
AN INTERVIEW WITH LANI GUINIER

—LINDA MAGUIRE—

FORUM: Different legal experts define "minority" in different ways; some emphasize numbers, others stress a position of disadvantage. What is your working definition of a minority?

GUINIER: I do not want to seem as if I am rephrasing the question in order to answer it, but I think that part of the problem with the way in which we talk about race or racial minorities is that we tend to look for one universal solution that works in all situations. The issue of race in this country is very complicated, very nuanced and very contextualized. Some people would call it "socially constructed." So in order to answer the question "What is a minority?" I would have to know the context. If we are talking about a voting minority, it could be any politically cohesive group that is numerically insignificant. If we are talking about a racial or language minority, that group could in fact be a majority of a voting district but a minority numerically of the jurisdiction as a whole. It is therefore a hard question to answer in the abstract.

FORUM: Explain, if you would, the systems of cumulative voting and supermajorities and their application in the United States.

GUINIER: Both supermajority rules and cumulative voting are ways in which political power is allocated among different groups or among different voters. They represent alternatives to a strict up or down, simple majority, winner-takes-all system. Now a simple, winner-takes-all system seems normal to Americans because that is what we are used to. If you look at it in context however, the only countries that still use single member district, winner-takes-all systems exclusively, are former colonies of Great Britain. Most of the rest of the world has moved to some system of proportional representation or some system in which there are multiple forms of representing voters. The reason they have moved to alternative election systems is because they have learned, in part, from our mistakes. The United States may have been one of the first democracies, but that does not mean we have the last word on what a democracy is. Our approach, which, as I said, is derived from the British system, essentially allocates power by geographic regions. It groups people together based on

Lani Guinier is professor of law at the University of Pennsylvania Law School. She spoke with Linda Maguire, Editor-in-Chief of The Fletcher Forum, on 28 October 1994 from her office in Philadelphia.

where they live and it assigns them a single representative. So it aggregates a group of people who are in what we call a district, and it gives them one person to represent them. We then have an election, people vote, and whoever gets the most votes in that particular election gets all of the power.

Technically, then, 51 percent of the people in the district can get 100 percent of the power. The assumption is that the 51 percent of the people who have the most votes and therefore elect the representative, are going to elect someone who will represent all of the people in the district, including the 49 percent who did not vote for him or her. That assumption is based on the "golden rule," or principle of reciprocity, which says that whoever is in the majority today will not be permanently in the majority but has to worry about potential defectors who may join with today's minority to become the next governing coalition. Therefore, in order to insure that the members of the current majority will be treated fairly when they are in the minority, the current majority treats the current minority fairly. That is one of the reasons that we think of simple winner-takes-all majority rule as being fair.

However, there are other ways in which you can justify simple majority rule if you think about a district or a geographic unit as simply one unit within a much larger territory. If the territory is subdivided in a way that is "representative," then presumably (and this is a presumption, again, that the simple majority, winner-takes-all rule rests upon), the 49 percent in one district may be a majority in another district. It is therefore assumed that that group gets direct representation of its interests from people who are elected in other districts by like-minded voters. So there is a second assumption: that the 49 percent in our hypothetical district is treated fairly by the governing majority, and is directly represented by majorities in other districts that were elected by like-minded voters. So the group that is in the minority does not have to wait for a time when it becomes a majority in that district in order to be treated fairly. But it is essentially a principle of virtual representation, or vicarious representation, to claim that the present minority is represented or has surrogate representatives who, though not elected by it, are responsive to its interests.

A third assumption that undergirds simple, winner-takes-all majority rule in these districts is that the district itself represents some kind of group that is cohesive or has enough similar interests that a single representative can fairly provide constituent service. For example, I live in Pennsylvania and I am assumed to be represented by two Senators even if I did not vote for them because, as a resident of this state, I have certain interests that they are going to represent regardless of what our respective politics may be.

Now those three assumptions about simple, winner-takes-all majority rule, are flawed when you have a permanent majority, or when you have a majority that monopolizes power. So if you have a system in which the majority in one district is a majority in every district, then the 49 percent minority is not really represented. It is represented on the hope or promise of "the golden rule," but it is not represented in terms of that second assumption I described as the virtual or vicarious representation principle. There are lots of other ways in which you can see that the principle of 51 percent representing 100 percent of the people is

a wish; it is a hope, an assumption. Ideally we would want to have 100 percent of the people getting 100 percent of the power, but unanimity is very hard to get. So we will go to 51 percent because we have more people supporting a representative than opposing him or her, or we have more people supporting a decision than opposing it.

