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The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success

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# THE TRIUMPH OF TOKENISM: THE VOTING RIGHTS ACT AND THE THEORY OF BLACK ELECTORAL SUCCESS

*Lani Guinier\**

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For almost two decades, the conventional civil rights political empowerment agenda of black activists, lawyers, and scholars has focused on the election of black representatives.<sup>1</sup> The belief that black representation is everything has defined litigation strategy under the Voting Rights Act.<sup>2</sup> Through judicially enforced spurs to black electoral success, black voters gain political self-confidence and legislative influence.

A set of submerged premises and assumptions concerning the goals and strategies for achieving black equality underlie this empowerment agenda.<sup>3</sup> Through use of what I characterize as "the theory of black electoral success," this article identifies, organizes, and presents these related propositions. In black electoral success theory, empowerment is obtained through meaningful enfranchisement, which exists where blacks are elected. The theory thus promotes the election of individual

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1. I use the terms "black" and African-American interchangeably. I prefer the term black for two reasons. First, many of my observations about black political empowerment apply to other racial groups. The term black succinctly describes a racial identity and status based on color that is shared, to some degree, by other people of color with different ancestral lineages. See Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 335 n.50 (1987). Similarly, the black community is a convenient proxy for an insular group that is politically cohesive, historically stigmatized, economically depressed, and socially isolated.

Second, although I also use the term minority, especially to convey the numerical status of blacks in this society, as Patricia Williams observes, minority "implies a certain delegitimacy in a majoritarian system." Use of the term "black" eludes this problem. See Williams, *Alchemical Notes: Reconstructing Ideals From Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 404 n.4 (1987); cf. *Graves v. Barnes*, 343 F. Supp. 704, 730 (W.D. Tex. 1972) (three-judge court), *affd. in relevant part and revd. in part on other grounds sub nom. White v. Register*, 412 U.S. 755, 769-70 (1973) (protected minority does not have a merely numerical denotation; rather it refers to an identifiable and specially disadvantaged group).

2. 42 U.S.C. § 1973 (1988). Section 1983 codifies as amended the Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 445. The Voting Rights Act of 1965, § 2, was amended in 1975, Pub. L. No. 94-73, 89 Stat. 402, and in 1982, Pub. L. No. 97-205, 96 Stat. 134. Amended § 2 of the Act, which provides a nationwide private right of action, states:

(a) No voting qualification or prerequisite to voting . . . shall be imposed or applied . . . in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

The term "representatives of choice" refers to "black" representatives. See *supra* note 1. The House Report accompanying the amendments defines representatives of choice as "minority candidates or candidates identified with the interests of a racial or language minority." H. Rep. No. 227, 97th Cong., 1st Sess. 30 (1981).

3. Although not synonymous, the terms empowerment, political equality, and effective representation are used here interchangeably to convey the concept of "full enfranchisement."

black representatives as spokesmodels for political equality.<sup>4</sup> Simply by virtue of election opportunities, black electoral success advances civil rights enforcement, government intervention on behalf of the poor, and black "role-model" development.

Although pervasive and influential, the theory of black electoral success has not been explicitly endorsed as a strategy nor articulated as a coherent conceptual model. Neither political science nor legal academic literature has provided voting rights lawyers, courts, or activists with a clear theoretical understanding of their project.<sup>5</sup> Instead, black electoral success has been pursued somewhat unself consciously as the inchoate rationale and frame of reference for black political and legal empowerment.

In this article, my goal is to organize the divergent themes of black electoral success strategy within one conceptual framework in order to give the themes more cogency and attention.<sup>6</sup> Having exposed the existence of a coherent theory, I then argue that the theory posits many of the correct goals but fails to provide a realistic mechanism for achieving them. The article proceeds in three Parts. In Part I, I develop the ideological and statutory roots of black electoral success theory. In Part II, I analyze the inadequacies of current voting rights litigation and its failure to realize the statute's original goals. I conclude in Part II by arguing that contemporary preoccupation with black electoral success stifles rather than empowers black political participation for three reasons. First, black electoral success theory romanticizes black elected officials as empowerment role models. By ignoring problems of tokenism and false consciousness, the theory promotes black electoral success in order to legitimate the ideology of

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4. Spokesmodels are role models who also speak in a representational capacity on behalf of others. Cf. *Star Search* (Television Program Enterprises 1991) (contestants compete for best "spokesmodel" based on their physical attributes, poise, and ability to talk). In general, the notion of spokesmodels seems to apply only to the black community. See Reed, *The "Black Revolution" and the Reconstitution of Domination*, in *RACE, POLITICS AND CULTURE: ESSAYS ON THE RADICALISM OF THE 1960s* 61, 67-68 (A. Reed ed. 1986) ("No 'white leaders' were assumed to represent a singular white population; social category 'black leaders' meant 'certain blacks were declared opinion-makers and carriers of the interests of an anonymous black population.'").

5. Black politics, unlike issues concerning employment or schools, is considered "offbeat," or worthy of only occasional interest. See, e.g., D. PINDERHUGHES, *RACE AND ETHNICITY IN CHICAGO POLITICS* 253-55 (1987) (noting the absence of substantial body of research addressing paradoxes in American black politics); Walton, Foreword to J. ELIOT, *BLACK VOICES IN AMERICAN POLITICS* at xi-xii (1988).

6. I also position black electoral success theory within current voting rights legal scholarship. See e.g., Abrams, *"Raising Politics Up": Minority Political Participation and Section 2 of the Voting Rights Act*, 63 N.Y.U. L. REV. 449, 472-75 (1988) (theory of a "jurisprudence of political opportunity"); Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 179-82 (1989) (theory of "civic inclusion").

“equality of opportunity.”<sup>7</sup>

Second, even in jurisdictions with proportionate black representation, black electoral success has neither mobilized the black community nor realized the promised community-based reforms. As an empowerment mechanism, electoral control of winner-take-all majority-black districts ignores critical connections between broad-based, sustained voter participation and accountable representation. In addition, although it claims legitimacy as a practical enforcement mechanism of the original goals of the civil rights movement, district based electoral ratification enforces only one of three original goals. While the current approach may result in the election of more black officials, it ignores the movement’s concern with broadening the base of participation and fundamentally reforming the substance of political decisions.

Third, the theory assumes that majority winners rule legitimately, even where such rule leads to permanent minority losers. The theory responds to minority disadvantage not by challenging majority rule but by providing a few electoral districts in which blacks are the majority.<sup>8</sup> Consequently, black electoral success theory simply reconfigures winner-take-all electoral opportunities into geographically based, majority-black, single-member districts. Representing a geographically and socially isolated constituency in a racially polarized environment, blacks elected from single-member districts have little control over policy choices made by their white counterparts. Thus, although it ensures more representatives, district-based black electoral success may not necessarily result in more responsive government.

In Part III, based on my critique of the black electoral success theory, I put forth suggestions for a different approach to voting rights reform. Relying on what I tentatively call “proportionate interest representation”<sup>9</sup> for self-identified communities of interest, I propose to reconsider the ways in which representatives are elected and the rules under which legislative decisions are made.

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7. See *infra* note 202 (describing false consciousness). The legitimating power of black electoral success was articulated, in the general context of civil rights law, by Professor Alan Freeman in his essay, *Antidiscrimination Law: A Critical Review*, in *THE POLITICS OF LAW* 96, 110-14 (D. Kairys ed. 1982).

8. The theory also assumes continued residential segregation. As developed *infra* notes 312-14 & 342, not all blacks presently reside within majority-black districts.

9. By disaggregating the majority and structuring decisionmaking to reduce the effect of prejudice, proportionate interest representation reflects an effort both to increase the number of black officials and to minimize the disadvantages accruing to black voters in a majoritarian system. In addition, the concept of proportionate interest representation embraces the civil rights movement’s vision of effective representation. This vision extended beyond electoral ratification and encompassed a broader theory of responsive government, the goal of which was to promise legislative accountability to black political interests.

## I. THE ROOTS OF BLACK ELECTORAL SUCCESS THEORY

As both an activist and a litigation strategy, black electoral success theory evolved from the civil rights movement's empowerment vision. The movement viewed broad-based political participation and representation as instrumental to community autonomy and to community-based reform. The theory of black electoral success emerged in response to pressure for judicial supervision of the movement's political agenda. To create a judicially manageable standard to enforce the Voting Rights Act, litigation adopted and modified the theory. By focusing narrowly on electing black officeholders, however, the litigation strategy and the theory eventually eclipsed the movement's wide-angled focus on transformative politics.

The perception that blacks were not effectively represented in majority-white jurisdictions because of racially polarized voting formed the basis of the litigation strategy. Essentially activists holding this view believed that officials elected by a bloc voting white majority ignored the interests of black voters without suffering any adverse electoral consequences.<sup>10</sup> Where such vote "dilution"<sup>11</sup> was established, black electoral success theory justified majority-black remedial subdistricts in which black registered voters exercised electoral control.<sup>12</sup> The litigation strategy posited electoral ratification within majority-black single-member districts as an appropriate mechanism for ensuring government accountability and responsiveness to black interests.<sup>13</sup>

In this Part, I begin by presenting the civil rights movement's vision of representation, participation, and legislative reform. I then demonstrate how the voting rights litigation agenda altered that vision.

### A. *The Civil Rights Movement's Theory of Political Participation*

The civil rights movement's vision of black political empowerment emanated from mass protests to achieve basic enfranchisement. Movement activists perceived the rights to register and cast a ballot as

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10. See, e.g., *Gingles v. Edmisten*, 590 F. Supp. 345 (E.D.N.C. 1984), *modified sub nom.* *Thornburg v. Gingles*, 478 U.S. 30 (1986).

11. See *infra* note 76 for a definition of vote dilution.

12. Voting rights litigants noted that black electoral success usually depends on black electoral control of small, majority-black subdistricts within a jurisdiction.

13. Such geographically configured districts would ensure government responsiveness through the election of black representatives. The theory also posits that white elected officials would become at least minimally responsive to their newly voting black constituents. See, e.g., T. BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63* 893 (1988) (one of the primary goals in winning the right to vote was to drive the white segregationist politicians from office).

foundational for political action, effective social change, and redress from, and representation in, government. These rights were important not only for blacks but for the advancement of a progressive agenda in general.<sup>14</sup> The movement was based on a redistributive theory of "representation and the right to participate," which engaged the political empowerment agenda of both 1960s integrationists and nationalists.<sup>15</sup>

The focus on disfranchisement materialized in the early 1960s, reflecting a major shift from protest to politics.<sup>16</sup> Black voter registration and political participation gradually became the movement's dominant vehicle for implementation of its legislative agenda.<sup>17</sup> Although some activists initially failed to appreciate the dramatic potential of voter education and registration, particularly in light of headlines generated by nonviolent integrated bus rides, electoral participation soon became the way to redeem southern politics.<sup>18</sup>

The Kennedy administration, preoccupied with incremental re-

14. Give us the ballot, and we will no longer have to worry the federal government about our basic rights . . . . Give us the ballot and we will fill our legislative halls with men of good will . . . . Give us the ballot and we will help bring this nation to a new society based on justice and dedicated to peace.

Dr. Martin Luther King, Jr., *quoted in* Hamilton, *Foreword*, in *THE NEW BLACK POLITICS* xviii (M. Preston, L. Henderson & P. Puryear eds. 1982). In suggesting that the most important step blacks could take was "that short walk to the voting booth," the NAACP, SCLC, and Dr. Martin Luther King, Jr., anticipated that the development of "[a]n alert, independent, and aggressive Negro electorate" would become an important progressive political factor. *Cf.* H. MOON, *BALANCE OF POWER: THE NEGRO VOTE* 9, 11 (1948).

15. *See, e.g.*, Barnett, *A Theoretical Perspective on American Racial Public Policy*, in *PUBLIC POLICY FOR THE BLACK COMMUNITY* 3, 39 (M. Barnett & J. Hefner eds. 1976) (nationalists, calling for black ethnic group unity, and black integrationists each pursued interrelated goals despite often heated rhetoric). For the nationalists the right to vote necessarily meant the right to constitute an "essential ingredient . . . of the sovereign principle," delegable only to "true representative[s]." *See* Delany, *The Political Destiny of the Colored Race*, in *THE IDEOLOGICAL ORIGINS OF BLACK NATIONALISM* 195, 197-98 (S. Stuckey ed. 1972).

