be very relevant if representatives were expected to exercise little independent judgment.

and violent passions. . . .”<sup>66</sup> Long terms were also necessary for government to initiate projects whose benefits were not immediately visible.<sup>67</sup> The Framers would not, of course, have representatives govern indefinitely in the face of public opinion. Still, they believed that a public official should have a lengthy enough term to guarantee “that there would be time enough before [the next election] to make the community sensible of the propriety of the measures he might incline to pursue.”<sup>68</sup>

Elected officials in a well designed republic with large election districts and reasonable terms of office, Madison thought, would be better able to identify and protect fundamental rights than the average citizens. Hence, if Guinier’s conception of racial justice is superior to that of the median voter, then the virtuous legislators in a Madisonian system who use their independent judgment are more likely than their constituents to favor strong civil rights laws. Moreover, elected officials not tethered by public opinion may profit from legislative debate on racial matters. Assuming that intelligent deliberation generally improves people’s conception of justice and the public good, then the greater the independent judgment of the representative, the more likely that representative is to realize after articulate legislative defenses of various racial policies that the measures favored by most persons of color are morally and constitutionally superior to the present status quo.

Nowhere is the difference between Guinierian and Madisonian electoral systems plainer than when Guinier asserts “[i]f the majority wields disproportionate power based on its prejudices, I conclude that in extreme circumstances majority domination may become majority tyranny.”<sup>69</sup> This remarkable sentence implies that Adolf Hitler and Martin Luther King ought

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66. Federalist 62 (Madison) in *The Federalist Papers* 376, 379 (cited in note 14). For a similar analysis of the presidential term, see Federalist 71 (Hamilton) in *The Federalist Papers* 431, 431-34 (cited in note 14); Federalist 72 (Hamilton) in *The Federalist Papers* 435, 437 (cited in note 14).

67. Federalist 63 (probably Madison) in *The Federalist Papers* 382, 383-84 (cited in note 14).

68. Federalist 71 (Hamilton) in *The Federalist Papers* 431, 434 (cited in note 14). Similarly, Publius regarded judicial review as a useful institution only when “a momentary inclination happens to lay hold of a majority.” Federalist 78 (Hamilton) in *The Federalist Papers* 464, 469 (cited in note 14). Publius offers no institutional device for preserving constitutional rights when a majority is committed to violating the liberties of the minority.

69. Guinier, *Tyranny* at 72 (cited in note 1).

to have "an equal opportunity to influence legislative policy."<sup>70</sup> The main problem with Nazi policy, apparently, is that vicious anti-Semites exercised *disproportionate* power. Had German Jews merely been barred from all professions in 1935, no majoritarian tyranny would have occurred as defined by Guinier because German majorities would have been exercising proportionate power based on their prejudices. No doubt Guinier believes that other non-electoral political institutions must remedy particularly inegalitarian policies. Her strong defense of proportional political power, however, seems to legitimate all expressions of social prejudice, as long as no individual's bigotries count for more than another person's bigotries. At the very least, Guinier's critics seem correct when they note the absence of "normative standards to bring to bear against the bad guys, because everyone is entitled to some satisfaction."<sup>71</sup>

Madison proposed a different definition of majority tyranny. Majority tyranny occurs, in his view, whenever majorities make policies "adverse to the rights of other citizens."<sup>72</sup> Thus, the *Federalist Papers*<sup>73</sup> promotes institutions that purport to minimize the influence of any prejudice on public policy and not institutions that rest content when all prejudices are equally represented. Publius insists that "it is the reason, alone, of the public, that ought to control and regulate the government. The passions," in his view, "ought to be controlled and regulated by the government."<sup>74</sup> Thus, a contemporary Madisonian representative would be more inclined to make policies reflecting the belief that racism is wrong than policies reflecting the proper balance between the 60% of the populace that favor white supremacy, the 10% that favor black supremacy and the 30% that favor racial equality.