FORUM: How would you counter criticism that a supermajority rule is just another name for a minority veto, or that cumulative voting would lead to what Clarence Thomas termed "racial balkanization"?

GUINIER: There are different ways of responding to the problem. First, you must agree that there is a problem when a majority hoards power, monopolizes power, fails to share power, or does not respect the legitimate interests of a minority. If so, and if you can ascertain that it is not just a hypothetical problem but is empirically identified in a particular jurisdiction, then the question becomes how to remedy the situation. That is where the issue of supermajority rules and cumulative voting become relevant. They are ways of remedying a majority rule, winner-takes-all system that is dysfunctional.

Now, one way of remedying the problem is to continue using districts to allocate power but to set aside districts in which the minority is in fact the majority. To insure that the majority does not hoard all the power in all the districts, you give the minority a district in which it is the majority. The problem with this particular solution is that it may reinforce polarization because it suggests that people have to be separated in order to be included. It may send a message to the jurisdiction-wide majority that in other districts they do not have to represent the minority because the minority has its own little district. And so the white majority — assuming that this is the United States, where most of the cases with which I am familiar involve a white governing majority — does not have to represent the interests of the black or Latino or Asian minority because those interests are taken care of by a single representative.

Of course, then you have what I describe as the "third generation problem." If the only way that the minority is included is through the election of a single person to represent the minority's interests in connection with a single district which the minority controls, then you are simply replicating the problem of majority tyranny or majority monopoly in the legislature. You are "integrating" the legislature with a token who will be outvoted along racial lines in the legislature if voting is as racially polarized there as it is in the electorate.

An alternative that I have described would be to remedy majority tyranny or majority monopoly through a different election system called "cumulative voting" where you do not allocate power initially by awarding different groups the control of a single district. What you do is allow the voters to essentially district themselves by the way they cast their ballots. Voters are given the same number of votes as there are open seats. Note that this is only a remedy for a problem of majority monopoly or majority tyranny in collective decision-making bodies such as city councils, state legislatures, county commissions or school boards. It is not relevant to the election of a single-person office such as

a mayor or a governor because that is the ultimate, winner-takes-all position. We are talking about collective decision-making bodies.

Assume that you have a jurisdiction with five seats on the school board. Instead of creating five separate districts and allowing the voters within each district to elect a single representative who then represents the interests of all of the voters in that district including those who did not vote for the person, cumulative voting gives all of the people in the entire community five votes and lets the voters aggregate, or stack, their votes in any combination to reflect their preferences. So if they wanted very much to be represented by a single person, they could put all five of their votes on one person. If they had multiple interests that they wanted represented, they could distribute their votes to reflect these interests. It is a way of enabling voters who feel that they are a politically cohesive minority to vote strategically to acquire representation for their "minority group interests." But it does not forever lock them into a minority position because at each election they can reconfigure their votes or form transracial coalitions. They can agree, in advance, with another group to vote for that group's preferred candidate in exchange for votes from that group for the minority group's preferred candidate.

FORUM: And this method has already been put into practice in several states, has it not?

GUINIER: Yes, and its practical uses are not limited to remedying voting rights violations. It is also used by corporations when electing members of the board of directors to insure that the majority of the shareholders do not control all of the seats. It has been in effect in corporate governance for at least a hundred years. It is a system that has worked in other contexts to essentially insure representation of minority interests. It does not give the minority a veto in the sense that the minority gets special privileges. It gives the minority the opportunity to be represented so that the interests of the minority can be directly represented by voters who share those interests.

A supermajority rule is a little bit different, but again, it is used in other contexts. For example, in the United States Senate there are a number of protections for the minority party. What the supermajority rule does there, is to require between 60 to 75 votes to pass something. It is a way of insuring that the majority works with members of the minority to form a successful coalition. In the Senate they have supermajority rules for very high stakes issues, such as amending the Constitution or passing a treaty, because there is less confidence on those issues that 51 percent of the representatives can be trusted to represent 100 percent of the people.