16. *See* S. LAWSON, *BLACK BALLOTS* (1976); *Negro Vote Surge Expected in South — Administration Experts Sure of a Political Break Through as Result of Recent Gains*, *N.Y. Times*, June 26, 1961, at 1, col. 6 ("The Rev. Dr. Martin Luther King Jr. and other leaders of the new militant movements — the sit-ins and Freedom Riders — have come around to agree that the vote is the key."); *see also* Nelson, *Cleveland: The Rise and Fall of the New Black Politics*, in *THE NEW BLACK POLITICS*, *supra* note 14, at 187 (since the mid-1970s, the black community has accepted the idea "that electoral politics provide[s] the best avenue for advancing black interests."); Preston, *Black Politics and Public Policy in Chicago: Self-Interest Versus Constituent Representation*, in *THE NEW BLACK POLITICS*, *supra* note 14, at 159-61 (politics is now the "cutting edge" of the civil rights movement).

17. T. BRANCH, *supra* note 13, at 479 (voter registration defended during the early 1960s as a priority in order to build political protections for the movement, especially when the religious zeal faded); *see also* Williams, *Black Political Progress in the 1970's: The Electoral Arena*, in *THE NEW BLACK POLITICS*, *supra* note 14, at 74-75.

18. *See, e.g.*, S. CARMICHAEL & C. HAMILTON, *BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA* 87 (1967) (SNCC started its first voter registration project in 1961 because it believed that political power organized around the right to vote was the key to dismantling southern racism).

form, supported voter registration efforts because these efforts appeared to be less threatening and disruptive.<sup>19</sup> Robert Moses and other black voter registration activists, however, defended their work as the most promising response to indigenous efforts to transform local reality.<sup>20</sup>

The Voting Rights Act was enacted in 1965 following "sustained national pressure"<sup>21</sup> to include all Americans in the liberal, democratic electoral process. Some commentators have argued that the Act, which was passed and signed into law barely four months after its formal introduction, represented the civil rights movement at its most commanding.<sup>22</sup> Critics, however, have suggested that the Act's electoral strategy reflects the triumph of tokenism.<sup>23</sup>

Yet both proponents and critics agree that the Voting Rights Act united the black ideological spectrum. The Act's passage bridged the divergent aims of integration and nationalism<sup>24</sup> in ways that both

19. T. BRANCH, *supra* note 13, at 482. Some of the earliest efforts to change tactics from protest to politics were engineered by the Kennedy Justice Department "to coax [civil rights activists] out of precisely the kind of confrontational actions [such as the Freedom Rides] around which they were shaping their identities." *Id.* at 479. The Kennedy Administration pushed the merits of voter registration, extending promises of draft exemptions, foundation grants, lawsuits, newspaper coverage, prosecution of obstructionist white Southern officials, and federal protection for voter registration activists. *Id.* at 480-81, 619-20. *But cf. id.* at 680-83, 713, 787 (FBI failed to investigate certain complaints or simply gathered information for subsequent civil cases without enforcing criminal protections against harassment or intimidation of voters).

20. *Id.* at 330, 331, 486.

21. R. WEISBROT, *FREEDOM BOUND: A HISTORY OF AMERICA'S CIVIL RIGHTS MOVEMENT* 150, 152 (1990) ("despite [the Voting Rights Act's] far-reaching implications, the legislation enjoyed broader, more sustained public support than any previous civil rights measure.").

22. *Id.* at 152-53; L. KILLIAN, *THE IMPOSSIBLE REVOLUTION, PHASE II: BLACK POWER AND THE AMERICAN DREAM* 74 (1975) (victory seemed complete when President Johnson declared on introducing the Voting Rights Act, "we shall overcome"); M.L. KING, JR., *WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY?* 34 (1967) ("[W]hen the 1965 Voting Rights Law was signed, it was proclaimed as the dawn of freedom . . .").

23. *See, e.g.,* Freeman, *supra* note 7; Reed, *supra* note 4, at 63.

24. Integration and nationalism were the most salient characteristics of the African-American intellectual and political agenda in the 1960s. *See* J. GRANT, *BLACK PROTEST* 9, 13 (J. Grant ed. 1968) (although integration in American political and economic mainstream has been main tendency in fight for black rights, demand for positive assertion of blackness also persistent thread); Marable, *A New Black Politics*, *THE PROGRESSIVE*, Aug. 1990 at 18, 20 (black protest movements all based on fundamental racial ideologies of either integration or black nationalism).

*Compare* M.L. KING, JR., *THE TRUMPET OF CONSCIENCE* 10 (1967) (integration a basic aspect of freedom, meaning the freedom to choose where to live, to eat, to attend school) and Marable, *supra*, at 18 (racial integrationists consistently advocate elimination of all restrictions that keep blacks from participating fully in society's mainstream) *with id.* (black nationalists reject integration as a hoax, are suspicious of alliances with whites, and advocate self-help community based empowerment); C. LINCOLN, *THE BLACK MUSLIMS IN AMERICA* 45 (1961) (nationalism an involuntary, defensive response to escape hostile forces) and S. CARMICHAEL & C. HAMILTON, *supra* note 18, at 47, 54-55 (black liberation lies in group action acknowledging race as an overwhelming fact of life; goal is to build and strengthen the black community with its racial and cultural integrity intact and to obtain "an effective share in the total power of the society").



committed the black community to collective action in pursuit of political power and camouflaged the tension between assimilation and recognition of racial group identity and interests. Through concerted political action, integration and nationalism converged.

For integrationists and many nationalists, the struggle for effective use of the ballot became "the number one civil right."<sup>25</sup> Black activists saw political empowerment as a vehicle for mobilizing the black community, articulating a black social and economic agenda, and electing both authentic black and responsive white officials.<sup>26</sup>

### 1. *Political Participation: Mobilizing the Black Community*

The goals of community autonomy and participatory democracy inspired the consensus demanding meaningful access to electoral politics. The idea of community autonomy evolved from a group consciousness that reflected a collective identity shaped by historic conditions and social realities. To differing extents, group identification reflected a shared perception that triggered collective activity.<sup>27</sup> Group solidarity and a general mistrust of the fairness of existing resource allocation increased the likelihood of political activity.<sup>28</sup> Group consciousness connected conceptions of efficacy to political participation.<sup>29</sup> Indeed, both integrationists and nationalists envi-

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25. See, e.g., King, *Civil Right No. 1 — The Right to Vote*, N.Y. Times, Mar. 14, 1965, § 6 (Magazine), at 26. Many black nationalists played an important role in the fight for the franchise, reflecting their "admiration" for America's "free institutions." THE IDEOLOGICAL ORIGINS OF BLACK NATIONALISM, *supra* note 15, at 21, 146-48.

26. See, e.g., J. GRANT, *supra* note 24, at 427 (independent black politics added economic power to concepts of freedom and political action); M.L. KING, JR., *supra* note 22, at 37-38, 149-50 (1967); M.L. KING, JR., WHY WE CAN'T WAIT 166 (1963). King advocated full political participation by an enlightened electorate to elect blacks to key political positions, to liberalize the political climate in the United States and to influence the allocation of resources; see also *Voting Rights: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 89th Cong., 1st Sess. 377-80 (1965) (statement of Roy Wilkins, Executive Director, NAACP, and Chairman, LCCR) (eliminating voting restrictions means elected officials will become responsive to the will of all the people).

27. See generally S. VERBA & N. NIE, PARTICIPATION IN AMERICA: POLITICAL DEMOCRACY AND SOCIAL EQUALITY (1972); *infra* notes 47-49, 62 and accompanying text.

28. Miller, Gurin, Gurin & Malanchuk, *Group Consciousness and Political Participation*, 25 AM. J. POL. SCI. 494 (1981); Shingles, *Black Consciousness and Political Participation: The Missing Link*, 75 AM. POL. SCI. REV. 76 (1981).

29. Miller, Gurin, Gurin & Malanchuk, *supra* note 28; Shingles, *supra* note 28; see also S. CARMICHAEL & C. HAMILTON, *supra* note 18, at 46 (group identity mobilizes participation; where blacks have a majority they will seek control; when they lack a majority they will seek proper representation and sharing of control). Stokely Carmichael's views are particularly interesting because he worked in the civil rights movement doing voter registration work in the early 1960s. Toward the end of the decade, identifying with a black nationalist ideology, he became one of the foremost advocates of "Black Power." According to Carmichael, even blacks associated with an integrationist ideology approved notions of group power.

America has asked its Negro citizens to fight for opportunity as *individuals*, whereas at certain points in our history what we have needed most has been opportunity for the *whole*

sioned political struggle as the means to group salvation.<sup>30</sup>

The concept of participatory democracy<sup>31</sup> was the heart of the civil rights "mass movement." Developing a political identity was critical to the movement's efforts to cultivate a grass roots base. Political organizing, particularly in support of black candidates, continued the movement's affirmation of self-worth and human dignity.<sup>32</sup> Electoral politics awakened blacks to their humanity, their heritage, and their potential, as citizens, to participate *equally* in democratic self-government.<sup>33</sup> As one activist observed:

I think one of the things that made the delegation of the Mississippi Freedom Democratic party so hopeful, so expectant, was the fact that people had made a discovery that there is a way out of much that is wrong with our lives, there is a way to change it, and that is through the execution of this vote. . . . *That's the way we arrived in Atlantic City — really excited about the fact that we were at long last going to be able to participate, to be represented.*<sup>34</sup>

The movement's leadership continuously reinforced interaction with and equal participation by its "excited" grass roots base. Behind the movement's protest strategies were civil rights activists, the seminal political campaign workers, with their "tireless enthusiasm for

*group*, not just for selected and approved Negroes. . . . We must not apologize for the existence of this form of group power, for we have been oppressed as a group not as individuals. *Id.* at 49 (quoting paid advertisement by black church members affiliated with National Council of Churches).

30. For the former, salvation would come as the result of a perpetual engagement to make America true to its stated principles, extended on behalf of "the Negro people." For the latter, group salvation would result from the development of group identity, expression, and independence. *See, e.g.,* S. CARMICHAEL & C. HAMILTON, *supra* note 18, at 49; R. WEISBROT, *supra* note 21, at 206, 216; *see also* Delany, *supra* note 15, at 196-97 (right to vote must include right to constitute essential part of the ruling element).

31. The focus on equality and universal suffrage was greatly influenced by the one person/one vote language of *Reynolds v. Sims*, 377 U.S. 533 (1964). Some of the marchers from Selma to Montgomery in March 1965 carried "one man/one vote" signs. *See, e.g.,* *Eyes on the Prize* (videotape segment five). John Lewis was arrested for carrying a "One Man/One Vote" sign outside a Selma, Alabama courthouse. T. BRANCH, *supra* note 13, at 900; *cf. id.* at 587-88, 733 (describing predictions that the Supreme Court's reapportionment decisions would transform black voting the way *Brown v. Board of Education* changed education).

32. *See* S. CARMICHAEL & C. HAMILTON, *supra* note 18, at 104 (describing how voter registration campaigns gave blacks "a sense of being").