Contemporary politics offer some support for claims that persons of color would benefit from a political system that left representatives freer than at present to act on their personal notions of the public good. Legislative shirking on civil rights questions has never been studied systemically,<sup>75</sup> but some evidence

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70. *Id.* at 135. See Rush, 56 *Rev. of Pol.* at 518 (cited in note 53) (asking whether "the American Nazi party" is "to have 'a fair chance of having its needs and desires satisfied,'").

71. *Id.* at 518-19.

72. *Federalist* 10 (Madison) in *The Federalist Papers* 77, 78 (cited in note 14).

73. *The Federalist Papers* (cited in note 14).

74. *Federalist* 49 (Madison) in *The Federalist Papers* 313, 317 (cited in note 14). See *Federalist* 50 (Madison) in *The Federalist Papers* 317, 319 (cited in note 14).

75. An early study did find that elected officials were more likely to defer to constituent opinion on civil rights questions than on other legislative issues. Warren E. Miller

suggests that most legislators are inclined to support more liberal race policies than their constituents prefer. Surveys find that the better educated citizens most likely to become political leaders are more tolerant of racial minorities and less tolerant of such groups as the Ku Klux Klan than the average citizens.<sup>76</sup> Given the electoral backlash that began in 1966, good reason exists for doubting whether the median voter favored measures as comprehensive as the Civil Rights Acts of 1964<sup>77</sup> and the Voting Rights Act of 1965<sup>78</sup>. Finally, with the exception of the Reagan and Bush administrations (and the Rehnquist Court that was packed by those administrations), those institutions furthest removed from popular support have been most responsive to claims of racial justice during the twentieth century. The presidency has in general been more liberal than the national legislature; the federal judiciary has in general been more liberal than the presidency.

Madisonian systems have their faults. Institutional mechanisms that weaken ties between constituents and representations may strengthen ties between representatives and politically privileged interest groups. Progressive reformers sought to increase popular control over Congress because national representatives were taking advantage of their relative freedom from direct control to serve business interests instead of the public good.<sup>79</sup> Moreover, elected representatives (and judges) tend to be well-off, highly educated, white males inclined to confuse their class interests with fundamental rights.<sup>80</sup> Thus, American elites historically have been more concerned with negative freedoms from government interference than with positive rights to government assistance.

Significantly, leading opponents of the Constitution anticipated Guinier's attack on the elitism of the Constitution's electoral scheme<sup>81</sup> and demanded the smaller electoral districts they

and Donald E. Stokes, *Constituency Influence in Congress*, 57 *Am. Pol. Science Rev.* 45, 56 (1963).

76. See John L. Sullivan, James Piereson and George E. Marcus, *Political Tolerance and American Democracy* 92-106 (U. of Chicago Press, 1982).

77. 42 U.S.C. § 2000-2000h (1994).

78. 42 U.S.C. § 1973-1973bb (1994).

79. See David Graham Phillips, *The Treason of the Senate* 58-215 (Quadrangle Books, 1964).

80. See Paul Brest, *Interpretation and Interest*, 34 *Stan. L. Rev.* 765, 771 (1982); Michael W. McConnell, *A Moral Realist Defense of Constitutional Democracy*, 64 *Chi. Kent. L. Rev.* 89, 105 (1988) ("[r]ather than natural right, judges are more likely to impose upon us the prejudices of their class").

81. For the central role fears of aristocracy played in Anti-Federalist thought, see Wood, *American Republic* at 483-99 (cited in note 55).

thought were more likely to achieve proportional representation.<sup>82</sup> The Federal Farmer called for “a full and equal representation . . . in which the interests, feelings, opinions and views of the people are collected in such manner as they would be were the people all assembled.” “Each order,” in his opinion, “must have a share in the business of legislation actually and efficiently.”<sup>83</sup> “Representation,” the Impartial Examiner agreed, “should be such as to comprehend every species of interest within the society.”<sup>84</sup> He and other Anti-Federalists condemned the large election districts mandated by the Constitution because “[w]hen . . . the number of representatives in a legislature is very small . . . , they are inadequate to, and cannot sufficiently respect, all the complicated, variant and opposite interests, which must necessarily subsist in a commonwealth. . . .”<sup>85</sup>