The supermajority rule has also been used in voting rights cases where there is evidence that the racial polarization in the electorate is also a problem on the level of the city council or the county commission. Recently, in a Mobile, Alabama voting rights case, a supermajority requirement was instituted as one component of the remedy. There were seven members on a county commission: four represented majority white districts and three represented majority black

districts. In the settlement, the commission approved the use of a five vote supermajority so that no matter could pass the commission without the support of a biracial coalition. The rule does not say who has to be in the majority, it just says that the majority has to consist of five rather than four votes.

FORUM: With regard to the voting rights cases you discussed, there has been quite a bit of debate over the U.S. Supreme Court's interpretation of the Voting Rights Act. Some argue that the Act should still only apply to practices preventing minorities from registering and voting, while others take the more expansive view that it insures minority representation. What do you think of the Court's interpretation of the Act today?

GUINIER: It is not so much what I think as what the Congress intended, what the Supreme Court has consistently interpreted the Act to mean, and what makes sense in terms of democratic theory. Let me try to respond to all three. The first is what Congress intended. I do not think that there is a great deal of debate that when the Voting Rights Act was first passed in 1965, Congress was primarily concerned with the problem of just getting blacks access to the ballot. That was the immediate problem confronting Congress and it acted expeditiously to enact legislation that at the time was considered to be extraordinary. It was extraordinary in the sense that the federal government was taking very dramatic steps to monitor what the states did to insure that every voter within the state had the opportunity to cast a ballot.

What happened however, is that immediately after the Act was passed and the number of blacks registered and voting quickly rose, Congress discovered that ingenious and sophisticated schemes were being used to insure that those newly voting blacks could not elect candidates of their choice. They could vote, but they could not have any political influence. The Congress, in observing this problem, was also informed by what the Supreme Court was doing in the "one person, one vote" cases which were being litigated during the sixties and which had nothing, at least ostensibly, to do with race. The "one person, one vote" cases were challenges brought to the configuration of state and local legislative districts by white suburban and urban voters against legislatures that had failed or refused to redistrict themselves since the early 1900s. The fact that the population during the period from 1900 to 1960 had shifted from the rural farms to the cities was not reflected in the distribution of representation in the state legislature. The voters in the cities and in the suburbs were therefore challenging the fact that they did not have the same votes as those voters in rural communities whose representative represented far fewer people.

This is what "one person, one vote" means: everyone's vote should essentially have equal weight. It does not mean simply that there should be universal suffrage. Many people construe "one person, one vote" to mean that everyone should get the right to vote, but that is not what those cases were about. They were about equal voting weight. All of those voters in the "one person, one vote" cases were voting; nobody was formally disenfranchising the urban or suburban voters. What was happening is that the importance or influence of the vote was

being diluted by the fact that there were, for example, 10,000 people in a city district and 500 people in a rural district.

The Supreme Court, over the last thirty years, has consistently interpreted the Voting Rights Act to include the right not only to cast a ballot but the right to cast an equally weighted ballot. Congress has also amended and reenacted the statute in line with those interpretations. Congress reenacted the Voting Rights Act in 1970, in 1975, and then again in 1982, each time acknowledging that the Supreme Court had construed the Act very broadly to include not just the right to register and vote but also the right to have a vote that counted and that mattered. So those who are now claiming that the Act only applies to the right to cast a ballot are revising history and imputing to Congress their own political theory of voting. Now, what is their theory of voting? Basically this gets to the third point about democratic theory.

Those who interpret the Act narrowly theorize that if you can vote, you are enfranchised and you are therefore politically equal to every other voter. The problem is that no one votes purely for symbolic reasons. What the critics of a more participatory democracy are saying is that voting is a symbolic privilege which assures you of being treated equally with all other citizens in terms of having the right of the franchise. But in my view voting is also an instrumental activity, not just a symbolic one. People do not vote just to feel good about themselves, they vote in addition because they want to influence who gets elected. If people thought that they were just voting in an empty ritual and that their votes were not being counted, they would feel that there was something fraudulent about that. That is not what democracy means to most people, and it is not what it meant to the Congress that passed the Voting Rights Act.

Democracy means not only the ability to cast a ballot, but the ability to cast a ballot that leads to the election of a representative, and then the ability of that representative to have some fair chance of influencing legislative policy. This is not about race, this is about democracy. This is true for all voters. So the issue for the Voting Rights Act is whether the Act is necessary to insure that racial minority voters have the same opportunity as all other voters: to cast a ballot, to cast a ballot for someone who has a good chance of being elected, and to cast a ballot for a representative who, once elected, has a fair chance of influencing legislative policy.