33. The capacity to participate made integration meaningful. *See, e.g.,* *Black Power*, N.Y. Times, July 31, 1966, at E5, col. 1 (a paid advertisement by influential blacks affiliated with the National Council of Churches), *cited in* S. CARMICHAEL & C. HAMILTON, *supra* note 18, at 48-49. Political power, for nationalists as well, meant black people making decisions that affect their lives. *Id.*

34. VOICES OF FREEDOM: AN ORAL HISTORY OF THE CIVIL RIGHTS MOVEMENT FROM THE 1950S THROUGH THE 1980s 197-98 (H. Hampton & S. Fayer eds. 1990) (quoting Victoria Gray) (emphasis added) [hereinafter VOICES OF FREEDOM]. Approximately 80,000 blacks participated in "Freedom Vote," helping to dispel illusions about black political apathy. *Id.* at 181.

door-to-door persuasion"<sup>35</sup> and their open welcome to "anyone who will work, regardless of affiliation or ideology."<sup>36</sup> Civil rights workers planted themselves in the daily struggles of local blacks. They followed an activist model of continuous community education and political campaigning,<sup>37</sup> as illustrated by attempts of the SNCC workers to teach blacks in the rural south how to pass literacy tests.<sup>38</sup>

For many black nationalists as well, political participation by a self-consciously black community was important. The nationalists believed that a sense of community and group solidarity would potentially broaden political participation and include more blacks in the decisionmaking process.<sup>39</sup> Political enfranchisement would "make participants, not recipients, out of . . . a traditionally excluded [people]."<sup>40</sup>

## 2. Political Participation: Promoting a Social and Economic Agenda

Although basically engaged in liberal reform to provide a mainstream vehicle for advancement, voting rights activists sought also to expand the liberal vision toward a redistributive agenda premised on equality of condition, and not just freedom from overt discrimination.<sup>41</sup> Rather than a self-limiting movement to assimilate blacks into

35. R. WEISBROT, *supra* note 21, at 194; see also S. CARMICHAEL & C. HAMILTON, *supra* note 18, at 103-08 (describing SNCC organizing efforts).

36. Zinn, *The Old Left and the New: Emancipation from Dogma*, NATION, Apr. 4, 1966, at 385, 387.

37. Although the march from Selma to Montgomery directly preceded congressional action on the Voting Rights Act, the mass direct action efforts to achieve the ballot were not based on a single march but were built from extended campaigns and were accompanied by nightly mass meetings. Watters, *Why the Negro Children March*, in BLACK PROTEST IN THE SIXTIES 96 (A. Meier & E. Rudwick eds. 1970) (Selma voting rights campaign involved prolonged siege of demonstrations and mass meetings, day after day, week after week). Of course, the most famous mass meeting was the August 1963 March on Washington for Jobs and Freedom. See, e.g., T. BRANCH, *supra* note 13, at 840-49, 874; see also *id.* at 689 (describing blueprint for the Birmingham, Alabama campaign combining small-scale sit-ins, boycotts, mass marches and other organized efforts to publicize efforts, enforce economic pressure and overflow the jails).

38. See, e.g., T. BRANCH, *supra* note 13, at 573, 575-79. Septima Clark operated 95 citizenship schools across the South during 1962. See *id.* at 576.

39. S. CARMICHAEL & C. HAMILTON, *supra* note 18, at 39, 43, 47 (broadened political participation means blacks choosing their own leaders and holding them responsible; it also means more black people becoming politically active; goal of black self-determination is full participation in decisionmaking processes); *id.* at 44 ("The concept of Black Power rests on a fundamental premise. *Before a group can enter the open society, it must first close ranks.* By this we mean that group solidarity is necessary before a group can operate effectively from a bargaining position of strength in a pluralistic society."); see also Carmichael, *What We Want*, N.Y. REV. BKS., Sept. 22, 1966 (black consciousness provides the basis for political strength).

40. Hamilton, *An Advocate of Black Power Defines It*, in BLACK PROTEST IN THE SIXTIES, *supra* note 37, at 156.

41. See, e.g., S. CARMICHAEL & C. HAMILTON, *supra* note 18, at 37 (integration and nationalism both mean improving the lives of blacks both politically and economically); M.L. KING,

the councils of government, the original civil rights message endorsed, through the right to vote, broad notions of freedom from hunger, poverty, and discrimination.<sup>42</sup> Both nationalists and integrationists supported a common agenda on issues of civil rights enforcement and social welfare spending.<sup>43</sup>

American principles of equality and democracy were not the only factors compelling the representation of blacks through universal suffrage. Full political enfranchisement also would help complete the movement's "social revolution."<sup>44</sup> Blacks, like Fannie Lou Hamer, advocated "true democracy" and not merely equality within the ex-

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Jr., *supra* note 24, at 11, 14, 53, 61, 62 (political agenda involves economic justice, including a minimum annual income). Even the Urban League, one of the more conservative civil rights groups, projected a reformist view of democracy. Whitney Young, in his address at the League's 1963 national conference, expressed the group's underlying philosophy:

. . . democracy is more than a convenient institution through which privileges and material products flow to [white citizens]. For both [whites and blacks] democracy is a way of life, an ideal in which all share its rewards, as well as its responsibilities. . . . For the public official — whether city, state or federal — witnessing means greater concern for broad, democratic promises and human rights, rather than preoccupation with technical, constitutional details and states' rights.

Young, *For Protest Plus "Corrective Measures,"* in M. BRODERICK & A. MEIER, *NEGRO PROTEST THOUGHT IN THE TWENTIETH CENTURY* 287, 289-90 (1965).

From the time of the Niagara Movement, and the founding of the NAACP in 1910, black activists have adopted a protest platform that included: the right to equal treatment, increased public high school and college facilities, judicial reform, health care, and vigorous enforcement of the post Civil War Amendments. M. BRODERICK & A. MEIER, *supra*, at 48-50.

42. R. WEISBROT, *supra* note 21, at xiii (civil rights leaders demanded equality of condition not just desegregation); *see, e.g.* S. CARMICHAEL & C. HAMILTON, *supra* note 18, at 39-41 (political modernization emphasizes human dignity, not sanctity of property, "free people," not "free enterprise."); Matsuda, *supra* note 1, at 357 (Martin Luther King's version of rights would require radical transformation of existing social structures; King was concerned with ending poverty and closing the gap between the rich and the poor); *see also* VOICES OF FREEDOM, *supra* note 34, at 180 (quoting Unita Blackwell who attended a voter registration meeting held in a church in Sunflower County, Mississippi, during Freedom Summer 1964):

I was only told when I started off that if I registered to vote, I would have food to eat and a better house to stay in, 'cause the one I was staying in was so raggedy you could see anywhere and look outdoors. My child would have a better education. . . . It was the basic needs of the people. The whites, they understood it even larger than that in terms of political power. We hadn't even heard that word, "political power," because it wasn't taught in the black schools. We didn't know there was such a thing as a board of supervisors and what they did, and we didn't know about school board members and what they did.

*Id.*

43. *See* THE NEW BLACK POLITICS, *supra* note 14, at 17 (civil rights is a consistent black interest-group value and preference). For example, at the National Black Political Convention in Gary, Indiana in 1972, Coretta King and Black Panther Bobby Seale shared the platform at which a "Black Agenda articulated a revolution of values, a social transformation placing 'community before individualism, . . . a living environment before profits, . . . justice before unjust order, and morality before expediency.'" Poinsett, *Unity Without Uniformity*, *EBONY*, June 1972, at 45, 52. The Black Agenda contained eighty-eight recommendations, including proportionate black political representation, reparations, free education through college, guaranteed annual income, national health insurance and a National Black Political Assembly to sponsor candidates, lobby for black issues, and make recommendations to the black community generally. *Id.* at 52, 54.

44. T. BRANCH, *supra* note 13, at 880.

isting order.<sup>45</sup> By registering and voting, blacks could get people “outa office that [they] know was wrong and didn’t do nothin’ to help the poor.”<sup>46</sup>

Participation in the dominant political system did not necessarily mean assimilating its substantive assumptions or power arrangements. Black nationalists in particular asserted that blacks could gain political power without becoming indistinguishable from other groups in society.<sup>47</sup> Instead of becoming absorbed by the political mainstream, blacks could change it.<sup>48</sup>

Preoccupied with development of group identity and political and cultural expression, the nationalists shifted black activist concerns away from integration and coalition building. The nationalists, however, still supported electoral strategies<sup>49</sup> because they believed, as did the integrationists, that political participation would lead to more responsive, black community-oriented legislation.

45. J. WILLIAMS, *EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS 244* (1987) (quoting Ms. Hamer at the 1964 Democratic National Convention).

46. H. RAINES, *MY SOUL IS RESTED: MOVEMENT DAYS IN THE DEEP SOUTH REMEMBERED 249* (1977) (quoting Ms. Hamer).

47. Indeed, black nationalists offered racial pride and solidarity as a means of transforming the social, economic, and political conditions of black people. In this sense, black electoral success theory fit within a nationalist imagery that borrowed from the ethnic experience of group unity and determination to reinforce individual aspirations. S. CARMICHAEL & C. HAMILTON, *supra* note 18, at vii, viii (black power means, *inter alia*, psychic control by blacks over their own lives; black consciousness involves a sense of “peoplehood” that relies on group pride and communal responsibility); see also R. WEISBROT, *supra* note 21, at 201, 206. Even Dr. King saw group solidarity as part of his creative endeavor to reach the “Beloved Community” of interracial brotherhood and harmony. *Id.* at 206.

48. See, e.g., S. CARMICHAEL & C. HAMILTON, *supra* note 18, at vii (black power will “contribute to the development of a viable larger society”); L. KILLIAN, *supra* note 22, at 113, 125, 161-63; Hamilton, *supra* note 40, at 156; Jennings, *Boston: Blacks and Progressive Politics*, in *THE NEW BLACK VOTE 208-18* (R. Bush ed. 1984) (political participation can mobilize voters to alter the dominant substantive agenda while still retaining group consciousness).

49. From the 1960s through the 1980s, black nationalists supported voter registration and electoral activity. Nationalists, interested in preserving racial-cultural differences pushed for separate and equal black representation to give blacks greater self-consciousness and pride. By 1972, when the National Black Political Agenda was passed by a convention of black delegates in Gary, Indiana, group representation was openly perceived by most activists as critical to effective voting rights. See, e.g., D. PINDERHUGHES, *RACE AND ETHNICITY IN CHICAGO POLITICS 232* (1987) (“[b]lack nationalists of cultural and political dimension” actively involved in 1983 political campaign for black mayor); VOICES OF FREEDOM, *supra* note 34, at 225 (in 1964 Malcolm X offered to assist with voter registration and committed to work with the Mississippi Freedom Democratic party); *Worry For Democrats: “Black Power Drive,”* U.S. NEWS & WORLD REP., Mar. 27, 1972, at 82 (National Black Political Convention met Mar. 10-12, 1972, in Gary, Indiana, attended by 3500 delegates to set up an independent black political movement backed by the voting strength of black registered voters) *supra* note 47;. Some groups, such as the Nation of Islam, went through a temporary period of electoral isolation that ended at least by 1984 when Jesse Jackson ran for President. See, e.g., Joint Center for Political and Economic Studies, *Muslim Politics*, FOCUS MAGAZINE, POLITICAL TRENDLETTER 3 (June 1990).

### 3. *Political Participation: Electing Responsive Officials*

By concentrating on political participation, black activists hoped to achieve a fundamentally different political reality created in part by responsive government decisionmakers. Because access to the political process was measured, both pragmatically and ideologically, by the authenticity and responsiveness of elected candidates, the energy of the civil rights mass movement became focused on political organizing to elect black officials.

In general, black political leaders would temper the rhetoric and overt racism of white elected officials.<sup>50</sup> In particular, black representatives would, by definition, constitute a progressive force affirmatively promoting black interests. In addition, with blacks in office, white business and political leaders who wanted information about blacks, would no longer be dependent on their own menagerie of responsible "Negro leadership."<sup>51</sup> Led by black elected officials, black voters would also be positioned both to articulate their own "interests" and to challenge racially motivated or insensitive legislation.<sup>52</sup> Black elected officials thus ensure black voters a voice in the process of allocating government benefits.

Black electoral success generated interest in and captured the momentum of the first two civil rights concerns: mobilization and reform. The connection between black electoral success and mobilization was demonstrated during voter registration activity in the early 1960s. In Mississippi, some voter registration activists sought to run black candidates for Congress with the expectation not of winning, but of planting the idea of voting in the minds of blacks.<sup>53</sup>

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50. See, e.g., Cutler, *Using Morals, Not Money on Pretoria*, N.Y. Times, Aug. 3, 1986, at E23, col. 2 (Mississippi Sen. James Eastland, noted segregationist, apparently confided, "When [blacks] get the vote, I won't be talking this way anymore."); see also *infra* notes 254-58 and accompanying text.

