

## Voting Rights and Voting Wrongs

### An Interview with Lani Guinier

*Lani Guinier became the first black woman to be given tenure at Harvard Law School when she joined the faculty in July 1998. Her appointment was another milestone in a distinguished legal career. Guinier first came to public attention in 1993 when President Clinton nominated her to be the first black woman to head the Civil Rights Division of the Department of Justice. Immediately after her name was put forward, opponents virulently attacked the views on democracy and voting that she discusses below, driving Clinton to withdraw her nomination without a confirmation hearing. That experience led Guinier to use her subsequent public platform to speak out on issues of race, gender and democratic decision making and to call for candid public discourse on these issues. Guinier has written extensively in both scholarly and popular publications about new ways of approaching old problems, including issues of affirmative action, the "testocracy," gender equity, and race-conscious political districting. Her books include *The Tyranny of the Majority* (1994), *Becoming Gentlemen: Women, Law Schools and Institutional Change* (1995), and *Lift Every Voice: Turning a Civil Rights Setback into a New Vision of Social Justice* (1998), a personal and political memoir in which she uses the nomination debacle as a window on the civil rights movement past, present, and future. Her most recent book, co-authored by Gerald Torres, is *The Miner's Canary: Rethinking Race and Power* (2002).*

*Guinier was interviewed for Mass Humanities by Martin Newhouse, a member of the Foundation board.*

**MARTIN NEWHOUSE:** I think a good place to start would be the 2000 presidential election and the Supreme Court's decision in *Bush v. Gore*.

After both of those events, a lot of attention was focused throughout the country on problems with the way our elections are run. And in early 2001, you published an article in *The American Prospect* where you said, if I read correctly, that the election debacle and near constitutional crisis that followed might present an opportunity for mobilizing both political leaders and grassroots movements towards significant election reform – not just correcting problems with hanging chads and long lines at the polls, but significant reform in the way we elect our political representatives. Now, the 2004 presidential election has come and gone. Did what you were hoping for happen in the wake of *Bush v. Gore*?

**LANI GUINIER:** In hindsight that hope does sound very naïve. And in some ways, my hope was the expression of a perennial optimist who believes that when people see a problem they want to fix it. Unfortunately, the problem with American democracy is structural; it is not about the particular individuals who happen to be on the Supreme Court or the particular individuals who happen to be running for office. It is deeply situated in the democracy that the framers constructed in the eighteenth century. We're still operating with an eighteenth-century notion of democracy and with eighteenth-century technology in the twenty-first century.

So, for example, one of the premises of the framers in the drafting of the Constitution was the assumption that, in some ways, elections were not entirely competitive affairs. They didn't want to have ideological contests. They wanted the election to be an opportunity for the voters to ratify, to acclaim, the natural leaders of the community. And both the natural leaders as well as the voters, at that time, were white men who owned property. And because you don't want to insult anybody by questioning their right to be a leader, these elections were supposed to be, in some sense, more leisurely affairs, not partisan, not tempestuous, and not widely participatory.

Now, this was a clear advance over the European understanding at the time because it was an effort to create a natural as opposed to an inherited aristocracy. It was a challenge to rule by the king. This view of natural leaders, or natural aristocracy, is certainly a more populist view—there are more people who can participate—but it's still not entirely democratic.

I go through all this history because I think it's important to understand that the Constitution itself, as drafted by the framers, never explicitly granted the fundamental constitutional right to vote to anyone. The Constitution created no voters. Rather, it said that the voters would be the people that the states determined could vote. And then you had amendments to the Constitution, which simply state that the state or the United States cannot deny or abridge the right to vote on the grounds of race or the grounds of sex or the failure to pay a poll tax. But those are negative proscriptions. They are not an affirmative guarantee that we really want all citizens of the United States to participate in making the decisions that affect their lives. So this is a structural defect that is at the heart of our constitutional arrangement. And what I was hoping in 2000 is that the concerns that were then expressed about the unfairness of a president being elected who did not get a majority of the popular vote, who had also not gotten a majority of the votes cast—not necessarily the votes counted, but the votes cast—in Florida, and who was ultimately put into office by a 5-4 vote of an unelected branch of government, that these concerns might trigger deep reflection among politicians, thinkers, policy makers, and ordinary people about what we might need to do to update our democracy.

