

*The*  
TYRANNY  
*of the*  
MAJORITY

*Fundamental Fairness in  
Representative Democracy*

LANI GUINIER

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"Groups, Representation, & Race Conscious Districting: A Case of the Emperor's Clothes," 71 Texas Law Review 1589 (June 1993).

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# The Tyranny of the Majority

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

To me, fair play means that the rules encourage everyone to play. They should reward those who win, but they must be acceptable to those who lose. The central theme of my academic writing is that not all rules lead to elemental fair play. Some even commonplace rules work against it.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Even in governments in which minority legislators have increased, the marginalization of minority group interests has often stubbornly remained. Third-generation cases have now begun to respond. Third-generation cases recognize that it is sometimes not enough simply to ensure that minorities have a fair opportunity to elect someone to a legislative body. Under some unusual circumstances, it may be necessary to police the legislative voting rules whereby a majority consistently rigs the process to exclude a minority.

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

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

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

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

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

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

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

The fundamentally important question of political stability is how to induce losers to continue to play the game. Political stability depends on the perception that the system is fair to induce losers to continue to work within the system rather than to try to overthrow it. When the minority

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Supermajority remedies give bargaining power to all numerically infe-

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

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

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

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

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

Other democracies frequently employ alternatives to winner-take-all

majority voting. Indeed, only five Western democracies, including Britain and the United States, still use single-member-district, winner-take-all systems of representation. Germany, Spain, the Netherlands, and Sweden, among other countries, elect their legislatures under some alternative to winner-take-all majority voting. As the *New Yorker*, in a comment on my nomination, observed, President Clinton was right in calling some of my ideas “difficult to defend,” but only because “Americans, by and large, are ignorant of the existence, let alone the details, of electoral systems other than their own.”

No one who had done their homework seriously questioned the fundamentally democratic nature of my ideas. Indeed, columnists who attacked my ideas during my nomination ordeal have praised ideas, in a different context, that are remarkably similar to my own. Lally Weymouth wrote, “There can’t be democracy in South Africa without a measure of formal protection for minorities.” George Will has opined, “The Framers also understood that stable, tyrannical majorities can best be prevented by the multiplication of minority interests, so the majority at any moment will be just a transitory coalition of minorities.” In my law journal articles, I expressed exactly the same reservations about unfettered majority rule and about the need sometimes to disaggregate the majority to ensure fair and effective representation for all substantial interests.

The difference is that the minority I used to illustrate my academic point was not, as it was for Lally Weymouth, the white minority in South Africa. Nor, did I write, as George Will did, about the minority of well-to-do landlords in New York City. I wrote instead about the political exclusion of the black minority in many local county and municipal governing bodies in America.

Yet these same two journalists and many others condemned me as antidemocratic. Apparently, it is not controversial to provide special protections for affluent landlords or minorities in South Africa but it is “divisive,” “radical,” and “out of the mainstream” to provide similar remedies to black Americans who, after centuries of racial oppression, are still excluded.

Talking about racial bias at home has, for many, become synonymous with advocating revolution. Talking about racial divisions, in itself, has become a violation of the rules of polite society.

We seem to have forgotten that dialogue and intergroup communication are critical to forging consensus. In my case, genuine debate was shut down by techniques of stereotyping and silencing. As Professor Randall Kennedy observes, I was “punished” as the messenger reporting the bad

news about our racial situation. I dared to speak when I should have been silent.

My nomination became an unfortunate metaphor for the state of race relations in America. My nomination suggested that as a country, we are in a state of denial about issues of race and racism. The censorship imposed against me points to a denial of serious public debate or discussion about racial fairness and justice in a true democracy. For many politicians and policymakers, the remedy for racism is simply to stop talking about race.

Sentences, words, even phrases separated by paragraphs in my law review articles were served up to demonstrate that I was violating the rules. Because I talked openly about existing racial divisions, I was branded “race obsessed.” Because I explored innovative ways to remedy racism, I was branded “antidemocratic.” It did not matter that I had suggested race-neutral election rules, such as cumulative voting, as an alternative to remedy racial discrimination. It did not matter that I never advocated quotas. I became the Quota Queen.

The vision behind my by-now-notorious law review articles and my less-well-known professional commitments has always been that of a fair and just society, a society in which even adversely affected parties believe in the system because they believe the process is fair and the process is inclusive. My vision of fairness and justice imagines a full and effective voice for all citizens. I may have failed to locate some of my ideas in the specific factual contexts from which they are derived. But always I have tried to show that democracy in a heterogeneous society is incompatible with rule by a racial monopoly of any color.

By publishing these law journal articles as a collection, I hope to spark the debate that was denied in the context of my nomination. We will have lost more than any one individual’s opportunity for public service if we fail to pursue the public thirst for information about, and positive-sum solutions to, the issues at the heart of this controversy. The twentieth-century problem—the problem of the color line, according to W. E. B. Du Bois—will soon become a twenty-first-century problem if we allow opposing viewpoints to be silenced on issues of race and racism.

I hope that we can learn three positive lessons from my experience. The first lesson is that those who stand for principles may lose in the short run, but they cannot be suppressed in the long run. The second lesson is that public dialogue is critical to represent all perspectives; no one viewpoint should be permitted to monopolize, distort, caricature, or shape public debate. The tyranny of The Majority is just as much a problem of silencing minority viewpoints as it is of excluding minority representatives or pref-

erences. We cannot all talk at once, but that does not mean only one group should get to speak. We can take turns. Third, we need consensus and positive-sum solutions. We need a broad public conversation about issues of racial justice in which we seek win-win solutions to real-life problems. If we include blacks and whites, and women and men, and Republicans and Democrats, and even people with new ideas, we will all be better off.

New ideas about how to resolve old problems are critical to shaping consensus solutions. To reach consensus we must do more than simply maneuver to avoid controversy. Consensus must be built, not just located. We have become so polarized that we have difficulty speaking to each other, as demonstrated by the controversy over recent judicial opinions condemning race-conscious districting. I believe we may forge a genuine consensus if we consider anew some of the ideas discussed in this collection of essays—the very same ideas previously dismissed as “out of the mainstream.”

I am grateful for the opportunity provided by the publication of my law journal articles to participate in a national, public conversation about race, justice, and fundamental fairness. I would like to lower the decibel level but increase the information level on public discussion that surrounds race. I hope that those who actually read what I wrote will challenge decisionmakers—from politicians to pundits—to represent fairly and more carefully the broad spectrum of public opinion about race.

Most of all, I hope we begin to consider the principle of taking turns as a means to bring us closer to the ideal of democratic fair play. Justice Potter Stewart wrote in 1964 that our form of representative self-government reflects “the strongly felt American tradition that the public interest is composed of many diverse interests, [which] . . . in the long run . . . can better be expressed by a medley of component voices than by the majority’s monolithic command.” In that “strongly felt American tradition,” I hope more of us aspire to govern like Madisonian Majorities through “a medley of component voices.” In that “strongly felt American tradition,” I hope more of us come to reject the “monolithic command” of The fixed Majority.

After all, government is a public experiment. Let us not forget Justice Louis Brandeis’s advice at the beginning of this century: “If we guide by the light of reason, we must let our minds be bold.” At the close of the same century, I hope we rediscover the bold solution to the tyranny of The Majority, which has always been more democracy, not less.

# Groups, Representation, and Race Conscious Districting

## *A Case of the Emperor's Clothes*

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

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

*of gerrymandering or winner-take-all districting is as deceiving as "emperor's clothes."*<sup>1</sup>

With voices pitched in the high decibel range, critics of race-conscious districting<sup>2</sup> are blasting the Voting Rights Act and its 1982 amendments. A recent *Wall Street Journal* headline declares that voting is now "rigged by race."<sup>3</sup> Ethnic activists, the writer asserts, are collaborating with GOP operatives in an unholy political alliance to herd minorities into their own convoluted urban districts in order to improve GOP prospects in majority white suburban areas. According to such critics, this is a "political one-night stand" made possible by misguided federal courts and Department of Justice officials construing the 1982 Act to create majority minority districts, the newest form of "racial packaging."<sup>4</sup>

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

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

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

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

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

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

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

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

Another effect of these assumptions is gerrymandering, which results from the arbitrary allocation of disproportionate political power to one group.<sup>11</sup> Districting breeds gerrymandering as a means of allocating group benefits; the operative principle is deciding whose votes get wasted. Whether it is racially or politically motivated, gerrymandering is the inevitable by-product of an electoral system that aggregates people by virtue of assumptions about their group characteristics and then inflates the win-

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

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

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

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

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

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

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

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

## I

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

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

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



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

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

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

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

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

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

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

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

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

Of course, one could counter that representation is essentially a process of providing individual constituents with individual service and that it is therefore an individual right. This is a top-down view of representation in which the representative reaches back to his or her district to return government benefits to district constituents. In this sense, equalizing the number of constituents equalizes access for individuals, not groups of individuals. Representation becomes the formal opportunity to receive one's fair share of government benefits or to have access to one's representative for individual constituency service. Voting creates "a personal value," or a symbolic statement of belonging, by the mere act of casting a ballot. A vote is meaningful because it is counted, whether or not it actually affects the outcome.