51. In 1963, for example, rather than consulting directly with the black civil rights leaders involved, Attorney General Robert Kennedy relied on a haphazard group of black entertainers and academics to explain events in Birmingham, Alabama. T. BRANCH, *supra* note 13, at 809-11. Even more typical was Birmingham's Mayor Thompson's effort to appease civil rights requests for negotiations by announcing "he would meet with a biracial committee of his own choosing, specifying Negro members who had praised his stand on segregation." *Id.*; see Wolman & Thomas, *Black Interests, Black Groups and Black Influence in the Federal Policy Process: The Cases of Housing and Education*, in BLACK POLITICAL ATTITUDES 183, 193-94 (C. Bullock & H. Rodgers eds. 1972) (describing indirect representation through practice of "consulting a few well-known black leaders or enlisting them in formal and highly visible advisory capacities").

52. Black representation would thus obviate difficult equal protection constitutional challenges to discriminatory policies. See J. ELY, *DEMOCRACY AND DISTRUST* 86-87 (1980) (the right to representation attempts to protect minorities from denials of equal concern as subjects of legislative policy).

53. T. BRANCH, *supra* note 13, at 560; see also S. CARMICHAEL & C. HAMILTON, *supra* note 18, at 100-20.

In response to local white sheriffs' excessive use of force against civil rights activists, blacks were urged to "Get that vote and pin that badge on a black chest."<sup>54</sup> Even the most inflammatory use in the late 1960s of the slogan, "Black Power," was an organizing tool to inspire political organization, to promote racial pride, and to provide a vehicle for black leadership.<sup>55</sup>

Civil rights activists linked electoral success to community based reform by assuring that black representatives, who were authentic community-based leaders, would be the vanguard for a new social justice agenda.<sup>56</sup> For example, black electoral aspirations stemmed, at least in part, from the belief that a black sharecropper, if *elected* tax assessor, would take a different view of taxing the poor.<sup>57</sup>

Election by a mobilized group of blacks was critical to the black official's legitimacy. The movement's unifying objective was to empower the black community, not simply its representatives.<sup>58</sup> King, in particular, condemned electoral opportunism by black politicians deaf to the demands of their community.<sup>59</sup> In addition, both the nationalists and the integrationists sought to elect descriptively black officials.<sup>60</sup>

For the integrationist, litigation to achieve black electoral success incorporated the preeminent process theory of empowerment: measuring political equality by the fairness of the process through which representatives were elected. Along with other liberal views about individual rights and democratic self-government, integrationists cheer-

54. R. WEISBROT, *supra* note 21, at 200 (quoting Hosea Williams on the "Meredith March" in Greenwood, Mississippi, June 1966); see also S. CARMICHAEL & C. HAMILTON, *supra* note 18, at 46 (a black sheriff can end police brutality; a black tax assessor can channel tax monies to improve services for black people).

55. S. CARMICHAEL & C. HAMILTON, *supra* note 18, at 44-46, 98-120 (describing Black Panther Party efforts in Alabama to run blacks for office in a manner that would serve as a "model for democracy"); R. WEISBROT, *supra* note 21, at 204.

56. Indeed, it is not mere coincidence that many prominent black elected officials and black candidates were once active in the civil rights movement. From Andrew Young to beleaguered former D.C. mayor Marion Barry, to Harvey Gantt, the 1990 Democratic nominee for U.S. Senator from North Carolina, many black political aspirants had their roots in civil rights struggle. See, e.g., Smothers, *North Carolina Democrat Sets Strategy in Taking on Helms*, N.Y. Times, June 7, 1990, at B7, col. 1.

57. R. WEISBROT, *supra* note 21, at 235.

58. *From Gary to Miami Beach*, EBONY, Sept. 1972, at 142 (national black assembly "would force white politicians to deal with the entire black community instead of with a few hand-picked black politicians"); Poinsett, *supra* note 43, at 27, 45 (people work to create black politics to empower all of black America — instead of only representatives).

59. King noted that simply electing blacks was not enough. "Negro politicians can be opportunistic as their white counterparts if there is not an informed and determined constituency demanding social reform." M.L. KING, JR., *supra* note 22, at 49.

60. A. KARNIG & S. WELCH, BLACK REPRESENTATION AND URBAN POLICY 9 (1980) (organizing to elect blacks to public office logical extension of confluence of black attitudes).

fully argued that a group has its requisite degree of political power if it is able to elect a fair number of representatives.

The nationalists asserted that the community could self-consciously develop a strategy of social and economic transformation by participating in politics on the basis of group power. The nationalists, however, also soon supported the black electoral success strategy as a shortcut to achieving recognition of group identity and to providing a mechanism for channeling group solidarity.<sup>61</sup> Because black representatives were both authentic community leaders and legitimated by black voter support, they compelled greater support than sympathetic white officials. Propelled by the basic "essentialism"<sup>62</sup> of the nationalist position as well as the undeniable reality of ethnic politics and racial group segregation,<sup>63</sup> both the integrationists and the nationalists<sup>64</sup> accepted a theory of representation based on four assumptions about black elected officials: (1) black officials were authentic because of their community and cultural roots; (2) they gained authority from the fact of election; (3) they were legitimate because of community mobilization and enthusiasm; and (4) they were presumptively responsive members of a historically, socially, and politically stigmatized group with strong and cohesive civil rights, redistributive, and community-based agendas.

### B. *The Evolution of a Legal Strategy of Political Empowerment*

The civil rights movement empowerment vision was a statement of strategy and faith. After passage of the Voting Rights Act, that vision collapsed. Litigation to enforce the Voting Rights Act transformed the original goals of broad-based voter participation, reform, and authentic representation into the shorthand of counting elected black officials. In addition, judicial interpretation of the statute compressed the civil rights movement's capacious conception of political represen-

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61. See, e.g., S. CARMICHAEL & C. HAMILTON, *supra* note 18, at 46-47; see also *supra* notes 29-30.

62. See S. CARMICHAEL & C. HAMILTON, *supra* note 18, at 46-47. Black electoral success theory reflects the basic "essentialism" of the nationalist position. The theory locates meaning in the concept of racial identity as a social-cultural, historically derived structure. For some nationalists, racial identity also has biological significance. For black power nationalists of the 1960s and early 1970s, however, essentialism meant recognition of their group identity as a source of pride, culture, and as a politically animating force.

63. A. KARNIG & S. WELCH, *supra* note 60, at 9 (political organizing based on view that electing black officials would change laws by exercising control over parts of government structure).

64. THE BLACK POLITICIAN: HIS STRUGGLE FOR POWER (M. Dymally ed. 1971) [hereinafter THE BLACK POLITICIAN] (diverse black leaders all stressed black political organizing); Clark, *Foreword to id.* (black power movement is an "effective smokescreen" behind which quest for "genuine direct political power for blacks could proceed with minimum interference").



tation, redistribution, and participation into a narrow electoral focus on black representation.

The 1965 Voting Rights Act was a landmark piece of legislation.<sup>65</sup> The Act responded directly to the most urgent claims of activists challenging direct impediments to registration and voting. In drafting the Act, Congress was concerned with eradicating discrimination "comprehensively and finally" from every election in which voters were eligible to cast ballots.<sup>66</sup> Passed<sup>67</sup> and amended<sup>68</sup> to promote black political representation, the Act contemplates the right to vote as the right to meaningful political participation and to an effective voice in government.<sup>69</sup> The right to vote is the right to effective representation:

65. Commemorating the Voting Rights Act's 25th anniversary, Governor Douglas Wilder of Virginia, the first black elected governor this century, credited the important symbolism of his own election to the Act, one of "two landmark events which literally changed the face of this nation." Lewis, *They're Wild About Wilder*, Phil. Inquirer, May 28, 1990, at A9, col. 1.

66. S. REP. NO. 417, 97th Cong., 2d Sess. 5 (1982); see also 42 U.S.C. § 1973(c)(1) (1988).

67. Some quarrel with the original legislative understanding of the right to vote. For example, Abigail Thernstrom writes that the 1965 Act was concerned exclusively with registration and voting, and later was transformed unwittingly into a statutory mandate for black electoral success, or "job corps" for black elected officials. See A. THERNSTROM, *WHOSE VOTES COUNT?: AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS* 11, 18, 22-30 (1987). Even Thernstrom, however, concedes, that by 1970 Congress, the judiciary, and voting rights plaintiffs all acknowledged the importance of a meaningful right to vote, meaning the right to elect representatives of choice. *Id.* at 22, 31. Without engaging in a semantic exercise or an extensive legislative history of the 1965 Act, it is nevertheless significant that in his message to a Joint Session of Congress transmitting the proposed 1965 legislation, President Johnson referred to the right of citizens to have a voice in electing their leaders as the *cornerstone* concern of the legislation. See 111 CONG. REC. H5059 (1965) (equal right to vote affirms dignity of man because it rests, *inter alia*, on most basic right of all, the right to choose one's own leaders). Even Republican opponents of the 1965 Act acknowledged the consensus "to free those of our citizens who now endure the near-tyranny of nonrepresentation." See, e.g., H.R. REP. NO. 439, 89th Cong., 1st Sess. at 37-38, 53, (1965).

68. See 115 CONG. REC. 5517 (1970) (joint view of ten members of the Judiciary Committee). The Senate sponsors of the 1965 Act supported its renewal in 1970 in part because the Act was so successful in encouraging blacks "running for office in Southern states to help assure adequate representation of all interests." *Id.* at 5520.

69. For example, the Act defines "voting" to include "all action to make a vote effective." 42 U.S.C. § 1971(e) (1988); see also *supra* note 67. As the Supreme Court announced one year before the Voting Rights Act was passed, "[E]ach and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies." *Reynolds v. Sims*, 377 U.S. 533, 565 (1964); see also *Terry v. Adams*, 345 U.S. 461 (1953) (striking down whites-only preprimary selection process on the ground that the right to vote is a right to an effective voice in governmental decisionmaking); cf. *City of Richmond v. United States*, 422 U.S. 358 (1975) (Brennan, J., dissenting) (blacks should enjoy the opportunity to elect responsive officials and have a significant voice in conduct of government affairs). President Lyndon Johnson allegedly told Hubert Humphrey during the legislative struggle for the 1964 Civil Rights Act:

Yes, yes, Hubert, I want all those other things — buses, restaurants, all of that — but the right to vote with no ifs, ands, or buts, that's the key. When the Negroes get that, they'll have every politician, north and south, east and west, kissing their ass, begging for their support.

M. MILLER, *LYNDON: AN ORAL BIOGRAPHY* 371 (1980); cf. F. PIVEN & R. CLOWARD, *WHY AMERICANS DON'T VOTE* 4 (1988) (right to vote is core symbol of democratic ideal that ordi-

the ultimate instrument of reform.<sup>70</sup>

Yet, within contemporary voting rights jurisprudence, mere electoral control by black voters over their representatives has come to satisfy the Act's conception of representation. In search of a statutory core value and judicially manageable standards, the courts have cobbled from the statute a right to minority electoral success. The courts have ignored statutory language providing for the "opportunity . . . to participate [equally] in the political process" and instead have focused exclusively on language securing the "opportunity . . . to elect the representatives of [the protected group's] choice."<sup>71</sup> Especially since 1986, the courts have measured black political representation and participation solely by reference to the number and consistent election of black candidates.<sup>72</sup> The submergence of black electoral potential and the subsequent emergence of black voting majorities capable of electing black candidates have become the preferred indicia of a statutory violation.<sup>73</sup> Issues of voter participation, effective representation, and policy responsiveness are omitted from the calculus.<sup>74</sup>

Given the development of voting rights jurisprudence, current judicial interpretation of the Act is not surprising. Initially, blacks focused primarily on first generation, direct impediments to electoral participation, such as registration and voting barriers.<sup>75</sup> Once these obstacles were surmounted, however, the focus shifted to second generation, indirect structural barriers such as at large, vote-diluting elections.<sup>76</sup>

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nary people would have a stake in government and their grievances addressed through the right to elect representatives).