FORUM: Concerning legislative policy, you suggest that legislatures should work less by up and down votes and, instead, seek cooperation and even consensus. Given the recent history of a Senate agenda stifled by a filibustering minority, is this really a practical project? Has it not, in fact, harmed all efforts to help the most disenfranchised groups in this society?

GUINIER: That is a very, very good question. In light of current evidence one would think that I am not only a democratic idealist but a democratic delusionist. In my writing I have not been talking about the Congress but rather about local governing bodies. There are many reasons why I have not been talking about the Congress. One is that I have not studied the Congress, another is that

many of the issues that are played out at the local level become exaggerated or extraordinarily polarized at the national level in a way that is completely out of context. So in a way it is hard to get a handle on them.

I think that, in part, the problem you have described — that of a filibustering minority and very partisan politics — is exactly the problem that I am trying to deal with in my writing. I keep looking for positive-sum solutions. A positive-sum solution is a solution in which everyone wins something, no one wins everything, but no one loses everything. It is not a zero-sum solution in which there can only be one winner and one loser. A positive-sum solution is one in which there are multiple winners. Part of the reason there is such partisanship in the Congress or at the national level, is that in the United States we too often look for winner-takes-all solutions. We look for solutions in which there is only one winner and everyone else is a loser; therefore the stakes are very high. In order to get anything, one must win; and in order to win, one must demolish or demonize the opponent.

Part of what I keep looking for are paradigm shifts that would enable us to imagine innovative solutions in which we take turns or we rotate power or we share power so that the stakes are not as high in terms of identifying a single winner. Therefore one can envision it as a possibility, if not a probability, that people can learn to cooperate.

FORUM: You speak of “an aggressive, formal policy that endorses cooperation to modify behavior toward tolerance.” Is this a concrete policy or more of an ethic of behavior? If the former, what would be the details of such a policy?

GUINIER: It is more of an attention to process. It structures the process in a way that is more likely to create incentives for cooperation. For example, much of my research is on jury deliberations. Those who study jury deliberations have found that if a jury takes a vote immediately, it often polarizes the jurors into warring factions. It is often better to just go around the room and get people to talk and identify what their concerns are. Then, once it becomes more obvious what the issues are, it is helpful to try and work through those issues before taking a vote. The act of voting can itself be polarizing if it means that people have to declare themselves as being on one side or the other. And so one of the ideas that I have been working with is trying to put voting off as the last resort. If you have to vote, trying to structure the voting in a way that gives people multiple options so that it does not require the total abandonment of one position.

This is my son's insight about the kids who want to play hide and seek versus the kids who want to play tag. If there are four who want to play one game and two who want to play the other, you could go by a strict vote, up or down, and play the game that the four want to play. But you can also, as my son suggests, take turns. The kids can play the other game after the first game, or for a proportionately shorter amount of time.

We need to start reconceptualizing the notion of politics because right now we think about politics as a battle to the death. We think it must be a total victory,

as if politics is modelled after war. But it does not have to be this way. Politics is essentially a way of organizing society to allow people to participate in making the decisions that affect their lives. No one said it had to be total victory.

FORUM: Discuss the constitutionality of interest representation, particularly if it applies only to certain groups. How will the groups deserving of interest representation be determined?

GUINIER: I believe the Voting Rights Act is constitutional and what I have been arguing is that the Act was designed to remedy the prejudicial exclusion of certain groups. Where Congress suspects that the excluded groups have suffered, been disenfranchised, or been denied their basic constitutional rights, it has within its power to create rules or procedures for examining such situations and then to authorize the federal judiciary to order a remedy if a violation is found. So interest representation seeks to remedy the fact that some groups which have politically cohesive interests have been denied the opportunity to compete or to participate as equals with all other groups. If it is proven that those groups are suffering because of prejudice, because of racial block voting, because of a confluence of factors, then a remedy must be found. When I say that interest representation is constitutional, I mean that the Voting Rights Act is constitutional because it provides a remedy to those groups that have been denied the opportunity to participate.