While this top-down view might rest on the assumption that the right to *representation* is an individual right, it does not mesh well with the assumption that the right to *vote* is an individual right. Indeed, a voter need not vote at all to be represented under this understanding. Actually casting a vote is less important than establishing voting status. Representation becomes the process of initiating a relationship in which one need not ever participate except by moving into the district. Even nonvoters are represented vicariously by choices made on their behalf.

Proponents of the philosophy of individualism attempt to use the one-person, one-vote principle to locate voting in the status of individual or constituent. They rely on the fact that every individual has the *opportunity* to cast a potentially winning vote or to be represented vicariously by one who does. This approach camouflages the group nature of voting by emphasizing the personal aspects of representation.

Consistent with their prevailing political philosophy of individualism, some members of the Court have struggled mightily to use one-person, one-vote rules to avoid the concept of group representation. However, even where its nexus to group activity remains disguised, the principle of one-person, one-vote is as consistent with group as it is with individual representation. Similarly, the one-person, one-vote principle is consistent with semiproportional representation systems. Even if voters each were awarded five votes to plump as they choose, the one-person, one-vote principle would be satisfied, since each voter would have the same voting power or voting weight.

In this chapter I argue that despite the efforts of some members of the Court to characterize representation as an exclusively individual notion, the concept of group representation became unavoidable for two reasons. The first, which I develop in Part II, is that the concept of group voting was

necessary to understand the political unfairness of excluding racial minorities in a racially polarized constituency. The second, to which I now turn, is that the one-person, one-vote principle was conceived and articulated within a construction of constituencies based on geography. It is districting itself that merges individual representation with the representation of groups of individuals. Thus, it always has been necessary to acknowledge, at least implicitly, the relationship between districts and interests. I already have explored some of the bottom-up interest representation aspects of the equality and empowerment claims in earlier chapters. In the next subpart, I further develop the link between group representation and territorial districting.

### B. Group Representation and Territorial Districting

In this subpart, I argue that because of our explicit and implicit recognition of constituencies of geography, we have never actually employed a system of individual representation. Indeed, the use of geographic districts as the basis for establishing representational constituencies is at its very heart a system of group-based representation. Moreover, even where districts comply with principles of one-person, one-vote, such districts dilute the voting strength of both individuals and groups.

The concept of representation necessarily applies to groups: groups of voters elect representatives; individuals do not.<sup>25</sup> Representation is more than the individual relationship between constituent and elected representative. Because representation is primarily about political influence, not political service, bottom-up representation becomes the essential link to a genuine voice in the process of self-government. Districting is a form of group-interest representation, albeit an imperfectly realized one.

Districting, by definition, assumes that each voter is a "member" of a "group" comprised of all the voters in her district."<sup>26</sup> As Justice Stewart noted, "The very fact of geographic districting . . . carries with it an acceptance of the idea of legislative representation of regional needs and interests."<sup>27</sup> Regardless of whether other Justices of the Warren Court ever consciously adopted the idea of interest representation, in working within territorial districts they assumed that interests reflect where people live.

The view that geography approximates political interests is not a new idea. Indeed, the idea that geographic units reflect a common or group identity is part of the historical explanation for the winner-take-all system of districts. The American system of winner-take-all districts was adapted from the system in Britain prior to 1832, which in turn can be traced to

feudal origins.<sup>28</sup> The feudal tradition helped define the law of the franchise on the theory that "it was the land, and not men which should be represented."<sup>29</sup> It was the community, in theory, that was represented, and therefore the qualification for voting was corporative, with the franchise varying between communities.<sup>30</sup> Functional groupings, not individuals, were the basic units of representation.<sup>31</sup>

The British system also created a link between political representation and geographically based interests. Elected representatives were not seen as representatives of individual constituencies; they were merely equal members of Parliament who represented all of Britain.<sup>32</sup> The parliamentary system of representation had evolved in Britain because of feudal duties and obligations; the lord and his vassals were literally tied to the land, and representation in Parliament was actually part of the lord's feudal service to the king. Similarly, inhabitants of the medieval town were not separate, for representational purposes, from the town itself.<sup>33</sup> The town was a political association, and the status of its inhabitants was defined by the rights of the group to which they belonged, namely the town. This link between political representation and economic or geographic ties was later carried over to the United States during the Colonial period.<sup>34</sup>

By the late Eighteenth Century, towns were directly represented in the American colonial legislatures by representatives with explicit instructions to represent the towns' interests. The relevance of town representation is that colonial towns "exercised power as a group; as a group they had rights, as a group they had powers."<sup>35</sup> Representation by geographic groups became the norm, in part because there was often no practical distinction between occupational and territorial representation.

Indeed, the word "representation" originated as a term used by medieval jurists to describe the personification of collectivities; the spokesperson for a community was its embodiment, the bearer of its representative personhood. Even in its modern form, representation often connotes the activity of furthering the interests of an abstraction rather than of an individual. Although many liberal theorists of American democracy espouse the importance of representation of the rational individual, this claim is at odds with the historical roots of an electoral system that relies on regional rather than political units of representation.

It is also at odds with the practice of districting. The process of geographic districting collects people into units of representation by virtue of certain group characteristics or assumptions about shared characteristics within geographic communities. Geographic districting grounds the rep-

resentational relationship in the opportunity to vote for a candidate to represent the interests of voters within a regionally defined political unit. It is assumed that those voters who share the homogeneous characteristics that give the district its "identity" (its dominant political, regional, or racial affiliation) are in fact represented. Because *all* voters share at least a common regional identity—they all live within the district's geographic walls—all voters are therefore assumed to be represented without regard to their actual choice of a candidate.

But the geographic unit is not necessarily politically homogeneous or of one mind as to who should represent it. In any contested election, some voters will vote for someone other than the winning candidate. These votes do not lead to the election of any candidate. Although these voters reside in equally populated districts, they have not chosen someone to represent their interests. Their theoretically equal votes are, as a practical matter, wasted in that the casting of their vote did not lead to the selection of their representative. The term "wasted votes," therefore, refers to votes cast for a candidate who does not win. In addition, I use the term to refer to votes cast for someone who does not need the votes to win.

Perhaps for this reason, one commentator refers to the constituency of geography as an "artificial 'group.'"<sup>36</sup> Constituents do not consciously choose to become members of this group, since very few people move somewhere in recognition of their likely voting efficacy within particular election subdistricts. Similarly, when they move, few people know in advance the particular elected officials by whom they are likely to be represented. In other words, voters do not move to an election district; they move to a neighborhood or community.

I am suggesting that constituents within a geographically districted group may be there involuntarily, without sharing the same interests as other community residents, and despite pre-existing hierarchical relationships.<sup>37</sup> In this way, membership in the territorial constituency is like membership in a family, with the former imposed by residence and the latter by kinship. Like family, geographic districts may not reflect conscious choice; as "compulsory constituencies," they nevertheless reflect ties that bind.

Moreover, even if this factual assumption is incorrect, voters who might move based on the likelihood that they will reside within a specific election district are not acting rationally. This is because the imperative of the one-person, one-vote rule mandates continual redistricting. Even motivated voters may rely on existing district configurations for only limited lengths of time.

In addition, the level of mathematical equality now required by the courts makes it hard to claim that many election districts are neighborhoods. The upshot of absolute population equality as the basis for representation is that equipopulous districts are more important than districts that preserve communities of interests or leave neighborhoods intact. In this respect, districting under the one-person, one-vote rule is arbitrary. Indeed, this was Justice Stewart's complaint when he accused the Court of privileging the personal right to vote over the efforts of local government to represent regional needs, communities of interest, or political subunits.<sup>38</sup>

Districting justifies the representation of this artificial group using a theory of virtual representation. "Virtual" representation works like "constructive" in "constructive possession." It means "as if" or "pretended" representation. In contrast to direct representation or bottom-up representation, virtual representation relies on the concepts of (1) *indirect representation*, (2) representation of *similar interests* elsewhere, and (3) *top-down* representation. While the theory of virtual representation could be justified by any one of these concepts, the three assumptions generally are interrelated. Each of these assumptions is critical to the validity of virtual representation.