70. As President Johnson declared when he signed the historic 1965 Act, "But only the individual Negro, and all others who have been denied the right to vote, can really walk through those doors, and can use that right, and can transform the vote into an instrument of justice and fulfillment." 111 CONG. REC. 19649, 19650 (Aug. 6, 1965).

71. See *supra* note 2.

72. *Thornburg v. Gingles*, 478 U.S. 30, 92-93 (1986) (O'Connor, J., concurring) ("Electoral success has now emerged, under the Court's standard, as the linchpin of vote dilution claims.").

73. See Karlan, *supra* note 6; Karlan, *Undoing the Right Thing: Single-Member Offices and the Voting Rights Act*, 77 VA. L. REV. 1, 8 n.27 (1991).

74. See, e.g., *Mack v. Russell County Commn.*, No. 90-712 (M.D. Ala. Aug. 1, 1990) (three-judge court), *cert. pending* 59 U.S.L.W. 3460 (U.S. Oct. 26, 1990) (issue is confined to changes in black voting constituency not relative power of black elected officials).

75. The first generation of voting litigation, and the 1965 statute which represented the congressional response, were concerned with the complete and total exclusion of blacks from the electoral process. The initial structure of the Act itself focused on the suspension of literacy tests, the deployment of federal registrars, and federal administrative review of local registration procedures in covered jurisdictions. Success under the Act was immediate and impressive. The number of blacks registered to vote rose dramatically within five years after passage. See Karlan, *supra* note 6, at 183-84.

76. "[D]ilution is a process whereby election laws or practices, either singly or in concert, combine with systematic bloc voting among an identifiable group to diminish the voting strength

With its winner-take-all rules, the at large election format, instituted by many southern jurisdictions in response to increased black registration, essentially allowed a bloc voting racial majority to control all the elected positions. Fifty-one percent of the population consistently decided one hundred percent of the elections. In addition, although everyone had one vote, some votes were qualitatively less important than others because of the voter's or the candidate's race or both. As a result, the black minority was permanently excluded from meaningful participation.<sup>77</sup>

Thus, second generation voting rights litigation focused on "qualitative vote dilution." Voting rights activists sought to elect more black officials, primarily by creating majority-black single-member districts. Indeed, by 1980, the right most closely associated with the Act was that of casting a "meaningful" vote for someone who could get elected.<sup>78</sup>

In 1982, Congress amended the Act to include the right to a meaningful vote.<sup>79</sup> A "meaningful vote" became explicitly a vote for a viable minority preferred representative.<sup>80</sup> In addition, the amendments

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of at least one other group." Davidson, *Minority Vote Dilution*, in *MINORITY VOTE DILUTION* 1, 4 (C. Davidson ed. 1984); see *Gingles v. Edmisten*, 590 F. Supp. 345 (E.D.N.C. 1984), modified *sub. nom.* *Thornburg v. Gingles*, 478 U.S. 30 (1986), where the court considered:

the essence of racial vote dilution . . . is this: that primarily because of the interaction of . . . racial polarization . . . with a challenged election mechanism, a racial minority with distinctive group interests that are capable of aid or amelioration by government is effectively denied the political power to further those interests that numbers alone would presumptively give it in a voting constituency not racially polarized . . .

590 F. Supp. at 355 (citations omitted). Structural barriers, such as at-large elections, dilute minority voting strength and make voting a futile gesture where the electorate is racially polarized. See, e.g., *Nevett v. Sides*, 571 F.2d 209 (5th Cir. 1978); *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1976). At-large elections have been struck down under a constitutional theory of discriminatory effects, *White v. Regester*, 412 U.S. 755 (1973), a constitutionally compelled intent test, *Rogers v. Lodge*, 458 U.S. 613 (1982), and a statutory results standard, *Thornburg v. Gingles*, 478 U.S. 30 (1986).

77. While pluralist theories of democracy contemplate minority losses, they do not envision a minority that always loses. See *infra* notes 170-73 (principle of "minority acquiescence" — that minorities are supposed to lose — does not contemplate systematic bloc voting).

78. Encouraged by the Supreme Court's reapportionment decisions as popularized by the slogan, "one person/one vote," a meaningful vote became a vote undiluted by discriminatory, though facially neutral election schemes. See *City of Mobile v. Bolden*, 446 U.S. 55, 103 (1980) (Marshall, J., dissenting); *Allen v. State Bd. of Elections*, 393 U.S. 544 (1968); *Reynolds v. Sims*, 377 U.S. 533 (1964). Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach from the Voting Rights Act*, 69 VA. L. REV. 633, 649-58 (1983), refers to this as a "substantive effects test," which he concedes may be appropriate for fundamental constitutional rights.

79. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (1982); see *supra* note 2.

80. As amended, the statute states that a violation is established if blacks have "less opportunity than other members of the electorate . . . to elect representatives of their choice." 42 U.S.C. § 1973 (1988) (as amended). By codifying the language of *White v. Regester*, 412 U.S. 755, 766 (1973), proponents sought to embrace a line of cases with an established, judicially manageable set of standards for ascertaining abridgement of minority voting rights. Blacks would henceforth

provided that dilution claims could be proved based on discriminatory results alone.<sup>81</sup> Although not sufficient to establish a violation, the absence of black elected officials is circumstantial evidence, according to the Act's text, of discriminatory results.<sup>82</sup>

From the perspective of its legislative history, the 1982 statute gave litigants a flexible tool and a broad mandate to challenge inequalities in the political process. Moreover, the statutory language seemed vague enough to cover a wide range of political disablements.<sup>83</sup> Indeed, in light of this vagueness, supporters hoped a "core value" would be discovered, distinct from either proportional representation or discriminatory purpose.<sup>84</sup> To those reading the legislative history, it appeared as if Congress had, consistent with the Act's mandate to protect *full* exercise of the franchise by black voters,<sup>85</sup> avoided both finger pointing and finger counting.<sup>86</sup> Within the wide net cast by the statute, no particular factor could govern all cases. Yet, once the statute was enacted, the predictable search began for a justiciable formula, ostensibly structured around a central, measurable factor. Foreordained by the nature of their adjudicative task, courts attempted to discover which factor could become the first among equals, the center around which to balance the other variables.

The linchpin of pre-1982 constitutional dilution challenges had been unresponsiveness.<sup>87</sup> But unresponsiveness, an obvious metaphor for political exclusion, was elusive as an evidentiary tool and almost as

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enjoy the statutory right to elect candidates of their choice based on a functional view of their political circumstances as reflected in local historic, social, and economic relationships. Dillard v. Baldwin County, 686 F. Supp. 1459 (M.D. Ala. 1988); cf. Note, *Defining the Minority-Preferred Candidate Under Section 2 of the Voting Rights Act*, 99 YALE L.J. 1651, 1665-67 (1990).

81. The Act was amended in response to a 1980 Supreme Court decision cabining dilution claims to direct proof of intentional discrimination. *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

82. See *supra* note 2. The statutory disclaimer stated that "[t]he extent to which members of a protected class have been elected to office" is relevant, "provided [t]hat nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973(b) (1988). The *Senate Report* also identified minority electoral success as a probative factor. See S. REP. NO. 417, 97th Cong., 2d Sess. 16, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 177, 193 (presence of minority elected officials is a "recognized indicator of access to the process") [hereinafter 1982 SENATE REPORT].

83. See Mississippi State Chapter Operation PUSH v. Allain, 674 F. Supp. 1245 (N.D. Miss. 1987); *Vargas v. Calabrese*, 634 F. Supp. 910 (D.C.N.J. 1986).

84. Boyd & Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347, 1399-400 (1983); Derfner, *Vote Dilution and the Voting Rights Act Amendments of 1982*, in MINORITY VOTE DILUTION, *supra* note 81, at 145, 159-61.

85. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); see also 128 CONG. REC. 14,302-341 *passim* (1982).

86. See *Gingles v. Edmisten*, 590 F. Supp. 345, 355 (E.D.N.C. 1984), modified *sub. nom.* *Thornburg v. Gingles* 478 U.S. 30 (1986); *Major v. Treen*, 574 F. Supp. 325 (D. La. 1983).

87. See, e.g., *Lodge v. Buxton*, 639 F.2d 1358, 1375 (5th Cir. 1981); *Zimmer v. McKeithen*, 485 F.2d 1291, 1305 (5th Cir. 1973) (en banc). Unresponsiveness was initially perceived as a

difficult and divisive as proving discriminatory purpose.<sup>88</sup> Thus, in its place, post-1982 litigators favored evidentiary factors more sensitive to sophisticated social science techniques and less malleable by unsympathetic judges. These litigators drew from the one person/one vote quantitative dilution cases, where the issue of impermissible vote dilution was measured by "objective" evidence of numerical deviations from absolute equality.<sup>89</sup>

Because arithmetic had proved useful in the quantitative dilution cases, voting rights activists advanced comparable solutions to their evidentiary quandary. Activists sought an easily identifiable, uniformly enforceable proxy for the judicial inquiry into dilution jurisprudence. Expert witnesses were hired to provide "objective" evidence of racial vote dilution.<sup>90</sup> In particular, the capacity to prove racial bloc voting developed through application of computer technology to precinct by precinct election results. As a result, the "core value" for racial vote dilution cases shifted to reflect the value of social science evidence. The apparent ability of statistics to simplify and objectify racial bloc voting obviated the need for other "gauzy" sociological evidence.<sup>91</sup>

In addition to its evidentiary sensitivity, litigation focusing on racial bloc voting had theoretical appeal. The "extent to which voting in the [jurisdiction was] racially polarized"<sup>92</sup> provided a critical rationale for rejecting election arrangements that diluted and submerged black voting strength. If whites refused to vote for black candidates, and

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"core value" since it was the unwillingness of the governing body to respond to the needs and interests of the minority community that prompted judicial concern in the first place.

88. See, e.g., Blacksher & Menefee, *From Reynolds v. Sims to Mobile v. Bolden: Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 HASTINGS L. REV. 1, 43 n.283 (1982). Proving unresponsiveness involved the awkward task of identifying specific pieces of legislation sponsored and supported by particular legislators antagonistic to minority group interests. The claim also could be conclusively rebutted with evidence of peripheral and insignificant "minority interest" legislation. Because unresponsiveness was judicially unmanageable, litigators convinced Congress to demote unresponsiveness to optional rebuttal. Unresponsiveness became a relevant factor only to the extent plaintiffs chose to prove it. See 1982 SENATE REPORT, *supra* note 82, at 29 n.116, reprinted at 207 n.116.

89. See *Karcher v. Daggett*, 462 U.S. 725, 738-39 (1983).

90. One of the most successful efforts involved the analysis of election returns using both the "interocular" test and "bivariate regression" to demonstrate polarization in the electorate, although sophisticated racial bloc voting analyses did not surface in dilution litigation until the late 1970s. See, e.g., *Nevett v. Sides*, 571 F.2d 209 (5th Cir. 1978), *cert. denied*, 446 U.S. 951 (1980). After the 1982 amendments, however, proof of racial bloc voting assumed primary importance. See *Thornburg v. Gingles*, 478 U.S. 30, 55 (1986).

91. See *Mobile v. City of Bolden*, 446 U.S. 55, 71 n.17 (1980) (dilution claim rejected based simply on gauzy sociological evidence).

92. S. REP. NO. 417, 97th Cong. 2d Sess. 29 (1982) (listing typical, evidentiary factors to be considered within a totality of circumstances analysis).

whites were in the majority, then political market failure existed.<sup>93</sup> Although politics involves winners and inevitable losers, pluralist theory depends on a fluid exchange between the two. If one group is permanently excluded, political remedies ultimately will be bypassed in favor of less mainstream alternatives.<sup>94</sup>

That whites and blacks voted in racial blocs ultimately became the preferred evidentiary linchpin. Many courts, however, still felt adrift in a sea of factors. Jurisprudential parameters establishing cause and effect, not just evidentiary anchors, were needed.<sup>95</sup> Courts demanded judicially manageable instructions which dictated where to draw the line between marginal and substantive claims. If dilution was the submergence of minority votes in a racially polarized electorate, then courts needed a mechanism for distinguishing that phenomenon from undilution. The courts looked to the language of the statute for an answer.

