

The Washington Post Book World  
March 27, 1994, Sunday

Making Her Case

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BOOK WORLD; PAGES 3, 6.

**LENGTH:** 922 words

THE TYRANNY OF THE MAJORITY: Fundamental Fairness in Representative Democracy

By Lani Guinier. Free Press. 324 pp. \$ 24.95

LESS THAN A YEAR after her nomination to be assistant attorney general for civil rights was withdrawn because of criticism of the supposedly anti-democratic implications of her previously obscure and uncontroversial law review articles, Lani Guinier has brought out a book of her edited and revised texts. The disputed texts are accompanied only by a modest introduction that is decidedly less revealing than Guinier's recent essay in the New York Times Magazine.

Just as she did last June, Guinier, who returned to work as a law professor at the University of Pennsylvania, emphasizes that she is "a democratic idealist, committed to making American politics open to genuine participation by all voters." She correctly reiterates that her ideas "are not undemocratic or out of the mainstream," but she also quietly concedes that in the past she may have failed to locate some of her ideas "in the specific factual contexts from which they are derived." Guinier acknowledges that the earliest of her law review pieces are "not necessarily representative" of her current thinking, and in one new paragraph unobtrusively added to her third essay, she now takes pains to stress that she is limiting her "wholly exploratory suggestions to the specific context of a remedial approach to extreme cases of racial discrimination at the local level."

Guinier's specific suggestions for voting rights reform are uncontroversial and in large part unremarkable. President Clinton's assertion last June that he could not accept or defend some interpretations of Guinier's articles reflected either insufficient familiarity with her writings or, far more likely, lack of the fortitude necessary for fighting a political battle that had reached the unpromising stage because of the White House staff's failure to give Guinier any visible support or assistance once her nomination came under fire. Both then and now, Guinier clearly believes that she might very well have turned her chances around had the president and the Senate Judiciary Committee gone forward with confirmation hearings that would have allowed her to explain her views to a nationwide audience.

Yale Law School professor Stephen L. Carter, in a 14-page foreword to this volume, accurately notes, "It is difficult to discern, within the bounds of reasonable disagreement, the basis for the conclusions that Guinier is a dangerous radical." In many instances, Carter observes, Guinier's words were "taken out of context" by her critics, and "the failure of many in the media to bother to read" Guinier's articles for themselves magnified that damage because of how the few "who

had done the reading -- initially her detractors -- became quite influential in crafting the general journalistic response." Had the Clinton White House handled Guinier's nomination with even a modicum of savvy and competence, Guinier likely would have won Senate confirmation to a post that she very much wanted.

The primary focus of Guinier's four reprinted articles is the desirability of coming up with "an alternative to winner-take-all majoritarianism" in highly polarized jurisdictions where a "permanent majority hegemony" results in "the unfairness of 51 percent of the people winning 100 percent of the power" in election after election. In "extreme circumstances," such as those Guinier herself experienced at first hand in litigating a voting rights case in Phillips County, Ark., "majority domination may become majority tyranny." In American political discourse, she writes, we need to be alert to the danger of equating "majority tyranny with democracy."

Guinier's preferred remedy in such circumstances is the concept of cumulative voting, where in multi-seat races for a city council or county commission, each voter gets the same number of multiple votes, and can concentrate or disperse them among one or more candidates as he or she sees fit. Such a format allows a permanent minority to give full voice to its intensity of preference. But Guinier stresses that she does not "advocate any one procedural rule as a universal panacea for unfairness." In the earlier articles, "I discuss super majority rules as a judicial remedy only in cases where the court finds proof of consistent and deeply ingrained polarization," Guinier writes. Her measured criticisms of any simple-minded focus upon drawing single-member districts purely for the purpose of trying to maximize the overall number of black elected officials has for some time placed Guinier in the more forward-looking ranks of experienced voting rights litigators.

Guinier emphasizes that she aspires to "a more cooperative political style of decision making" than simple winner-take-all electioneering. Unsurprisingly, she makes a good case against the rhetorically naive if not straw-man notion that majority rule ought to be the single linchpin of democratic government. Guinier has said that she wants to be seen as "a woman with an issue, not a grievance." Both in this book and in a book she's writing on the Voting Rights Act due in two years, Guinier hopes to vindicate her contributions to a debate that was cut short by the political fearfulness of an unprepared and unduly timid White House.

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