**MN:** Has any progress been made, in your view, towards what you would consider to be progressive reforms of our election system?

**LG:** Not much. What we've had instead are conversations more about the marginalia—the technology of counting votes or of casting ballots, for example—and not about the fundamental understanding of a genuinely participatory democracy. Basically, what I'm saying is that although the United States was once an advanced democracy, a country that can take credit for pioneering many concepts, today in 2006 we are well behind our peers in terms of our understanding of democracy.

So, to take a contemporary example, because there is no fundamental, affirmative guarantee of the right to vote in the text of the Constitution, we have a problem in New Orleans, where people who were residents of New Orleans in August of 2005 and have been dispersed through an act of God may not be able to continue to participate in elections that are being held in their name. And there's no affirmative obligation on the part of state election officials to canvass what those people think, because our legal arrangements don't create such an obligation. As a result, many people don't believe that there's an affirmative obligation on the part of any state or the federal government to ensure that all citizens can vote, unlike Canada, for example. In Canada, when the government takes the census, the obligation on the part of the government is also to register people to vote. By contrast, we take the view that voting is not a necessity but a luxury, and it's a luxury that people should basically be relied on to take advantage of themselves.

**MN:** You've also written about how elections should be conducted. Virtually every other democracy that we know of is a parliamentary system with proportional representation, which we do not have.

**LG:** Right, you're absolutely right. We have a different system based on districting.

In election by districts, the districts are drawn to track territorial configurations, and the assumption is made that the residents of any given district share the same interests. And so we create units of political representation based on where people live, and then we have elections within those districts, and even if the candidate you vote for doesn't get elected, you are still presumed to be represented by the candidate you voted against.

So that's the assumption behind districting: that you are still represented, even when you vote against the person who ultimately wins, because whoever wins represents the entire district as if the district were a corporeal being. And this, in some ways, comes from British history where towns were

represented, not the individuals within the towns. So the district is like a unit that has its own circulation system, its own thinking and hearing and seeing . . .

**MN:** Its own interests.

**LG:** Yes, yes. So, if somebody represents the district, they represent you, without regard to whether you voted for them.

**MN:** And so when representatives speak about "my constituents," they mean everybody in the district, not just those who voted for them.

**LG:** They mean everybody, including those who voted against them. So, what is called "service to constituents" is one aspect of representation that is satisfied to some extent by districting. But representation of diverse interests, of a range of ideas, of competing ideologies within a district is not served by a district system.

Most people, when they think about being represented, don't think about being represented by somebody they voted against. They think about being represented by somebody they chose, somebody they affirmatively voted for. And the notion is that you want to be able to hold your representative accountable to a set of shared views or interests, that the representative is going to want to hear your ideas, and that you are going to choose someone to represent you who is sympathetic to your ideas.

But no matter how you draw the district lines, you are always going to have people who "waste" their votes, and a "wasted" vote is not a hanging chad, it's not something, going back to Florida, where they actually, you know, throw your vote away because they can't count it. The wasted vote is counted. It's just that it doesn't count toward the election of anybody. So, a wasted vote is a vote that's either in excess of what your candidate needs in order to get elected, or is cast for somebody who doesn't get elected.

Districting is a system that inevitably wastes the votes of some people. Fifty-one percent of the people get to elect an individual who then represents 100 percent of the people. So, in that case, 49 percent of the people have essentially wasted their votes.

The only way you can address this problem is to use some form of proportional representation, like they do in Germany. They have a mixed system where they use districts and then they also have a party list. Everyone gets two votes. Within your district you can vote for a candidate like we do here, but at the same time you also get a vote for the political party that best represents your interests as ideas, as choices that you are making. As a result you are actually represented in terms of both service to constituents and representation of ideas.