Because the key statutory phrase characterized equal opportunity in the political process in terms of being able to elect "representatives of choice," judicial intervention appeared to be limited to claims that racially polarized voting denied blacks the ability to elect viable black candidates. Black electoral success, which apparently defined undilution, became the statutory metaphor for equal political opportunity.<sup>96</sup>

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93. See *supra* note 77.

94. See *City of Mobile v. Bolden*, 446 U.S. 55, 141 (1980) (Marshall, J., dissenting) (warning that political second class status for blacks provides short-lived, superficial tranquility because, without a reasonable judicial remedy, "the victims of discrimination" could not be long expected "to respect political channels of seeking redress"); see also *infra* note 107.

95. Although racial bloc voting was relatively easy to prove, it seemed omnipresent; every election system in every jurisdiction with some black population was vulnerable. Yet, judicial intervention would not halt the private racial preferences of individual voters. Whereas racial bloc voting might explain political market failure, it failed to identify which election schemes in particular were responsible and remediable.

96. The absence of proportional representation alone was not evidence of a violation. This absence, however, was still useful as a rhetorical device and to establish a baseline definitional floor of political inequality. At the same time, the presence of roughly proportional black representation defined the limits of equality. As Justice O'Connor observes, proportionate representation is an inexact concept. In a jurisdiction that is 40% black, a governing body with either 30% or 50% black representation would be sufficient to establish "undilution." *Thornburg v. Gingles*, 478 U.S. 30, 88-89 (1986) (O'Connor, J., concurring). As predicted by the 1982 amendments opponents, both the tool and the mandate became confined by judicial interpretation to the right to elect black representatives. But, contrary to opponents' claims, proportional representation was a ceiling rather than a floor. Even successful plaintiffs did not necessarily enjoy black representation proportionate to the black voting strength in the community. *McGhee v. Granville Cty.*, 860 F.2d 110, 120 (4th Cir. 1988). The phenomenon of the floor becoming the ceiling is not unusual in legal and other prescriptive discourses. See letter from Frank Michelman to author (Dec. 19, 1990) (on file with author). As long as black electoral success was consistent and proportionate, further scrutiny of black representation was discouraged. *Thornburg v. Gingles*, 478 U.S. at 77, 80 (remanding House District 23 because blacks enjoyed consistent, proportionate representation); see *infra* notes 307-09 and accompanying text. The quality of black representation was not investigated. *Id.* (describing black voters' unexamined claim in Durham that a

The right to a meaningful voice through voting thus became simply the right to elect minority "representatives of choice."

The litigation model's conception of representation produced a very limited vision of the relationship between black voters and black elected officials. Neither the degree of responsiveness of the elected official nor the tendency of the electoral process to depress black participation triggered coverage.<sup>97</sup> The fact of election was the threshold factor.<sup>98</sup> Mere electoral ratification by black voting majorities supposedly assured representational authenticity, authority, legitimacy, and responsiveness.

In addition to proving the existence of dilution, black electoral success also became the preferred remedy. Once a violation was established, the cure was to subdivide larger, heterogeneous electorates into smaller, homogeneous, majority-black districts where black voters could elect candidates of their choice to the governing body.<sup>99</sup>

Full exercise of the franchise was the Act's ennobling goal. But, juridical preference for easy-to-apply, judicially manageable racial vote dilution standards prompted the search for quantifiable and uniform measures of empowerment.<sup>100</sup> Litigators sought standards they could meet by using less costly social science evidence. In addition, Congress' failure to articulate a clear core value for defining political

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black elected through single shot voting was not adequately representing their interests because he was more directly beholden to white voters in the multimember district).

97. I make this claim notwithstanding the language in the legislative history accompanying the 1982 amendments which recognizes the relevance of a "depressed socio-economic condition" to judicial enforcement of the Act. See 1982 SENATE REPORT, *supra* note 82, at 29 & n.114, reprinted at 206-07 & n.114. The role of the representative has simply not been explored. The only discussion in the case law, for example, of the nature of representation involves some recent cases discussing judicial coverage under the Act based on the judicial "function." See *League of United Latin Am. Citizens Council No. 4434 v. Clements*, 914 F.2d 620 (5th Cir. 1990) (en banc), cert. granted sub. nom. *Houston Lawyers' Assn. v. Attorney Gen. of Texas*, 111 S. Ct. 775 (1991) (judges are not electorally accountable and are therefore not representatives subject to the Voting Rights Act). But cf. *Martin v. Allain*, 658 F. Supp. 1183, 1200 (S.D. Miss. 1987), cited with approval in *Chisom v. Edwards*, 839 F.2d 1056, 1063 (5th Cir. 1988), vacated, 853 F.2d 1186 (5th Cir. 1988), cert. denied, 488 U.S. 955 (1988), overruled, *League of United Latin Am. Citizens Council No. 4434 v. Clements*, 914 F.2d 620 (5th Cir. 1990), cert. granted, *Houston Lawyers' Assn. v. Attorney Gen. of Texas*, 111 S. Ct. 775 (1991).

98. The statute tracks the electorally triggering approach taken by the Supreme Court in one person/one vote cases. See, e.g., *New York City Board of Estimate v. Morris*, 489 U.S. 688 (1989) (fact of election subjects board to constitutional scrutiny under the fourteenth amendment). According to the Eleventh Circuit, "The language [of Section 2] is only and uncompromisingly premised on the fact of nomination or election." *Dillard v. Crenshaw Cty.*, 831 F.2d 246, 251 (1987).

99. See, e.g., *Connor v. Finch*, 431 U.S. 407, 414 (1977); *McGhee v. Granville County*, 860 F.2d 110 (4th Cir. 1988); accord *Chapman v. Meier*, 420 U.S. 1, 18-21 (1975); *Mahan v. Howell*, 410 U.S. 315, 333 (1975); *Connor v. Johnson*, 402 U.S. 690, 692 (1971); see also *Parker, Racial Gerrymandering and Legislative Reapportionment*, in *MINORITY VOTE DILUTION*, *supra* note 76, at 85, 111-13.

100. See *supra* notes 87-88 and accompanying text.

equality prompted voting rights lawyers to advance interpretations of the statutory scheme in response to complaints about the absence of black representation within the context of a viable, judicial remedy.

Voting rights case law thus evolved within a racial justice model that accepted as its premise the fact that people of different races often lived and voted differently from each other. Rather than insisting that such separateness and difference be eradicated, as in the school desegregation context, or that poor blacks, isolated from and stigmatized by an unresponsive government, be afforded equal government services, as in equalization of municipal services litigation,<sup>101</sup> the Voting Rights Act model of racial justice recognized racial difference. Group perspective was valued and legitimated by promoting electoral opportunities for black representation.<sup>102</sup> Using the conjunction of racial identifiability and geographic insularity as a convenient proxy for societal discrimination and political group consciousness, the litigation vision of political equality promulgated four complementary assumptions that eventually became the theory of black electoral success.

First, the litigation focused exclusively on electoral outcomes. The absence of black elected officials became both the symptom and the cause of political inequality. In other words, political equality was defined exclusively in terms of the electoral opportunities afforded a "fair" number of authentic — meaning chosen by the community — black representatives.

Second, the right to political equality was granted as a premise. But as the concept to which the statutory right referred, "political equality" required definition. Ultimately, the phrase was defined in terms of the ability of black voters to elect black representatives in rough proportion to their presence in the population.

Although the voting rights model explicitly rejected "quotas,"<sup>103</sup> choosing instead to speak in terms of "results,"<sup>104</sup> numerical proportionality sufficed to establish legality.<sup>105</sup> If twelve percent of elected officials nationwide were black, presumably reflective of the percentage of blacks within the population, the litigation model of political equality was satisfied.

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101. *Hawkins v. Town of Shaw*, 461 F.2d 1171 (5th Cir. 1972).

102. *Thornburg v. Gingles*, 478 U.S. 30 (1986); *United Jewish Orgs. v. Carey*, 430 U.S. 144 (1977).

103. See *supra* note 96.

104. See *Derfner*, *supra* note 84, at 159-60.

105. The voting rights model exemplifies the problem of racial proportionality as a remedy. *Freeman*, *supra* note 7, at 96, 102-03.



Thus, roughly proportionate black representation legitimated the electoral process. The idea underlying this concept was that only after previously excluded groups were successful within the electoral process would the white majority learn to accept black representatives as colleagues in collective governance,<sup>106</sup> only then would blacks invest in the normal channels of electoral mobilization and eschew more activist protest strategies.<sup>107</sup> These themes formed the basis for the authenticity and electoral mobilization assumptions of a black empowerment theory of representation.

Third, majority rule was unquestioned as long as the majority admitted a fair number of blacks to its decisionmaking council. Minority electoral presence "softened the harshness of the principal of majority rule."<sup>108</sup> By virtue of their electoral success within majority-black districts, black representatives had representational presence, which was equated with authority and responsiveness to their distinctive group interests.

Fourth, political equality was judicially enforced by subdividing the electorate into single-member districts, a "fair" number of which were controlled by black voters. Single-member districting was the judicially preferred remedy for electoral discrimination.<sup>109</sup> Moreover, the chosen enforcement mechanism, electoral ratification in majority-black single-member districts, itself became a goal because it appealed as a pragmatic, political tool to both the integrationists and the nationalists.

Both nationalists and integrationists contemplated that small districts, controlled by black majorities, would be the best tool for ensuring minority inclusion, encouraging greater citizen involvement in decisionmaking processes, simplifying organizing efforts, and reflecting residential and social segregationist reality.<sup>110</sup> The emergence of black majority electoral districts became a justiciable proxy for black inclusion in the exercise of government authority. This remedy satis-

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106. The model assumes that in majority-white jurisdictions, whites must overcome the lasting legacy of Reconstruction era stereotypes to vote for black candidates. See *infra* notes 164-79 and accompanying text.

107. See T. BRANCH, *supra* note 13, at 880 (quoting John Lewis, then head of the Student Nonviolent Coordinating Committee (SNCC), at the August 1963 March on Washington); S. KARNIG & A. WELCH, *supra* note 60, at 15 (until blacks given fair share of political power, danger of continued widespread violence); U.S. COMM. ON CIVIL RIGHTS, THE VOTING RIGHTS ACT. UNFULFILLED GOALS 63 (1981); Note, *United Jewish Organizations v. Carey and the Need to Recognize Aggregate Voting Rights*, 87 YALE L.J. 571, 590 n.106 (1978). See generally *City of Mobile v. Bolden*, 446 U.S. 55 (1980) (Marshall, J., dissenting).

108. See letter from Jim Blacksher to author (Aug. 15, 1990) (on file with author).

109. See *supra* note 99.

110. See, e.g., S. CARMICHAEL & C. HAMILTON, *supra* note 18, at 15-16; *infra* notes 237-39.

fied the activists, who eventually abandoned a mass movement in exchange for election-oriented litigation campaigns.<sup>111</sup>

As an enforcement mechanism, the black single-member district strategy achieved three separate functions: first, it provided a successful litigation approach to challenge the failure of the election to produce elected black officials; second, it gave courts a justiciable standard to determine the problems and progress that were closely related to the ultimate limits of the voting rights inquiry; and third, as I argue in the next Part, it “inescapably closed the door” on the real goal of the civil rights movement, which was to alter the material condition of the lives of America’s subjugated minorities.<sup>112</sup>

## II. THE THEORY OF BLACK ELECTORAL SUCCESS

Q: Now, why would you come from Crittenden County to participate in a fundraiser for a county race that was basically a local race to Phillips County?