First, virtual representation assumes that the district winner *indirectly* represents the district losers.<sup>39</sup> For this to hold true, the election winner must do an adequate job of representing all those who reside within the district, including his or her political opponents. This assumption is based on the golden-rule principle that the winner will not tyrannize the losers because the winner may become the loser in the next election. Because the winner realizes the value of political stability, the winner will also represent the losers. Thus, in the long run, the losers' votes are not permanently wasted because they operate to hold the winners in check.

The second assumption of virtual representation is that the district losers technically are represented by *similarly situated* voters elsewhere in the political system. In this assumption, voters are represented when other voters—who are like them—vote in other districts and succeed in electing their candidate of choice. This reasoning assumes that similarly situated voters are fungible. "District voters" are grouped by characteristics they share with "nondistrict voters." Because of these group characteristics, district losers are vicariously represented by winners in other districts for whom they would have voted had they been given the chance. As a result, the second assumption sees voters as represented based on certain "group" characteristics that can be externally predetermined for a

ten-year period (between census counts) at the time of reapportionment and that can be measured jurisdiction-wide, rather than district-wide. Again, the district losers' votes technically are not wasted because district losers are represented by someone, albeit not someone for whom they voted.

The third virtual representation assumption is that the district itself is a cognizable group that is represented ultimately as a community of the whole. This incorporates the proposition that a district has some independent existence apart from the discrete individuals who form an electoral majority. This is the historical claim that the district itself has a political or group identity.

This argument relies on a *top-down* view of representation. Living in Pennsylvania, I am represented by two United States Senators even if I am under eighteen years old, mentally incompetent, or disenfranchised based on noncitizenship or a criminal conviction. The assumption is that the district, and hence all its residents, are serviced whenever anyone is elected to represent the district. The key element of representation is equal access to the elected representative who is available to each constituent as a result of her status as a district resident. Each of the voters within the district is represented, even those who voted for a losing candidate *as well as those who did not or could not vote*. Because voting is primarily symbolic of personal status within a coherent community, virtual representation argues that no one's vote is wasted.

Every voter in a district is presumed to be represented simply because her territorial constituency is represented. The voter within a territorial constituency is represented because she has someone to turn to in case of personal constituency service needs. She is presumed to be represented even if she did not vote for the winning candidate. The fact that she wasted her vote is ignored because she is nevertheless "geographically" present within the political subdivision. No stock is placed in the fact that she did not vote for the representative. She is simply represented through the direct representation of her needs and her geographic nexus to the representative's supporters.

If districting is to be justified by virtual representation, the entire theory of districting depends upon the juxtaposition of territorial constituencies and interest constituencies. Drawing district boundaries presumably defines communities of interest. District lines determine a set of associations between the voter and a particular representative as well as among the voters themselves. It is only because voters within a particular district are deemed unlikely to have opposing interests that the notion of a per-

sonal relationship between the voter and the representative can survive. Voters are presumed fungible, meaning they are essentially indistinguishable on some critical threshold issue. The representative otherwise would be unable to service disparate personal needs without compromising the interests of other constituents.

These virtual representation assumptions are related to two somewhat inconsistent premises of liberal individualism. One is the value of majority rule. The district majority governs with legitimacy because the district is a coalition of shifting "factions" whose multiplicity of interests will keep any one from dominating. The factions demonstrate that the district is not homogeneous, but the winner will virtually represent the losers because the losers are not permanent; the winner may be the loser at the next election. The first premise thus shares the first premise of virtual representation. It posits that individuals who vote for losing candidates are adequately represented by the winning candidate and have as much opportunity to influence that candidate as do other voters in the district.<sup>40</sup>

The second premise is that representation is primarily a personal relationship between the representative and her constituents. In this context, the representative does not know how a particular constituent voted and will service her needs in the hopes of recruiting or sustaining her allegiance. Adherents of the personal relationship perspective do not deny that the representative is more likely to represent faithfully the interests of those who voted for her; they simply suggest that the *needs* of each constituent also will be met because a district constituency establishes a relationship between the voter and her personal representative without regard to the voter's actual electoral preference.

This premise, however, unlike the majority-rule premise, is based on a view of relative homogeneity within the district. Because the district constituents have similar needs and interests, it is possible for one representative to service adequately all constituents. If the constituency has such common interests, one would expect a relatively unanimous constituency. By contrast, the majority-rule assumption relies on a more fractured constituency to balance the majority's urge to dominate. The personal relationship perspective and the majority-rule premise are, therefore, in some tension. They define voting by reference to competing notions of fungibility and personal access on the one hand and distinct interests on the other.

As a consequence, the virtual representation assumptions do not fit neatly within a one-dimensional view of representation based on liberal individualism. In fact, the rational individual who serves as the focal point

of individualism would often take actions that are wholly inconsistent with virtual representation. The most apparent inconsistency is the idea that one's interests can be effectively represented by someone whom the voter, when given the choice, rationally determined did not reflect her interests. There is something distinctly unliberal in the view that indirect representation of interests is preferable to direct representation of groups or interests as defined by the voters themselves.<sup>41</sup> If the voter who goes to the polls is represented by the person against whom he or she votes, then the representation of the majority of the people becomes a representation of the whole people. The voter is defined not by a rational individual choice but by the majority's choice.

Another inconsistency is the notion that the voter will be motivated to participate when she will be adequately represented by whoever is elected. Voting will simply become a habit, a civic duty, although it yields no direct results. In such a scenario, the rational individual might choose not to vote because of the small likelihood of casting the decisive vote.

Yet another inconsistency is produced by the virtual representation assumption that wasted votes—those cast for a losing candidate—do not reflect the absence of representation because the territory defines the community, the group *as well as its interests*. This view suggests that mere geographical subdivisions have interests distinct from those of the people who inhabit them. Because individualism posits that the rational individual will act in her own self-interest, this external determination of the interests represented is inconsistent with individualism.

Perhaps most inconsistent with the theory of autonomous, rational individuals is virtual representation's notion of fungibility. Virtual representation, explicitly in the second assumption and implicitly in the third, assumes that individuals are interchangeable based on some externally observed characteristics. Accordingly, individual choice is subordinated to the choices made by the majority, and the individual must allow someone in another district to act on her behalf.

In these often unstated but related ways, districting conflates the view that territorial constituencies virtually represent discrete individuals who reside therein with the view that territorial constituencies group like-minded voters. Related to each of the virtual representation assumptions, therefore, is the corollary that we can use proxies, in this case geography, for determining voter interests. Such proxies merge voters' own definitions of their interests with the self-interest of political incumbents or with the interests of a homogeneous territorial district majority. The use of such proxies reveals the fundamentally group-based nature of represen-

tation—a feature that is inherent to, but inadequately recognized by, our contemporary system of representation.

For example, where representation is only virtual rather than direct, those who vote for the losing candidate may find that their interests are not represented at all. The constituency is presumed to be a group based on a single choice—the decision where to reside. This one choice may not be a real choice for some; for others it may not satisfactorily carry all the weight being assigned. Or the assumption that the geographic constituency is not dominated by a highly organized majority may simply be wrong as a matter of fact.

It is important to recognize, therefore, that the districting debate is not only about representing groups. It also may be about representing groups or individuals unfairly. If voting reflects the voter's conscious choice rather than simply representing the voter's state of belonging, then winner-take-all districting in fact *wastes* votes of both individuals and groups. First, it makes certain there are political losers in each district. Those who vote—as individuals or as a group—for the losing candidate do not obtain any direct political representation. They did not initiate, and they cannot alone terminate, the representational relationship. In response, an individual-rights advocate might argue that the individual who votes for a losing candidate is adequately represented by the winning candidate and has “as much opportunity to influence that candidate as other voters in the district.”<sup>42</sup> This, of course, only makes sense if one assumes both that election results count for very little and that representation is exclusively about individual access to representatives chosen by others.

In response, districts could be made more homogeneous to reduce the number of wasted votes. But this alternative demonstrates the second way that winner-take-all districting wastes votes. When more people vote for the winning candidate than is necessary to carry the district, their votes are technically wasted because they were unnecessary to provide an electoral margin within the district *and* they could have been used to provide the necessary electoral margin for a like-minded partisan in another district. In other words, packing voters in homogeneous districts wastes votes because it dilutes their overall voting strength jurisdiction-wide.