**MN:** One term you've used to describe what you're talking about in terms of our districting and representation is the "winner take all" system. And I know that one of the things that motivates your call for reform is not only the real disenfranchisement that you describe, but also the tremendous amount of popular disenchantment with the political process that the "winner take all" approach engenders.

**LG:** There are lots of reasons why an exclusively district-based system alienates voters. First of all, it moves all the candidates to the middle, because that's where most of the votes are, and in order to justify getting 100 percent of the power, you have to get close to 51 percent of the votes. So, if your views are not just in the center, you're not going to be represented, whether you're on the right or the left.

If you have a proportional representation system, and you have the support of only 30 percent of the electorate, you still could get 30 percent of the seats in the legislature. This has two consequences. One, it means that the parties have an incentive to go out and try to mobilize as many voters as possible because each new vote will increase the chance that they'll get another seat. Second, voters

have more incentive to participate because there is a greater likelihood that the candidate they vote for will actually get elected. In a “winner take all” system, especially where you have districts that are drawn by incumbents to protect their seats, as we saw in 2004, there are only a handful of seats that ever actually change hands. There’s no point in going to vote if the outcome is basically predetermined when the districts are drawn by the politicians who are creating districts to ensure their re-election.

The “winner take all” system alienates voters in three ways. One, as I just mentioned, their votes don’t count because there are basically only two parties that are vying for the middle, and if the voters have views that are not represented in the middle, then they’re not represented; two, their votes don’t count because the district is created by the politicians for the politicians’ self-interest; and three, the voters feel alienated because the structure encourages negative campaigning by politicians who seek to depress their opponent’s vote total. It doesn’t matter if negative campaigning depresses your own vote total as well because whoever gets the most votes gets all the power. You just have to depress your opponent’s vote more than you depress your own. Getting more people overall to participate is actually not the point.

**MN:** But doesn’t proportional representation simply push the “winner take all” result up to the next level? The legislature has to take decisions on various issues, there has to be a “yes” or “no” vote, ultimately, on what the country is going to do in this or that area of policy. Even in a proportional representation system, if the majority votes to go the way that an awful lot of people don’t like, those people are going to be very angry about that. Do you think this kind of system you’re talking about will ameliorate this type of disenfranchisement that results from the ultimate governmental decision?

**LG:** Okay. Let me break that down a little bit, because what you’re saying is that there are really three different levels at which we should think about participation. One is just the right to cast a ballot. Are you going to be able to go to your polling place and physically cast a ballot? And the second is the aggregation question, meaning are they going to count your ballot in a way that leads to the election of somebody that you like, or are they going to discount your ballot because you’re in a district in which your ballot really doesn’t matter because the incumbent has gerrymandered the district so that his or her supporters are in the majority and it doesn’t matter what you do.

So, one level is participation. The second is aggregation, meaning, how do we join your vote with others to elect somebody. And then, the third level is governance. And that’s when you’re talking about legislative policy outcomes. When your representative gets into the legislature, is that person going to be able to influence the outcome of the debate? If the majority rules at the legislative level, and your representative is in the minority, you’re still not going to be satisfied with the policy outcome.

Well, I think that public policy is not made on straight up or down votes. I think the way in which we hold elections is a very artificial way of making decisions. Most of the time in the legislature, while ultimately there may be an up or down vote, there’s plenty of negotiation that takes place before the final vote. And in that negotiation, it’s really important to have a diverse set of views at the table, to have a range of ideas in play, to have representatives who bring new perspectives to bear on the shape of the legislation—so that it’s not just an either/or proposition, it’s really trying to solve a problem and be informed by the vast range of information that should be brought to bear on both the definition of the problem and then the solution.

So you’re right in a literal sense, that at the end of the day, you’ve got to get a majority of the votes to support the outcome. But if the people that agree with you are not even at the legislative table, where the bargaining is going to take place, then you have absolutely no influence on the shape of the bill that the majority is ultimately going to vote on.