A: Well, the reason I would come, first of all, there are no blacks elected to a county position in eastern Arkansas and no blacks serving in the House of Representatives in eastern Arkansas and no blacks elected to anything other than school boards in districts that are predominantly black. And I feel like blacks should be elected to public office because they should have a chance to serve.

And I want to help get blacks elected so little black children can see them serving and I want to dispell (sic) the myth that some white kids might have that blacks can’t serve or shouldn’t be serving at the courthouse. And when my little girl goes to the courthouse or when other little girls go to the courthouse, I want them to be able to see black people working up there.

And if we can get some blacks elected at the local level, eventually we can — blacks will have the expertise and we can groom them to the point where they can run for the state legislature and other positions.

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Black electoral success theory defines descriptively black representation as a meaningful empowerment goal of structural reform legislation and litigation. The theory contains four basic assumptions: (1) the authenticity assumption; (2) the mobilization/electoral control as-

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111. J. CONYERS & W. WALLACE, *BLACK ELECTED OFFICIALS: A STUDY OF BLACK AMERICANS HOLDING GOVERNMENTAL OFFICE* 20 (1976) (89% of black officials surveyed believed court actions very important in achieving real progress); C. STONE, *BLACK POLITICAL POWER IN AMERICA* 10 (1970) (age of demonstrations has passed to age of the ballot).

112. See letter from Samuel Issacharoff to author (Sept. 24, 1990) (on file with author).

113. *Whitfield v. Democratic Party*, 686 F. Supp. 1365 (E.D. Ark. 1988), *affd. by equally divided court*, 890 F.2d 1423 (8th Cir. 1989) (en banc) (trial transcript at 654-55) (testimony of black state legislator Ben McGee, who was elected to the Arkansas House from a majority-black single-member district created as a result of a successful voting rights challenge in *Smith v. Clinton*, 687 F. Supp. 1310 (1988)).

sumption; (3) the polarization assumption; and (4) the responsiveness/reform assumption. District-based electoral ratification by black voters is the theory's primary enforcement mechanism.

In this Part, I analyze each of these assumptions. I conclude that the black electoral success empowerment model fails to provide a realistic enforcement mechanism for establishing either leadership accountability within the black community or representational effectiveness within the legislative deliberation and coalition-building process. The theory marginalizes black leadership and leads to token representation. Black electoral success theory has failed to comprehend, or even to examine, the nature of representation within collective decisionmaking bodies controlled by prejudice and external inequalities.

My critique of the black electoral success model rests essentially on three claims. First, the status of blacks as a discrete, disadvantaged minority cannot be addressed simply by mobilizing blacks to turn out on election day to elect more black candidates. Black representatives are not necessarily effective advocates for legislative responsiveness.

Second, the prejudice and hostility facing blacks within the political process cannot be eradicated by creating majority-black single-member districts from which black candidates can be elected. Black legislators, especially those representing geographically segregated districts, may be victims of prejudice. Thus, if racially polarized voting results in electoral market failure, then the concept of political empowerment must also address failed legislative decisionmaking. Minority empowerment requires minority legislative influence, not just minority legislative presence. In other words, blacks must develop explicit mechanisms for overcoming majority prejudice in the governing policymaking body.

Finally, the first two claims will not be fully resolved until we focus on the concept of proportionate interest representation, which has received virtually no attention from civil rights lawyers or scholars. By directly undermining the legitimacy of winner-take-all majority rule, proportionate interest representation responds to domination by a hostile, permanent majority.

A. *The Authenticity Assumption: Black Elected Officials Are Authentic Role Models*

Authentic black representation, or "descriptive" representation,<sup>114</sup>

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114. Descriptive representation is representation by culturally and physically similar persons. See H. PITKIN, *THE CONCEPT OF REPRESENTATION* 60-91 (1967); Grofman, *Should Rep-*

is the first important building block for black electoral success theory. Authenticity refers to community-based and culturally rooted leadership. The concept also distinguishes between minority-sponsored and white-sponsored black candidates.<sup>115</sup> Basically, authentic representation describes the psychological value of black representation. The term is suggestive of the essentialist impulse in black political participation: because black officials are black, they are representative.<sup>116</sup> Thus, authenticity reflects the importance of race in defining the character of black political participation.<sup>117</sup>

Authentic leadership is electorally supported by a majority of black voters and is, at its best, culturally similar to its constituency base. Thus, authenticity subsumes two separate concepts, the political and the cultural. Black representatives are authentic because they are elected by blacks *and* because they are descriptively similar to their constituents. In other words, they are politically, psychologically, and culturally black.

### 1. *Political Authenticity*

Authentic leaders are those elected by black voters. In voting rights terminology, electoral ratification from majority-black, single-member districts establishes authenticity. These facts distinguish the authentic representatives from those officials who are handpicked by the "establishment," or who must appeal to white voters in order to

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*representatives Be Typical of Their Constituents?*, in REPRESENTATION AND REDISTRICTING ISSUES (B. Grofman ed. 1982).

115. Authentic representatives need not be black as long as the source of their authority, legitimacy, and power base is the black community. White candidates elected from majority-black constituencies may therefore be considered "black" representatives. Nevertheless, the term usually connotes a minority group member. *See, e.g.*, *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 504 (5th Cir. 1987) ("black preference is determined from elections which offer the choice of a black candidate"). Although some civil rights advocates acknowledge that whites who are sponsored by and elected within a *majority-black constituency* can and do represent minority interests, very few would support as authentic leaders whites who are elected within a *majority-white constituency* with some black support. Others claim that even minority-sponsored white candidates elected within a majority-black jurisdiction, while sympathetic, are not generally perceived as aggressive advocates of black interests. As discussed *infra*, the real ambivalence asserts itself regarding the election of black representatives outside majority-black districts with some black support.

116. *See infra* notes 253-55 (discussing responsiveness assumption). Representatives are any elected government officials, arguably including members of the judiciary. *See supra* notes 97, 115.

117. *See, e.g.*, C. STONE, R. WHELAN & W. MURIN, URBAN POLICY AND POLITICS IN A BUREAUCRATIC AGE 17 (1986) (few factors are more important to contemporary urban politics than race or ethnicity); Fainstein & Fainstein, *The Racial Dimension in Urban Political Economy*, 25 URB. AFF. Q. 187 (1989) (arguing that race plays a critical independent role in determining political outcomes and political roles for blacks). *But cf.* Marable, *supra* note 24, at 20 (race-based strategy for social change minimizes growing class differences within black community).

get elected.<sup>118</sup> Establishment-endorsed blacks are unlikely to be authentic because they are not *elected* as the representatives of choice of the black community.<sup>119</sup> In addition, these officials are often marginal community members whose only real connection with black constituents is skin color. Electoral support by a majority of black voters is thus a convenient proxy for political authenticity.

## 2. Cultural and Psychological Authenticity

In addition to electoral ratification, authenticity refers to a cultural and psychological view of group solidarity. Black representatives are not just physically black. Because they grew up being black, these officials enjoy a cultural and psychic linkage that cuts across class lines. Black electoral success theory suggests that black elected officials, who are physically and culturally similar to their constituents, fulfill the black community's need for self-affirmation through "role models."<sup>120</sup>

From students protesting the absence of black college<sup>121</sup> and law professors,<sup>122</sup> to church leaders ostensibly supporting black community needs,<sup>123</sup> black activists and white sympathizers consistently describe their efforts, at least to some extent, in terms of finding and promoting black role models. By their presence, role models articulate black interests and represent the needs of aspiring young blacks.<sup>124</sup> Role models are living symbols of the equal opportunity

118. See *Gingles v. Edmisten*, 590 F. Supp. 345 (E.D.N.C. 1984), *modified sub. nom.* *Thornburg v. Gingles*, 478 U.S. 30 (1986) (trial transcript) (blacks elected from majority-white multi-member districts sail trim, meaning they defer to other blacks to introduce and promote controversial legislation that would affect black constituents); *infra* note 308.

119. Defendant jurisdictions are challenged when they attempt to get credit for establishment endorsed black leaders, unless they produce evidence that a majority of black voters also supported the candidate. See *Collins v. City of Norfolk*, 883 F.2d 1232 (4th Cir. 1989); *Gingles*, 590 F. Supp. at 345. The litigator's approach is to examine voting patterns to determine whether the election system enables the black community to elect its own candidates or whether black officials are chosen instead by white voters.

120. See, e.g., May, *After 40 Years Making the Law, Rodino Now Teaches It*, N.Y. Times, Jan. 25, 1989, at B1, col. 4 (black representative better serves as role model for black youths); see also *supra* note 4 (role models who speak in a representational capacity become "spokesmodels"). But see *infra* note 147 (spokesmodels may not articulate community-based vision).

121. Lee, *Minority Issues Lie Behind Protest Over Cutting of Budget at CUNY*, N.Y. Times, May 28, 1990, at A1, col. 5.

122. See, e.g., Butterfield, *Harvard Law School Torn by Race Issue*, N.Y. Times, Apr. 26, 1990, at A20, col. 1.

123. Teltsch, *Bronx Church Honors a 'Role Model'*, N.Y. Times, May 27, 1990, at A30, col. 1.

124. For example, some blacks claim that as teachers they have "a clear, racial representational function," meaning that they both "comprehend" and "represent" the needs and interests of all black students. See Bell, *Statement*, reprinted in MINORITY GROUPS NEWSLETTER 18 May, 1990 (section on AALS) (advocating on behalf of black women role models and mentors); see also Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539, 574 (Many role models are "black

process.<sup>125</sup> They reflect the importance of group consciousness to black psychic identity.

Black elected officials are among the most prominent "role models."<sup>126</sup> The election of black representatives affirms that blacks are participating citizens who take an active interest in policy decisions that affect their lives. Authentic representatives also provide psychological uplift by affirming black culture, humanity, and group solidarity.

In the electoral context, role models mediate the paradox of a representative democracy in which all citizens are equal, but some are more equal than others.<sup>127</sup> Including all sectors of society in government operation is consistent with Madison's vision.<sup>128</sup> In a representative democracy, however, all citizens cannot be directly involved in decisionmaking. Some citizens are either "actually" or "virtually" represented.<sup>129</sup> Role model theory justifies the representative principle by referring to a black leadership aristocracy which leads other blacks by virtue of their own achievement and sense of social responsibility.<sup>130</sup> The idea of a black leadership aristocracy was no doubt influ-

people who have achieved stature and power in the white world because they supposedly represent the interests of the entire black community. Such role models gain capital (literally and figuratively) to the extent that they project an assimilated persona that is as unthreatening to white people as it is (supposed to be) intriguing to our young.").

125. For example, minority faculty assist minority student recruitment by suggesting the opportunity to provide mentors for minority students and "hint[ing] at a culturally and ethnically heterogeneous campus environment." *Minority Issues in Legal Education*, LAW SERVS. REP., May-June 1990, at 4, 13; see *infra* notes 132-33.

126. See, e.g., Ayres, *Drug Trial Begins for Mayor Barry, Prosecution Says It Is a Case of Addiction and Deceit*, N.Y. Times, June 20, 1990, at A2, col. 5 (in the recent prosecution of D.C. Mayor Marion Barry for drug use and perjury, "[t]he role model issue was unescapable.").

127. B. BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* 145-47, 291 (1984) (principle of representation that rescues democracy from the problems of scale is itself inherently oligarchical; representation is incompatible with equality and social justice); cf. Abrams, *supra* note 6, at 479 (representative democracy embodies unresolved tension between equality of all citizens and the greater participation of a few as important policy decisionmakers).

128. See, e.g., THE FEDERALIST NO. 39 (J. Madison) (rejecting elitist plutocracy).

129. See Michelman, *The Supreme Court, 1985 Term — Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 50-55 (1986); see also Guinier, *Keeping the Faith*, 24 HARV. C.R.-C.L. L. REV. 393, 427-29 (1989) (actual representation involves direct election by constituents; virtual representation consists of representation by someone elected by another constituency with common interests and sympathies).