The third way districting wastes votes is apparent if we consider voting broadly. I have suggested that voting is not simply about winning elections. The purpose of voting is to influence public policy. Accordingly, I have elsewhere proposed a concept, which I labeled “proportionate interest representation,” to describe the importance of an equal opportunity to influence public policy, not just to cast a ballot. This concept

reflects both the equality and empowerment norms that I discussed earlier, because the right to cast an equally powerful vote subsumes the right to participate directly in the choice of representatives who then presumably enjoy an equal opportunity to influence legislative policy.

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.

For example, race-conscious districting attempts to provide disadvantaged racial groups the equal opportunity to participate by drawing majority minority geographic districts. Proponents of this strategy assume that electoral control—becoming a district majority—works as a proxy for interest. But creating majority black districts also means creating majority white districts in which the electoral success of white legislators is not dependent on black votes. In this way, race-conscious districting may simply reproduce within the legislature the disadvantaged numerical and racial isolation that the majority minority district attempted to cure at the electoral level.

Where blacks and whites are geographically separate, race-conscious districting isolates blacks from potential white allies—for example, white women—who are not geographically concentrated. It “wastes” the votes of white liberals who may be submerged within white, Republican districts. As a consequence, districting may suppress the development of cross-racial legislative coalition building. Because majority black districts are necessarily accompanied by majority white districts, black representatives may be disenfranchised in the governing body. In this third sense, districting wastes votes because it fails to ensure legislative influence.

The wasted-vote phenomenon makes gerrymandering inevitable.<sup>43</sup> Because winner-take-all districting awards disproportionate power to electoral majorities, it inflates the advantage of district control. This inflated power quotient drives the apportionment process and leads some, myself included, to conclude that on some level all districting is gerrymandering. Gerrymandering is inherent in the districting process, which in essence is the process of distributing wasted votes.

Where incumbent politicians seek safe districts to ensure their reelection, they may be inclined to gerrymander, *i.e.*, waste the votes for

their likely opponent. Where political or racial partisans seek legislative control, they may be inclined to gerrymander, *i.e.*, pack the minority party or minority race into a few districts to diminish their overall influence. Or they may fracture the likely supporters of the minority party or minority race, spreading out their votes among a number of districts and ensuring that they do not comprise an electoral majority in any district. These votes are counted, but they are essentially irrelevant in influencing the electoral or governing process.

The gerrymandering phenomenon illustrates once again the group nature of districting. Gerrymandering depends on assumptions about voters' likely behavior based on externally observed or supposed group characteristics or perceived common interests. Although the use of electoral districting has been defended based on the virtues of individual representation, assumptions about the nature of groups likely form the theoretical underpinnings of this election method.

I have tried to show that district representation weakens the connection between the voters' votes and the voters' representative by wasting votes. Unless all the voters in the district vote for the winning candidate, some of their votes are wasted. In addition, if a candidate only needs fifty-one percent of the votes to win, but the district is homogeneous and electorally noncompetitive, then all votes for the winning candidate over fifty-one percent are also technically "wasted." The point is that the voter is deemed represented whether she votes for the losing candidate; is an unnecessary part of the winning candidate's victory margin; or fails to vote at all.

The concept of wasted voting reveals the one-dimensional quality of the virtual representation assumptions. Yet wasted voting is only one of the ways that district representation minimizes the connection between voting and representation. The winner-take-all aspect of territorial constituencies also tends to over-represent the winning party and to deny the losing party a voice on behalf of their specific interests in the legislative forum where public policy is finally fashioned. In addition, territorial constituencies both submerge and subsume the concept of group representation. They also subsume individual definitions of relevant group identity in favor of individual residential decisions.

The artificial nature of these geographic associations suggests the limitations of the view that individual representation is the cornerstone of the right to vote. Territorial constituencies do not realize individual autonomy for at least three reasons. First, many people do not exercise real choice in deciding their place of residence.<sup>44</sup> Second, even where resi-

dential decisions are conscious and discretionary, they do not capture the range or salience of interests which voters may hold. Third, the one-person, one-vote requirement of equipopulous districting makes districting even more artificial. If the major constraint on the drawing of district lines is the number of people within each district, district lines cannot conform to naturally occurring areas of common interest. When incumbents exercise enormous control over the districting process, including the custody of census data and the access to computer technology, communities of interest may become mere re-election opportunities. This is the threat to functional interest representation that various Justices have predicted over the years in their dissents to strict population equality principles.<sup>45</sup>

The key point is that criticisms leveled at race-conscious districting as a means of group representation should in fact be directed at the process and the theory of geographic districting itself. In the next Part, I attempt to show that when commentators criticize race-conscious districting, they are really finding fault with the assumptions behind districting in general. It is districting itself which is anomalous, because geographic definitions of group identity, especially within subdistricts, are often so artificial.

## II

In this Part, I argue that race is as effective as geography in functioning as a political proxy, but neither is as effective as allowing voters the opportunity to make their own *local* choices about the nature and salience of their interests. Semiproportional systems permit shifting coalitions to form based on voters' own determinations of their interests or their group identity. In other words, geography and race rely on representational assumptions about group association but do not suggest the necessity, standing alone, of either representing or defining group interests a particular way. Modified at-large systems, such as cumulative voting, could be viewed as preferable alternatives that allow members of racial groups, politically cohesive groups, and strategically motivated individuals to be both self-defined and represented, while minimizing the problem of wasted votes for *all* voters.

Race in this country has defined individual identities, opportunities, frames of reference, and relationships. Where race has been of historical importance and continues to play a significant role, racial-group membership often serves as a political proxy for shared experience and common interests. At least to the extent that an overwhelming majority of group

members experience a common “group identity,”<sup>46</sup> those who are group members are more likely to represent similar interests. Group members also may share common cultural styles or operating assumptions.<sup>47</sup>

Group members also are more likely to be perceived by their constituents as representing them. This definition of representative as descriptive likeness or racial compatriot has a psychological component. Just as the flag stands for the nation, the presence of racial group members symbolizes inclusion of a previously excluded group. The symbolic role results from both the personal characteristics of the racial-group member and the assumption that, because of those characteristics, the racial-group member has had experiences in common with her constituents. As Hanna Pitkin writes in her groundbreaking work on representation, “We tend to assume that people’s characteristics are a guide to the actions they will take, and we are concerned with the characteristics of our legislators for just this reason.”<sup>48</sup> Thus, many racial minorities do not feel represented unless members of their racial group are physically present in the legislature.

As a result, traditional voting rights advocates comfortably rely on race as a proxy for interests. For example, in conventional voting rights litigation, election contests between black and white candidates help define the degree of racial polarization, *i.e.*, the degree to which blacks and whites vote differently. The idea is that the outcome would be different if elections were held only in one community or the other. The assumption of difference extends explicitly to the specific candidate elected, and implicitly to the issues that the candidate, once elected, would emphasize.

The assumption of this difference between races rests in part on the claim that where black candidates enjoy protection from electoral competition with whites, black voters can ratify their choices to hold their representatives accountable. In this way, the association between race and interests is modified to the extent that voters are given a meaningful choice in both initiating *and* terminating a representational relationship. Voting rights advocates assume that minority group sponsorship is critical.<sup>49</sup> It is only where minority voters exercise electoral control, or have a meaningful opportunity to retire their representative, that race functions as a representational proxy. Thus, majority-black single-member districts take advantage of segregated housing patterns to use geography as a proxy for racial choice, racial control, and racial representation.<sup>50</sup>

I argued in Part I that the one-person, one-vote cases, with their focus on equalizing individual access through equalizing population, conceal the group nature of representation by districting. The one-person, one-

vote rule merges political interests and regional interests under the umbrella of equal access for equal numbers of people. In order to justify placing people with different political interests into one district with only one representative, the wasted vote problem is elided by discussing everything in terms of individual voters. In deference to a tradition of according individual rights a higher value, and relying on the access view of voting, adherents to population-based districting simply skip over geographic districting’s implicit assumptions about group attributes.

Race-conscious districting confronts the group nature of representation more directly. It attempts to minimize the wasted vote problem for minority voters whose preferred candidates—because of racial bloc voting by the majority—experience consistent defeat at the polls. Where voting is racially polarized, white voters and black voters vote differently. Where blacks are a numerical minority, racial bloc voting means that the political choices of blacks rarely are successful. To remedy this problem of being a permanent loser, black political activists and voting rights litigants have sought majority black districts in which the electoral choices of a majority of blacks determined the electoral winner.