Guinier’s affinity for Anti-Federalist principles may discredit her effort to obtain Madisonian credentials,<sup>86</sup> but not her underlying political commitments. Madison may have triumphed in 1787, but, as Gordon Wood suggests, that triumph was short-lived.<sup>87</sup> For 200 years, the American political system has been evolving toward the more populist order Guinier envisions.<sup>88</sup> Indeed, the Madisonian notions of a common good and persons with distinct capacities to ascertain that common good seem foreign to the more democratic and less republican constitutional regime of the late twentieth century. Nevertheless, if Guinier’s proposals are to receive the intelligent debate they deserve, scholars and citizens must recognize that the alternative to interest representation is not territorial representation but a form of representation that sees good government as something more than the fair aggregation of everyone’s policy preferences.

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82. See Levinson, 33 UCLA L. Rev. at 261-63 (cited in note 18). For a suggestion that Guinier’s “neopluralism echoes almost word for word the writings of John Calhoun.” see Rush, 56 Rev. of Pol. at 514 (cited in note 53).

83. 7 *Letters from The Federal Farmer* (Dec. 31, 1787) in Herbert J. Storing, ed., 2 *The Complete Anti-Federalist* 214, 265-266 (U. of Chicago Press, 1981).

84. 3 *Essays by The Impartial Examiner* in Herbert J. Storing, ed., 5 *The Complete Anti-Federalist* 172, 192 (U. of Chicago Press, 1981).

85. *Id.*

86. See *supra* note 12 and accompanying text.

87. Gordon S. Wood, *The Radicalism of the American Revolution* 229-369 (Alfred A. Knopf, 1992).

88. *Id.*; John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 98-100 (Harvard U. Press, 1980).



## OUR CHOICE

The central question of representative government is whether electoral systems should minimize or maximize the impact of public opinion on public policy.<sup>89</sup> Everyone agrees that legislators in a democratic republic should ultimately be accountable to the people. No one thinks that every governmental actor should be controlled by popular sentiment all of the time. The issue is the extent to which public officials should be harnessed by public opinion. Guinier prefers a tighter relationship than at present. Madison sought a much looser bond.

If this debate is to be resolved in part on consequentialist grounds, then constitutional commentators must rely on something more than convenient empirical assumptions when promoting their pet electoral reforms. Proponents of proportional representation must carefully study public opinion and public priorities when determining the probable impact of their preferred voting schemes on electoral and legislative decisionmaking. Madisonians (or conservative democratic theorists) must determine whose interests and rights get protected when legislators are not immediately accountable to the people. At a minimum, constitutional and political theorists must recognize when they are making empirical assertions and learn how to back up those assertions with empirical evidence.

By assuming without sufficient evidence that political marginalization is primarily a left-wing phenomenon, *The Tyranny of the Majority*<sup>90</sup> and other neo-populist works<sup>91</sup> obscure the fundamental choice that proponents of racial justice must make between institutions that loosen or tighten the bonds between the citizenry and its elected representatives. Persons of color are certainly entitled to their fair share of the spoils of a politics of self-interest, but American practice suggests that such spoils will be meager. Citizens who regard a semi-permanent underclass as a public curse and racial discrimination as a public evil might better achieve their more egalitarian ends by supporting electoral institutions that promote rights and the common good. Taking this step, however, may require persons on the left to abandon romantic conceptions of a people willing to imple-

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89. See Hanna Fenichel Pitkin, *The Concept of Representation* 145 (U. of California Press, 1967).

90. Guinier, *Tyranny* (cited in note 1).

91. See Richard D. Parker, "*Here, the People Rule*": *A Constitutional Populist Manifesto* 88-93 (Harvard U. Press, 1994) (assuming without any empirical support that "[m]ost oppression . . . is the work of [elite] minorities" who should be checked by "the majority of ordinary people").

ment the latest rage in critical (whatever) studies and recognize that political justice might best be promoted by those persons trained to deliberate on matters of public importance.