The remedy, however, should not treat the excluded group specially. The remedy should be the opportunity for all voters to cast an equally weighted vote. The remedy should be an opportunity for all voters to enjoy one vote, one value. By this I mean that everyone's vote should count towards the election of someone. Voters who form coalitions based on particular interests must then meet whatever the threshold for representation is in a particular community. I am not advocating a bright line threshold here; in my opinion the threshold should be between one and 51 percent. But there are many numbers between one percent and 51 percent, therefore each community should decide what makes sense for that community. A community must decide what size groups it wants represented in the community. Why should only groups that are a majority be represented? Why should only 51 percent be represented? I say that is too high. On the other hand, I would say that one percent is too low because then all you get is noise. So, within that range, I have advocated threshold-lowering election systems such as cumulative voting or other forms of proportional and semi-proportional representation that give every voter, not just the plaintiff class that has established a violation of the Voting Rights Act, the opportunity to cast a vote that leads to the election of somebody. The only way to do this is to shift from a paradigm that awards power based on geography to a paradigm that awards power based on interest. The rationale for the paradigm shift from geography to interest is that geography is not always a proxy for interest. In some instances, geography is a proxy for some of your interests but not all of them. Why not give voters the opportunity to establish, by the way they cast their ballots, what their interests really are at a particular election?

FORUM: Instead of drawing lines which carve out arbitrary districts?

GUINIER: Exactly. It is very arbitrary when you think of who normally gets to draw those lines: incumbent politicians. And what are the interests that are driving many incumbent politicians? Getting reelected. Their impulse is to draw lines that give them safe seats that perhaps overrepresent a majority. Instead of providing competitive districts in which the minority and majority are not assured of power in any particular election, many incumbents are inclined to create heavily Democratic districts that are 65 to 70 percent Democratic to insure that the Democratic incumbent will get reelected and that the Republican minority will be essentially unrepresented. Of course, the reverse also happens. This is not the exclusive talent of one party or the other.

FORUM: Do you think that such a system of interest representation will create more backlash and polarization in the political sphere or less?

GUINIER: I think that it would create less, but it is worth trying in any case. The reason it is worth trying is that right now there is very little that we could do worse. The level of negative campaign ads, of attack ads, of people personalizing an election as if it were about individual candidates and not about issues that affect real people in real ways. It would be hard to get more polarized than what we have right now. In addition, we have one of the lowest levels of voter participation in the world. People are turned off by the way in which we allocate power. On some level people are telling us that the system needs to be changed because they do not feel enfranchised enough even when they do vote. To them it is not worth the effort to cast a ballot. That is the tragedy.

FORUM: So in your view, experimenting with different voting systems would serve to stabilize and legitimize the political system, instead of having the opposite effect?

GUINIER: Exactly. It might create an incentive first of all for people to go and vote because if they do not vote they are not just giving up one vote, they are giving up five or six or whatever the number of votes is. They are giving up the capacity not just to vote their most salient interests, but to form cross-cutting coalitions. Systems such as cumulative voting give voters the capacity to exercise a very intelligent vote. They can send very nuanced messages. In addition, it is much harder to engage in negative campaigning when you run against five or six people than when you run against just one, because at some level you have to give voters an affirmative reason to vote for you, as opposed to just not voting for the other candidate.

FORUM: What potential do you see for the application of the concepts we have discussed to country situations such as those of Mexico, South Africa or the former Yugoslavia?

GUINIER: South Africa is doing exactly what I am talking about. We should be learning from South Africa. South Africa changed to an all-race election, and what did they do? Did they adopt winner-takes-all majority rule? Of course not. If they had, would the white minority have been represented? What they did is

come up with a power-sharing arrangement in which the white minority is assured, not only of having some representatives in the legislative body, but also of having some seats in the Cabinet. In addition, they adopted a supermajority rule. I do not recall exactly the number but I think that it is about 60 or 65 percent. To me the great irony is that South Africa may figure out a way to solve its race problem before we do.

I am glad you are doing this in the context of your international issue because the more people study international democratic systems, the more they will discover that our system is not only in the minority among democracies, it is also in the extreme minority. It is extremely overrepresentative of the majority compared to other systems. If one did a continuum around the world and looked at the way in which different democratic countries elect their representatives, on the one hand there would be the United States. With the United States are three or four other countries which are the most majoritarian states. On the other end of the spectrum are Israel and South Africa. In the middle are countries such as Germany or New Zealand. So there are many alternatives. What we do in the United States just happens to be one of the worst, if measured in terms of electoral fairness to minorities and participation rates by all of the voters.