Yet some commentators challenge race-conscious districting on the grounds that special protection throughout the political process for the rights of minority groups is unnecessary as long as individual minority group members have a fair chance to participate formally by voting in an election.<sup>51</sup> For these commentators, race-conscious districting is illegitimate because the right to vote is individual, not group-based.<sup>52</sup> Relying again on assumptions about fungibility and access, these observers challenge the right of minority groups to representative *or* responsive government.<sup>53</sup>

Given the prominence of racial group identities, I am not persuaded by this criticism to abandon the concept of group representation. I am aware of, but not in accord with, those critics of race-conscious districting who object on moral grounds to the drawing of districts along racial lines.<sup>54</sup> As I suggested earlier, representation is a bottom-up process that ideally recognizes the importance of influencing public policy decisions on behalf of constituency interests. Accordingly, we cannot define political fairness merely as electoral fairness that guarantees nonbiased conditions of voting eligibility and equally counted votes. Nor do I think the only issues are whether blacks have special claims for protection or whether whites can or should represent blacks, although I think they can and do.<sup>55</sup>

Yet, in making the argument that racial groups deserve representation, I do not rely primarily on the political, sociological, or cultural claims in-



volved in racial-group identity, or even on the historic context of group disfranchisement. My principal argument rests on the distinction within the political process between a claim for group rights and a claim for group representation.<sup>56</sup> I argue for the latter based on the historic evidence that representation within territorial districts is implicitly about recognition of group interests, not just individual access. However, the future of such group representation—like the future of the group itself—lies less inside geographic boundaries and more within the cultural and political community forged by group consciousness and group identity. Empowerment—for a group as well as for an individual—comes from active assertion of self-defined interests. A group is represented where it has the opportunity to speak out and not just to be spoken for.

The argument for recognition of group interests makes three assumptions about representation. First, legislators should represent unanimous, not divided, constituencies.<sup>57</sup> Second, each voter's vote should count toward the election of a representative. Third, the unit of representation should be psychological, cultural, and/or political rather than territorial.<sup>58</sup> In other words, groups should be represented, but in ways that permit automatic, self-defined apportionment based on shifting political or cultural affiliation and interests. This would enable voters to form voluntary affiliative districts without the need for prior authorization or formal recognition of the group as one which deserves special treatment. Because such group identity would be affiliative and interest-based, group representation would encourage both coalition building among racial and political factions and grass-roots political organization around issues, not just individual candidacies.

If the decision to represent groups already has been made in the adoption of geographic districting, then group representation based on racial-group association or historical oppression becomes less problematic. Whatever the alleged flaws in racial-group representation, it is racial representation within a system of geographic districts that must be analyzed. As one white Democratic congressman who represents a largely minority constituency is quoted as saying, "I'm torn about it. I do not believe you have to be of the exact same ethnic group to do a good job in representing that community. But, in the end, I think it's that community's choice."<sup>59</sup> Thus, it is important to emphasize the connection between choice, accountability, and group identification. Whoever represents minority interests (just as whoever represents majority interests) should be directly, not merely virtually, accountable to those interests.

Yet some critics of race-conscious districting might attempt to distin-

guish race from geography as a useful political proxy. Such critics claim that geographic association, unlike race, is temporal, individualistic, and discretionary, at least for some people. There are two problems with this purported distinction. First, geography is neither discretionary nor individualized for members of disadvantaged racial groups.<sup>60</sup> Rather, it reflects the very essence of limitations on choice based on group identity. Race-conscious districting can capture racial communities of interest precisely because residential ghettos are often the result of racial discrimination. As Professor Pamela Karlan writes, residential segregation reflects racial discrimination in both the private and public housing market.<sup>61</sup> Because residential segregation by definition results from the absence of choice, race-conscious districting "can serve as a proxy for a bundle of distinct political interests."<sup>62</sup>

A second problem is that this criticism applies only to race-conscious representation executed within a system of fixed district boundaries. Indeed, the concern can be avoided almost entirely where the voters themselves define their own interests using alternative, modified at-large systems of representation. Representation based on voluntary interest constituencies would unhitch racial-group representation from arbitrary, involuntary assignments.

The voluntary interest constituencies would be comparable to Professor Iris Marion Young's model of a "highly visible" social group with emotional, historical, and social salience defined by a sense of group identity, not just shared attributes.<sup>63</sup> According to Young, groups exist only in relation to other groups. The social processes of affinity and differentiation produce groups. Yet group differentiation is not necessarily oppressive or homogeneous. Group differentiation is created by multiple, cross-cutting, and shifting differences.

The group differentiation of racial minorities is a function of historical oppression, shared experience, and present inequality. Territorial configurations may track this phenomenon to the extent that disadvantaged racial groups are concentrated in substandard housing in urban ghettos, but differentiation by race cuts across geographic lines in many cases. Some racial-group members share a group consciousness without sharing group space. Others are dispersed in small barrios throughout the jurisdiction. Still others may technically be group members in terms of their racial origin or current residence but not in terms of their racial identity.

In addition, group differentiation by race subsumes gender, age, and class differences. A racial group that is politically cohesive on civil rights or welfare policy may have some members with interests that are not shared

throughout the group. On these issues, the racial group members may have more in common with group members of another race living outside their immediate geographic area. In other words, racial groups are not monolithic, nor are they necessarily cohesive.

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.

Yet strategies for race-conscious districting respond to important deficits in a non-race-conscious geographic districting process. Proponents of racial-group representation confront on the jurisdiction-wide level the unfairness of the indirect, virtual representation claims. In justifying race-conscious districting, voting rights activists appropriately employ the concept of racial-group identity. They can demonstrate that members of the racial group have distinctive interests that are often ignored by elected officials who suffer no adverse consequences at the polls. In this way, the activists challenge the view that voters are fungible, especially where minority group voters are consistent losers as a result of racial bloc voting by the jurisdiction majority.

Based on complaints about the way that virtual representation assumptions operate at the macro level to dilute minority voting strength, race-conscious strategies seek to control smaller, majority minority districts. By making the minority a district majority, race-conscious districting seeks to exercise the prerogatives of majority rule on behalf of a jurisdiction-wide minority. But while they challenge the fairness of jurisdiction-wide virtual representation of minority voters by the majority, proponents of race-conscious districts replicate many of the same fairness problems at the micro level.

The same assumptions about virtual representation that were the object of challenge at the macro level are now reproduced within subdistricts that the racial minority controls. The majority minority subdistrict operates on the same winner-take-all, majority rule principles. Even as an imperfect geometric “fractal”<sup>64</sup> of a larger jurisdiction-wide majority, it carries with it the assumptions of virtual representation to justify the mi-

nority group’s domination. As a consequence, race-conscious districting raises in microcosm the theoretical questions I raised in Part I about districting itself.

An illustration of this fractal problem is a 1992 New York City congressional plan that included a Brooklyn/Queens district to represent the interests of a Latino minority. This district concentrated Latinos in a new 12th Congressional District. Several Latino activists filed as candidates in the Democratic primary. So did Representative Stephen Solarz, a white incumbent whose previous district was consolidated within one-fifth of the new “Latino” district.

The entry of a well-financed, nine-term incumbent from a largely Jewish section of Brooklyn shifted the political expectations. The primary, which had been expected to focus on issues of interest to a poor Latino constituency, turned into a debate over whether a minority group could be represented by someone of a different ethnicity. According to a Latino community organizer, “The community is saying, ‘Why is it that this Jewish person who has always represented other interests than ours, comes in now saying he’s going to be our savior?’”<sup>65</sup> This complaint—that the white incumbent should not enter the race—rested on a complex, but misinformed, understanding of group representation.

The group is deemed represented where it has electoral control over the winner. The organizer’s concern was that the sixteen percent white minority in the district—not the Latino majority—could have electoral control by consolidating their votes and converting their minority status into a plurality win. Since there were at least four Latino candidates, the white candidate would most likely win if the Latino vote were split, even though Latinos are fifty-five percent of the district’s voting-age population. If the Latino majority was disaggregated into factions supporting different Latino candidates, it could have been white voters who chose the representative for the new district.

Latino activists complained that this did not give their community the choice they deserved. “The whole idea was to give our community some degree of choice, Latinos or non-Latinos who have some connection with the community. . . . [The well-financed white incumbent] doesn’t fit that bill at all.”<sup>66</sup> The white candidate answered, “The other candidates fear that I’ll win, which somewhat belies their notion that the purpose of this district was to empower the people to make a choice.”<sup>67</sup>

The nature of this controversy was captured by a *New York Times* headline that appeared before the primary: “Does Politics of Fairness Mean Only Those from Minorities Should Apply?”<sup>68</sup> I propose restating the

problem as follows: Does politics of fairness mean that self-defined groups are best represented by territorial districts, even those they ostensibly control? So stated, the question shifts the issue from the candidate to the constituency. By asking this new question, we can see the three incongruous assumptions inherent in racial control of territorial constituencies.