**MN:** In preparing to talk to you, I read your article on *Brown v. Board of Education* that appeared in the *Journal of American History*. It was a very good article, very thought-provoking, and I also have dipped into *The Miner’s Canary*, which deals with issues of race. Before we close, I wonder if you could just speak a little bit about the relationship between districting and race.

**LG:** The metaphor of the miner's canary is a helpful metaphor in responding to your question. This is a metaphor that my co-author, Gerald Torres, and I use to talk about race, but it really is a good metaphor for talking about race and redistricting. And, we basically argue that the experience of those who are most vulnerable in a particular situation, the experience of those who've been left out, who've been perennially excluded—the experience often of blacks or Latinos or gays or women in certain circumstances—is often the experience of the canary in the mine.

Miners took canaries into the mines to alert them when the atmosphere was too toxic, because the canary's more fragile respiratory system would give way when it was dangerous, and the canary's suffering was a signal that the miners should evacuate the mine. And so, the argument that we make is that the experience of blacks or Latinos in a particular instance is like the experience of the canary—that these groups are often more vulnerable to the toxicity in the atmosphere. Unfortunately, the way our society has framed the conversation to date is to say, when we see the canary gasping for breath, "Well, let's give it a little gas mask so it can continue to survive, or a little respirator to allow it to breathe more easily," rather than saying, "It's telling us something. What is the message?" Because the miners ultimately had a lot to learn from the canary and so the idea is that the miners and the canaries have to get together in order to fix the atmosphere in the mines, not simply to evacuate them.

So, how does that apply to race and redistricting? Well, during the 1990s, the Supreme Court was very much preoccupied with the question of race-conscious districting, and the Court took offense at the appearance of certain districts which were drawn in order to provide a black community or a Latino community with the opportunity to be a majority in a particular district.

And again, given our "winner take all" districting system, the only way that any group can have power is to be a local majority, because the local majority essentially defines the identity of the district. So, if you are a numerical minority statewide, the only way you can have representation in the state legislature is to create majority minority districts, or districts in which your group is the majority. This is true of Democrats or Republicans or Blacks or Latinos, any group that feels it has a political identity.

What I was arguing, or we were arguing, in *The Miner's Canary* in terms of the racial gerrymandering cases, is that they were really the canaries in the mines; they were a signal that all districting is in fact gerrymandering. So that the bizarre shapes of some of these districts that caught the Court's attention because they were districts that were drawn to protect racial minorities were in some ways no different from the excessive partisan gerrymandering that is going on, not to protect a racial minority or necessarily to protect a racial majority, but to create a safe district for a partisan minority or a partisan group.

And so, you see, especially now with computers, the map makers can draw districts that meander around collecting voters and they can predict that the districts will vote a certain way even though their residents may have very little in common in terms of their lived experience. They may create a district that includes Newton and New Bedford, for example, and give them one member of the legislature or Congress because they are basically looking to protect incumbents and meet the requirements of one person, one vote.

And that process of going around, looking for voters is a process that ultimately disenfranchises all voters, not just racial minorities or political minorities, but all voters, because districting is a basically a system in which the politicians are choosing their voters rather than the voters choosing their politicians. So, race-conscious districting serves as the diagnostic tool. The Court could see the problem because they were alarmed when it was highly visible in a racial context, but, as we see with the Tom DeLay/Republican mid-decade redistricting adventure in Texas that is now before the U.S. Supreme Court, it is not a problem limited to race. It's a problem, as I suggested earlier, endemic to the structure of our democracy.

**MN:** Well, this has been fascinating. Thank you so much.

*Martin Newhouse is General Counsel of the New England Legal Foundation, a nonprofit public interest law firm that advocates for balanced economic growth, rational regulation, and the protection of property rights in New England. Previously he was a litigation partner in the law firm of Ropes & Gray LLP in Boston, where he practiced law for 20 years. He earned his A.B. in Economics from Columbia College in New York City, his J.D. at Yale University, and a Ph.D. in Modern European Cultural History from Columbia University.*

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