The first assumption is that because they represent a majority of the district population, the fifty-five percent Latino voting-age population is appropriately empowered to represent the entire district, although eight percent of the district is black, twenty-one percent Asian, and sixteen percent white. This assumption parallels the first virtual representation assumption: the district losers will be indirectly represented by majority winners.

Race-conscious districting is arguably necessary because the jurisdiction-wide majority is organized racially and permanently.<sup>69</sup> This argument suggests that there is nothing inherently wrong with the principles of indirect representation underlying winner-take-all majoritarianism, except where the majority operates based on its prejudices. As long as the current pattern of racial bloc voting continues, the minority cannot become part of the jurisdiction-wide governing coalition. Thus, "special" smaller majorities are warranted.

The second assumption is that a Latino majority in this one district will choose a representative for all Latinos in the city. This tracks the second vicarious representation assumption that similarly situated voters can represent each other. Because Latino interests are underrepresented in other winner-take-all congressional districts, their interests in the city as a whole are now fairly represented by virtue of their electoral control over this one district. Conversely, the Asian, black, and white minorities in this one district are *vicariously* represented by their electoral control over other districts in the city.

Thus, Latinos who do not live in the district are virtually represented by choices made by the Latinos who do live in the district. Race-conscious districting only approximates the diversity of voter identities in the *jurisdiction as a whole*, but not necessarily in each district.

With the second assumption, the race-conscious districting approach does not challenge political representation based on geography; it simply suggests that specific groups should dominate specific districts in proportion to their overall state-wide or jurisdiction-wide percentage. Here, the claim is that political fairness is measured by a jurisdiction-wide baseline rather than by reference to a critique of group rights or majority domination more generally. Majority domination is acceptable as long as each

group gets a chance to be represented somewhere in the jurisdiction by its own localized majority.

The third assumption is that the 12th Congressional District is a minority district without regard to the actual intra- or inter-minority conflict within the district. The third assumption presumes political cohesion based on the fiction that the district has an identity independent of the actual constituents. It also presumes equal access for constituency service within the district and relies on the claim that a minority identity ensures a minority ideology. Minority group interests will define the district identity and anyone who represents it.

The Asian, black, and white minorities are presumed to be represented because of their choice to live near Latinos. Stated differently, because Latinos are not as residentially segregated as other racial groups, they can represent the interests of their multicultural neighborhood as a whole. Their neighbors' interests are represented both for personal constituency service and for their territorially defined common interests.

The third assumption is related to the top-down view of representation. Like the virtual representation view that the district has an independent identity, the 12th Congressional District is a "Latino district." As a so-called minority district, it has an identity independent of the actual tensions present, the level of political cohesion, or the political participation rates of its constituents. In this way, race-conscious districting incorporates a static, somewhat monolithic, view of representation that, after the initial drawing of a majority minority district, diminishes the subsequent importance of broad authority from a consenting group of participants.<sup>70</sup>

For example, Latinos within the district arguably are represented by any one of the four Latino candidates, even where a majority of the Latino residents vote for a losing candidate. The issue of choice is submerged within a presumption of ethnic solidarity in the majority Latino population district, even if Representative Solarz did not compete. This is because the district is a Latino district, and the elected representative will therefore service all constituents equally, especially other Latinos.<sup>71</sup>

Yet a top-down view of representation does not encourage broad-based political participation among the district constituency. Nonvoters are represented equally with voters. Because representation is viewed primarily as a means of distributing constituency service and benefits and is primarily based on a common group identity, there is little incentive to monitor actively the public policy positions the representative takes within the governing body. Under this top-down view, elections serve not to initiate an interactive relationship, but to ratify an open-ended one.

In this way, the assumption of “minority district as independent identity” ignores issues of multiple, cross-cutting, and shifting differences. This is an empowerment strategy designed primarily to increase the proportion of minority-group legislators. Because of the success of individual minority-group members, the group as a whole is empowered. As I have argued elsewhere, however, empowerment is not based on assumptions about phenotypic representation. Voters also must be directly given the opportunity and the information necessary to define their interests for themselves.

These three assumptions, of course, invite the criticism that race-conscious districting arbitrarily reduces voters to their ethnic or racial identity and then only represents that characteristic in a way that isolates or balkanizes the population. But the real complaint is not with the race consciousness of the districting, but with the districting process itself. The race-conscious districting assumptions simply replay the same virtual representation assumptions that are used to justify territorial constituencies in the first place.

Thus, the race-conscious districting assumptions are neither unique nor necessarily contextual. For example, the winning candidate might be the one Latina who appeals to all the different ethnic and racial groups within the district, winning with a five-percent plurality of Latino support and a solid majority of white, black, and Asian votes. Although this individual might be Latina in identity, she would not in fact be elected directly by Latinos to represent their interests.

In fact, the successful candidate was Nydia Velazquez, a former representative of Puerto Rico to New York, who polled thirty-three percent of the vote, compared to twenty-seven percent for Mr. Solarz. According to *The New York Times*, Ms. Velazquez’s margin of victory came from overwhelming Latino support in Brooklyn and from strong support from the black community.<sup>72</sup> She reportedly benefited from an endorsement by the city’s black mayor, David Dinkins, and from the “firestorm” of criticism that erupted when Mr. Solarz decided to run in the newly drawn district.<sup>73</sup>

One might argue, then, that Ms. Velazquez’s election affirmed the second and third assumptions of virtual representation. Because Latinos supported her within the 12th District, Latinos throughout New York City are now vicariously represented even though they could not vote for her. In addition, Ms. Velazquez’s black support confirmed the viability of the third assumption that the 12th District is a bona fide “minority district.” The first virtual representation assumption is not directly implicated by

the election because it depends upon post-election behavior of the elected representative.

Four other Latino candidates competed in the primary. Elizabeth Colon polled twenty-six percent; Ruben Franco polled eight percent; Eric Ruano Melendez and Rafael Mendez each received three percent of the vote. Although I do not have the actual precinct totals, these figures do not rebut the possibility that a majority of Latino voters (especially those living in Queens) actually preferred someone other than Ms. Velazquez. Similarly, they do not deny the possibility that blacks, who are only eight percent of the District, may have supported Ms. Velazquez, but Asians and whites may have preferred someone else.

Since Asians, at twenty-one percent, are the second-largest group in the District, it may not be appropriate to presume that interminority political cohesion extends to all of the District’s minority voters. The other aspect of the third assumption—that this is a genuine Latino district—is also not clear, since a majority of Latinos may have preferred someone other than Ms. Velazquez.

The validity of the first assumption, that the electoral majority will now indirectly represent *all* the electoral minorities, also remains to be seen. It is currently a theoretical claim based on the operation of golden-rule reciprocity in conjunction with other assumptions about the individual nature of voting and representation. The District’s political reality, however, may defy the theory that the district minority—those who wasted their votes—will act as a potent political check on a shifting district majority. For example, the election returns suggest that there are distinct group interests among and within the Asian, black, and white district community. The votes of these subgroups may, as a practical matter, become permanently wasted.

Indeed, over the ten-year term of the District, the Latino majority may act cohesively and return the Latina incumbent to office. Re-election of the incumbent may occur with decreasing turnout as a percentage of all the District’s population, but with increasing support among those who do vote simply because she is the incumbent. This is consistent with evidence that minority candidacies generate relatively high voter turnout the first time a viable minority group member competed. Turnout, however, tends to go down when constituents realize that the election of a single minority incumbent changes very little of their day-to-day lives.

But the fact that the Latina is now an incumbent gives her tremendous resource advantages over any future opponents. Some may argue that her continued re-election reduces polarization within the district, as the other

non-Latina voters see Ms. Velazquez work on their behalf. On the other hand, her predictable re-election success may exacerbate rather than reduce intergroup conflict. The District's complicated racial, ethnic, and linguistic mix is not reflected in the ethnic or racial group membership of its representative. The fact that the district winner in a multi-ethnic district has a psychological, cultural, and sociological connection primarily to one ethnic or racial group may alienate other groups over time.

If Asians, for example, feel consigned to permanent minority status within the minority district, they may bide their time until redistricting in the year 2000, when the legislature decides how many minority districts should be created and who should control them. The fight to be "the group" who gets the district, and with it all the power, pits minorities against each other. The fact that some members of the other minority groups in the 12th District can only cast wasted votes for ten years encourages each group ultimately to think in terms of its own moral, historical, and pragmatic claims to exclusive or primary district representation. Where representation becomes the lottery of competing oppression, no one wins.

Only the second assumption, at least on the psychological level of vicarious representation, is solidly supported by the election of Ms. Velazquez. This is based on evidence that those minority group members who do not vote for group members nevertheless feel "represented" by them. This phenomenon reflects the continued vitality of racial group identity. Many group members feel most represented by one of their own.

Even if the second vicarious representation assumption is true, one could maintain that people are represented without regard for whom they choose to vote simply because of where they choose to live or who they are. Latinos in Queens living a few blocks outside the 12th District, who cannot vote for Ms. Velazquez, will continue to "waste" their votes within the districts in which they reside. Their votes, which under some other district configuration might help elect an additional, or simply a different, Latino, are submerged within their non-Latino district.

Because their votes will be wasted, nondistrict Latinos are not encouraged to participate directly in the process of self-government. The process of voting itself may become meaningless. Districting ignores this problem with wasted votes by embracing group representation based on territorial contiguity and indirect representation.

Because geographic districting wastes votes, neither minority groups nor majority voters are fairly represented. Districting fails to deliver on its virtual representation assumptions, even where districts are drawn to

maximize minority voting strength. Districting is not justified by the individual representation value because each voter's vote does not count to the greatest extent possible toward the election of a representative. Districting is not supported by the group representation value because legislatures do not represent unanimous constituencies, and they therefore find it either hard to govern or easy to excuse unaccountability. The tension—between values of individual and group representation; between direct and indirect representation; between top-down and bottom-up representation; and between wasted and effective votes—permeates virtual representation, even within race-conscious geographic districting.

For this reason, modified at-large systems used in corporate governance, such as cumulative voting, should be considered.<sup>74</sup> Under a modified at-large system, each voter is given the same number of votes as open seats, and the voter may plump or cumulate her votes to reflect the intensity of her preferences. Depending on the exclusion threshold,<sup>75</sup> politically cohesive minority groups are assured representation if they vote strategically.<sup>76</sup> Similarly, *all* voters have the potential to form voluntary constituencies based on their own assessment of their interests. As a consequence, semiproportional systems such as cumulative voting give more voters, not just racial minorities, the opportunity to vote for a winning candidate.

Racial-group interests become those self-identified, voluntary constituencies that choose to combine because of like minds, not like bodies. Legitimate interest constituencies are formed among groups of individuals who share similar opinions or identities. These interest constituencies are less fixed than under territorial districting. Nevertheless, racial minority groups may still choose collectively to elect representatives. But now the minority voters' choices are based on their own conception of identity, which may be defined in racial terms because it is either racially apparent, racially derived, or a function of historical treatment by the numerically superior racial majority.<sup>77</sup>

Thus, even if voting is thought to be a concept of individual autonomy, the recognition of voluntary choices to affiliate or form associations minimizes wasted voting while transcending "artificial groups" based solely on residence or race. On the other hand, if voting is seen as a group-representation concept, representation systems should minimize wasted votes in order to realize maximum influence and empowerment. Under either view of voting and representation, a semiproportional system is preferable because it minimizes wasted votes and defines voting behavior based on election choices exercised by the voters themselves.

Additionally, if racial group identity is a value that deserves representation, territorial constituencies are an imperfect proxy. If racial group membership is thought to be affiliative yet involuntary in the sense that history, culture, and social pressures combine to define one's membership, it is equally important to provide openings within the political process for self-defined group representation. Territorial constituencies do not do this, because they fail to maximize opportunities for group political empowerment and individual group members' participation and self-expression.

As a result, whether representation is considered essentially an individual or a group activity, the principle of one-vote, one-value is necessary to protect voters' interests.<sup>78</sup> Everybody's vote should count for somebody's election. Voters are directly represented only if they actively choose who represents their interests.

In this sense, I am arguing for a more expansive account of the representational relationship for *all* voters. In order to achieve political equality and political fairness, an electoral system should give voters the direct opportunity to initiate and terminate their own representational relationship. It is not enough that some voters choose for everyone or that everyone has an equal chance to be an electoral winner or an electoral loser. Voting should become a positive-sum experience in which all voters actively participate in selecting their representative.

On the assumption that each participant should enjoy an equal opportunity both to participate and to influence, the concept of one-vote, one-value describes the idea that each voter should elect someone to represent her interests. This new view of the representational relationship draws on the concepts of equal opportunity to participate and equal opportunity to elect representatives of one's choice that are embodied in the 1982 Voting Rights Act amendments. It arguably would expand the statutory view of the representational relationship in a way that benefits all voters.<sup>79</sup>

The courts, however, have been hesitant to employ a one-vote, one-value system as a remedy under the Voting Rights Act. In *Granville County, North Carolina*, black voters challenged the at-large method of electing the county commissioner. Blacks, who comprised forty-four percent of the county's population, had never been able to elect any person to the five-member commission. The defendant-commissioners conceded that black voters were not represented on the county's at-large commission. They also admitted that if the county were districted, *and if two additional commissioner seats were added*, blacks would be able to elect one of seven commissioners, giving the forty-four percent black popula-

tion "electoral control" over fourteen percent of the commission. The single-member districting remedy failed to capture much of the black community, which was dispersed throughout the county.

The plaintiffs proposed, and the district court approved, retention of the staggered term, at-large method of election with a threshold lowering, semiproportional modification that allowed voters to cast only three votes for the five open seats. When the modified system was employed, three blacks were elected to the seven-person commission.

The Fourth Circuit in *McGhee v. Granville* reversed and restricted the relief granted based on a narrow definition of the causal relationship between what the plaintiffs challenged and the available relief. The court ruled that single-member districts were the only appropriate remedy. Since the plaintiffs challenged at-large elections that prevented black candidates from getting elected, the exclusive remedy was to create single-member districts in which black candidates were likely to get elected. Even if all or many black voters did not reside in the newly configured majority-black districts, their remedy was limited to the "virtual" representation they received from districts that enjoy black electoral success.

By articulating its analysis of vote dilution exclusively in terms of single-member districts, the courts have tended to promulgate single-member districts as a talismanic liability and remedial threshold.<sup>80</sup> At the same time that courts have moved closer to a single-member district, black electoral success standard, they have clearly established "descriptive" proportional representation as the *ceiling*. The Court in *Thornburg v. Gingles*, for example, reversed a finding of dilution in District 23 where it appeared that black voters enjoyed "proportionate" representation because a black was consistently elected over a twelve-year period. The Court did not discuss the fact that in District 23 black voters had to employ "bullet voting" to elect the black candidate and thus forfeited their chance to influence which whites would be elected.<sup>81</sup> Nor did the Court address the evidence that the black who was elected was actually chosen by the white voters and had to "sail trim"<sup>82</sup> his legislative positions accordingly.<sup>83</sup>

Despite judicial reluctance to adopt alternative remedies, the principle of one-vote, one-value satisfies the representational needs of voters in two ways that districting does not. First, it extracts the unfairness of wasted votes from winner-take-all solutions. Votes that would have been wasted in a winner-take-all system are redistributed to voluntary constituencies consistent with the actual level of their political support. Second, it allows voters to choose their representational identity. Rather than imposing a group identity on a given geographic constituency, this system gives vot-

ers the opportunity to associate with the identity that fits their own view of psychological, cultural, and historical reality. Thus, racial and other politically cohesive groups could be represented in proportion to their actual strength in the electorate rather than in proportion to their geographic concentration. As a result of political organization, voter education, and strategic voting, any politically cohesive group that is numerous enough to meet the local threshold of representation could mobilize to gain representation.<sup>84</sup>

Ultimately, what the one-vote, one-value principle does is to transform the unit of representation from a territorial or racial constituency to a political or psychological one. This affirms Iris Young's view of the social group as one based on self- and historical-identification, and it rejects representational groups based simply on the joint possession of externally observable attributes or the choice of a residence.

One-vote, one-value makes the assumption that each voter should enjoy the same opportunity to influence political outcomes. No one is entitled to absolutely equal influence; but by the same token, no one is entitled to grossly disproportionate influence or a monopoly on control. The majority should enjoy a majority of the power, but the minority should also enjoy some power too. Thus, one-vote, one-value measures opportunities for fair participation using a baseline of actual participation and real political strength.

The principle of one-vote, one-value, as realized through cumulative voting, also restores the link between representation and voting by ensuring that legislators represent unanimous, not divided, constituencies. Representation becomes the process of bottom-up empowerment based on self-defined expressions of interest. Moreover, assuming voters vote strategically, votes are not wasted either by voting for losing candidates or by packing voters into safe districts. The legislative body can reflect fairly the range of opinions and interests within the public at large, including racial minorities who can be represented based on their electoral strength. Gerrymandering becomes unnecessary and can no longer be used to enhance the disproportionate power of incumbents to ensure their own reelection or to exaggerate the political control of the party in power. Finally, local political organizations may be given the space and the possibility of success. Such parties can fill the needs for political mobilization, voter education, and legislative monitoring that largely go unfilled in our current system.

Thus, by restoring the link between representation and voting, alternative election systems encourage voter participation. They also can

broaden the range of debate by allowing local political organizations to emerge and interest-based political coalitions to form. These coalitions would not be limited to neighborhood communities of interest, certain racial groups, or particular elections, but would contain dynamic possibilities for regional, reciprocal, or cross-racial political cohesion. The race-conscious context of districting might be retained, but only on an election-by-election, issue-by-issue, voter-by-voter basis.

Of course, semiproportional systems of representation can be criticized for their tendency to destabilize the electorate by either promoting stalemate or creating chaos. I have elsewhere identified many of these concerns, some of which still need to be addressed more fully. *In brief*, alternative election systems raise legitimacy concerns about paralysis, stability, and efficiency, all of which need to be taken seriously. On the other hand, for those who feel excluded, legitimacy is derived from broad-based consensual authority. Self-government by consensus that recognizes the views of minorities is legitimate and enduring.

In balancing the fears of balkanization against observations about existing alienation, I conclude that exclusiveness is a greater evil than controversy, that passivity does not equal contentment, and that differences need not be permanently enshrined in the electoral configuration. Modified at-large election systems encourage continuous redistricting by the voters themselves based on the way they cast their votes at each election. Whatever differences emerge, therefore, are those chosen by the voters rather than imposed externally on the voters based on assumptions about demographic characteristics or incumbent self-interest. These voter-generated differences may infuse the process with new ideas; diversity of viewpoint can be enlightening. Finally, the modified at-large system may simply reflect a necessary transition phase from power politics to principled politics. But, whether it succeeds in that respect, it at least has the benefit of infusing the process with more legitimacy from the perspective of previously disenfranchised groups.<sup>85</sup>

I do not mean to denigrate concerns that the proliferation of political interest constituencies may undermine consensus, exacerbate tension, and destabilize the political system. These concerns reflect a preference for conflict resolution that camouflages rather than identifies political differences. My preference, however, is first to recognize salient differences and then to work with those differences to achieve positive-sum solutions. My idea is that politics need not be a zero-sum game in which those who win, win it all. My idea is that where everyone can win something, genuine consensus is possible.

There is, in addition, a concern with one-vote, one-value principles that I have not previously considered. In my focus on wasted votes, I have not yet examined the effect of one-vote, one-value approaches on communities with large numbers of noncitizens, age-ineligible citizens, or people with other conditions that disable them from voting. For example, concerns about the representation of noncitizens are prominent in the Latino community; concerns about the disproportionate number of young citizens are also relevant to the black community. Thus, each of these communities has a special profile in terms of the number of people each voting member of the community ultimately represents. This is a virtual representation problem within the electorate itself.

Since districting is based on population rather than on turnout or registration rates, people who do not vote at all are nevertheless represented. This idea is encompassed by the third virtual representation assumption—that the district identity is independent, yet consuming, of all constituents. Even if one cannot vote, one's interests are presumably represented by those who can. For minority communities whose population is in greater need of government service, access to representatives based on population may be more fair than access to representatives based on turnout. A voluntary interest constituency composed of like-minded voters devalues the interests of elements within the constituency who cannot or do not vote.

Of course, the same criticism can be leveled at safe districting. Although its population base extends top-down representational access to nonvoters, these constituents are stuck with whomever the majority of district voters choose. In other words, safe districting assumes that nonvoters and voters are fungible in that the voters indirectly represent the interests of the nonvoters. Accordingly, children are only indirectly represented by the representatives chosen by adults on their behalf.

Admittedly, changing the structure of electoral units is an incomplete solution even to those problems on which I have previously focused. Because of its potential disruption, it is also a solution worth considering only where the existing election system unfairly distributes political power in a way that is itself disruptive or illegitimate. As for the problem of differential participation rates, I can speculate about three possible responses. First, like districting systems, one-vote, one-value election systems require some subdistricting. Except in very small cities or towns, some multimember subdistricts would be required both to reduce the complexity of the ballot and to promote access for local communities of interest. In

New York City, for example, boroughs might be appropriate multimember districts for borough-wide cumulative voting. This might accommodate the concern that representatives have a local constituency for whom they are responsible without regard to who actually voted for them.

Second, although interest representation based on one-vote, one-value does not directly protect nonvoters any better than districts, it does create an environment in which they, as well as voters, are encouraged to participate directly. By participation I refer to the broad range of bottom-up activity relating to the political process. I specifically disavow an emphasis exclusively on election-day voting. Because semiproportional systems rely on *voluntary* interest-group constituencies, they reward local political organizing efforts more than systems with predetermined constituencies. Representation is earned in proportion to political activity and actual turnout rather than fixed population or majoritarian aggregating rules. This means that local political organizations, with an activated grass roots base, can actually win elections.

Nonvoters can participate in the organizing and monitoring efforts of local political organizations and thus actively assert their own interests. Nonvoters can participate in all the pre- and post-election day activities of the political organization. In this way, one-vote, one-value encourages representation directly of interests, not just of voters. Nonvoters can directly support a local organization that articulates their interests rather than passively rely on the presumption that they benefit from choices made by those who virtually vote their interests.

Third, the commitment to consensus politics implicit in the one-vote, one-value approach benefits voters and nonvoters, majorities and minorities. It infuses the process with receptivity to new ideas. It promotes a new definition of stability based on inclusiveness, not quietude. It creates positive-sum possibilities rather than limiting participation to winners and inevitable losers. With its focus on coalition-building and consensus, it does not assume that conflict is better suppressed than voiced. Nor does it assume that politics need always be zero-sum.

One-vote, one-value represents a new vision of political participation. It assumes that empowerment comes from opportunities for the active assertion of one's own interests—speaking out, not just being spoken for. One-vote, one-value attempts to mediate directly the tension between individual and group representation that characterizes the districting process at each level. Thus it is more fair both to individuals and to groups.



### III. Conclusion

The controversy over racial-group representation offers us an opportunity to re-examine the political fairness of our district-based electoral system. I posit that a system is procedurally fair only to the extent that it gives each participant an equal opportunity to influence outcomes. I call this principle one-vote, one-value. This is a measure of procedural, not substantive, legitimacy. According to this principle, outcomes are relevant only to the extent that they enable us to measure degrees of input, not to the extent they achieve some objective, substantive notion of distributive justice.

The challenge to racial-group representation is actually a criticism of a different kind of group representation: representation based on homogeneous geographic constituencies. Race-conscious districting is simply one expression of a larger reality: winner-take-all districting. Both justify wasting votes with often unstated assumptions about the group characteristics of district voters. In other words, the criticism of racial-group representation is, at bottom, a criticism of winner-take-all districting in which the district boundaries and the incumbent politicians define the interests of the *entire* district constituency.

I conclude that group representation is as American as winner-take-all districting; that the two are conflated in criticisms of race-conscious districting; and that consideration of alternative means of representing racial groups can shift the debate about political fairness. By directly confronting the problem of wasted voting, we may make the system more legitimate from the perspective of previously disenfranchised groups, and more fairly representative of issue-based groups who previously have been aggregated and silenced within the majority.

I have proposed a new view of the representational relationship that is more protective of all voters' ability and more conducive to all voters' initiative to choose directly who represents them. By critically examining certain fundamental assumptions about representation, I hope to revive our political imagination. "Change the way people think," said South African civil-rights martyr Steven Biko, "and things will never be the same."<sup>86</sup> Or as Professor Robert Dixon declared about 25 years ago:

[N]ow that the first round of reapportionment has been accomplished, there is need to talk "one man-one vote" a little less and to talk a little more of "political equity," and of functional components of effective representation. A *mathematically equal vote which is politically worthless because of gerrymandering or winner-take-all districting is as deceiving as "emperor's clothes."*<sup>87</sup>