130. See Dubois, *The Talented Tenth*, in THE NEGRO PROBLEM 31, 45 (Arno Press ed. 1969) (1903). In Dubois' view, the "talented," whose own ability would be maximized, would make racially unique contributions, thus raising up the level of the race they represented. J. DEMARCO, *THE SOCIAL THOUGHT OF W.E.B. DUBOIS* 46 n.61, 48, 51 n.73 (1983). The ideal political system would enfranchise the talented tenth whose own empowerment and sense of social responsibility would benefit the masses. Dubois advanced a theory of self-development, voluntary self-segregation, and personal intellectual achievement to create an avant-garde that convinced whites blacks were worthy of help. E. RUDWICK, *W.E.B. DUBOIS: A STUDY IN MINORITY GROUP LEADERSHIP* 291 (1960).

enced by W.E.B. Dubois' repudiated belief in a "talented tenth."<sup>131</sup>

As role models, these black achievers presumptively represent equal opportunity. With few exceptions, their election signals that society's institutions are "color-blind" pure meritocracies.<sup>132</sup> Role models, who convey the message "We Have Overcome," also inspire those not yet overcoming.<sup>133</sup> Thus, in general, black role models are powerful symbolic reference points for those worried about the continued legacy of past discrimination.

Some critics assert that the authenticity assumption is a meaningless cultural and descriptive concept. For example, Abigail Thernstrom, an outspoken critic of the conventional empowerment model, denies the empirical or theoretical validity of culturally similar representatives, because whites can represent black interests.<sup>134</sup> Thernstrom attempts to revive the theory of virtual representation in which black interests are occasionally taken into account even if they are not actively promoted.<sup>135</sup> Thernstrom argues that the single act of voting

131. *Id.* Even though Dubois ultimately abandoned his early proposals for a talented tenth, the concept remained influential to the advancement of middle-class aspirations and opportunity. In many ways, treatment of the talented tenth became a barometer of the degree to which blacks had overcome racism, both as a direct measure of equal opportunity for individual black achievers and as an indirect measure of the lowered racial barriers for those disadvantaged blacks still suffering disproportionate levels of poverty and deprivation. Cf. Brooks, *Life After Tenure: Can Minority Law Professors Avoid the Clyde Ferguson Syndrome?*, 20 U.S.F. L. REV. 419, 423 (1986) (arguing that black middle class is in position to speak on behalf of black problems in general).

132. In the electoral context, promoting black role models is important to convince other blacks that the system is working. See Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301, 310 (1987); Freeman, *supra* note 7, at 96, 110.

133. Black elected officials are not only important role models, but their election, even in a majority-white electorate, also legitimates them as group spokespersons. The spokesmodel theory of empowerment affirms the status of blacks as full citizens who can not only vote but can also hold elective office. The individual advancement of black elected officials inspires black constituents to believe in the system, and the individual elected official, as a racial spokesperson, attests reliably to the soundness of that belief. Especially since it was assumed that black role models were meaningful cultural symbols, then spokesmodels were even more meaningful bridges to those less fortunate. See, e.g., A. RAMPERSAD, *THE ART AND IMAGINATION OF W.E.B. DUBOIS* 81 (1976) (Dubois recognized the need for a process of "natural selection" of indigenous black leadership); see also W.E.B. DUBOIS, *THE SOULS OF BLACK FOLK* (1973); Austin, *supra* note 124, at 575 ("By their sheer visibility, [role models] are of service to those left behind. They are functionally useful in providing images for emulation . . .").

134. Thernstrom's theory of representation is essentially that representation is a neutral outcome reflecting voter preference. In the absence of intentional discrimination, efforts to ensure "black" representation promote legislative set asides or electoral "quotas." A. THERNSTROM, *supra* note 67, at 237-38. Thernstrom's theory of voting rights has received considerable attention, in part because its proponent utilizes effectively the inflammatory language of quotas. See, e.g., Greenhouse, *The "Quota" Dispute Battle Over Civil Rights Bill Involves Larger Debate Considering Race*, N.Y. Times, July 21, 1990, at A10, col. 5 (in issues of race, no word is "more emotionally loaded or universally shunned than 'quota'"); see also *Wright v. Rockefeller*, 376 U.S. 52, 63-67 (1964) (Douglas, J., dissenting) (condemning "racial electoral registers" and race conscious districting which encourages racial partisans).

135. *But see generally* Guinier, *supra* note 129, at 427-29 (concept of color-blind, virtual

for any representative legitimates democratic self-government.<sup>136</sup>

Thernstrom's emphasis on color-blind, virtual representation abstracts the black experience from its historical context.<sup>137</sup> Virtual representation ignores the existence of group identity within the black community. Thernstrom's theory reduces electoral participation to the individual unit within the voting booth. At that level, the perception is most acute that one vote will have a negligible effect on the ultimate outcome.<sup>138</sup> Moreover, in neglecting the role of blacks and whites as politically cohesive groups, Thernstrom's electoral self-legitimizing focus fails to acknowledge the role that group identity plays in mobilizing political participation and influencing legislative policy.<sup>139</sup> Empirical research also refutes the efficacy of race-neutral theories of virtual representation.<sup>140</sup>

Even when elected officials are unresponsive and voters do not participate enthusiastically, some scholars suggest that voters are still virtually or collectively represented if the legislature as a whole is representative.<sup>141</sup> These scholars suggest that representation is an institutional rather than a personal relationship.<sup>142</sup> Black electoral suc-

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representation disenfranchises where interests of those "virtually" represented are not fungible with those "actually" represented).

136. Actual participation by group members in an extended political process becomes superfluous because nondiscriminating representatives are responsive to their *electoral* constituency regardless of race. The assumptions supporting this hypothesis have already been carefully dissected elsewhere. See, e.g., F. PARKER, *BLACK VOTES COUNT* (1990); Abrams, *supra* note 6, at 481-88 (individual preferences not easily aggregated nor translated into governing policies); Guinier, *supra* note 129, at 427; Karlan & McCrary, *Without Fear and Without Research: Abigail Thernstrom on the Voting Rights Act* (Book Review), 4 J. L. & POL. 751, 776-77 (1988).

137. See Freeman, *supra* note 7, at 101 (ideology of fungibility fails to deal with the concreteness of black experience).

138. See B. BARBER, *supra* note 127, at xiii (citing "crisis in participation"); Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1034-35 (1984) (citing problems of apathy and uninformed voting); Brennan & Buchanan, *Voter Choice: Evaluating Political Alternatives*, 28 AM. BEHAV. SCI. 185, 187 (1984); cf. S. VERBA & N. NIE, *supra* note 27, at 31 (table 2-1).

139. Most significantly, virtual representation is one step further removed from vicarious representation through political spokesmodels. At least the possibility of electing a descriptively similar representative mobilizes black voter turnout. Virtual representation, by contrast, offers nothing to animate participation. To the contrary, virtual representation undermines the fundamental values of participation in a democracy. See *infra* note 152 and accompanying text.

140. For example, studies suggest that House members are most responsive to their most supportive constituency. R. FENNO, *HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS* 234 (1978); cf. *infra* notes 152-53, 158 and accompanying text.

141. Weissberg, *Collective vs. Dyadic Representation in Congress*, 72 AM. POL. SCI. REV. 535 (1978).

142. *Id.*; H. EULAU & K. PREWITT, *LABYRINTHS OF DEMOCRACY: ADAPTATIONS, LINKAGES, REPRESENTATION, AND POLICIES IN URBAN POLITICS* (1973) (voters may in fact be better represented by legislators outside their district); cf. United Jewish Orgs. v. Carey, 430 U.S. 144 (1977) (white voter in majority-black district with nonwhite representative will be represented by legislator elected from other majority-white districts to the extent voting is along racial lines).



cess proponents dismiss such arguments as self-serving, because "institutional representation" has widened the gap between whites and blacks<sup>143</sup> and has resulted in general voter disenchantment.<sup>144</sup>

I, too, reject the criticism that authentic black representation is meaningless. Authenticity reflects the group consciousness, group history, and group perspective of a disadvantaged and stigmatized minority. Authenticity recognizes that black voters are a discrete "social group"<sup>145</sup> with a distinctive voice. As I argue below, authentic representation also facilitates black voter mobilization, participation, and confidence in the process of self-government.<sup>146</sup>

Authenticity, however, is a limited empowerment tool. As a descriptive matter, authenticity uses the nominally cultural to obscure its substantively political meaning. Although an important source of authority and legitimacy, electoral ratification by black voters fails to furnish a consistent mechanism for establishing community-based credentials or leadership accountability. Electoral success by culturally and ethnically black candidates in majority-white jurisdictions does not necessarily mean that black concerns will be addressed.<sup>147</sup>

For example, where "authentic blacks" are elected by whites with significant black support, electoral ratification by a majority of those blacks voting may not in fact send a recognizable message regarding substantive policies.<sup>148</sup> Especially in winner-take-all electoral systems, "the aggregation device of the election garbles these messages, producing winners while obscuring the reasons for their victories."<sup>149</sup> Thus,

143. See *A COMMON DESTINY* 6 (G. Janes & R. Williams eds. 1989); R. FARLEY & W. ALLEN, *THE COLOR LINE AND THE QUALITY OF LIFE IN AMERICA* (1989).

144. Oreskes, *As Problems Fester, Voters Send Pink Slips*, N.Y. Times, Sept. 23, 1990, at E5, col. 1; see also *supra* note 138; Oreskes, *Low Voter Turnout in Primaries, Once Again*, N.Y. Times, Oct. 4, 1990, at B16, col. 4 [hereinafter Oreskes, *Low Voter Turnout*] (Committee for the Study of the American Electorate reports widespread decline in voter turnout).

145. Young, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship*, 99 ETHICS 250, 259-61 (1989) (concept of social group is distinguished from simple aggregate or association of people by its special history, identity, values, and expressive style; social group is defined primarily by members' sense of personal identity derived from group affinity and relational differentiations from other nongroup members); see also *infra* notes 256-57.

146. See *infra* notes 164-65 and accompanying text.

147. See *infra* notes 275-83 (election of authentically black candidates in majority-black districts does not necessarily mean that those black elected incumbents will be responsive to the needs of the black community); see also *infra* notes 227-44 (authentic blacks not effective because they remain a discrete, insular legislative minority).

148. Where electoral ratification is imprecise because, for example, the black elected role model is elected in a majority-white jurisdiction, cultural authenticity alone often substitutes as a mechanism for defining and validating the "black" leader. See *infra* notes 196-201.

149. Abrams, *supra* note 6, at 487. Even where an electoral majority sends a clear message, the representative may have difficulty translating this message into substantive policy. She may be unable to persuade her legislative colleagues or she may feel obliged to support initiatives opposed by those who elected her. She may be subject to pressure from constituent groups or other organized interests not responsible for her election. Alternatively, a

even where black support provides a critical margin,<sup>150</sup> successful black candidates in majority-white electorates do not necessarily feel obligated to black voters.<sup>151</sup>

### B. *The Mobilization Assumption*

The mobilization assumption claims that black electoral success directly affects black political participation at the grassroots level.<sup>152</sup> To the extent that blacks can be encouraged to participate in the political process, the possibility of electing a "first" black tends to increase election day turnout.<sup>153</sup> Indeed, the courts and commentators have recognized that the inability to elect black candidates depresses black

representative's incumbency may so insulate her from electoral pressures that she feels little need to respond to constituent demands.

*Id.* Cf. Barnes, *Into the Mainstream*, 22 NATL. J. 262 (1990) (Virginia black governor Wilder "may become less accessible and less accountable politically to blacks whose demands will be competing for attention against those of Virginia's white-majority constituency — and those of Wilder's large campaign contributors").

150. The black "swing vote" is not usually critical unless there is a close split in the white vote. See Williams, *Blacks Cast Pivotal Ballots in Four Key Senate Races, Data Show*, N.Y. Times, Nov. 6, 1986, at A33, col. 3. Moreover, white political beneficiaries of the swing vote are often unaware of its decisive impact or deliberately ignore it because of even more decisive white support. Davidson, *supra* note 76, at 9-10; see also Stodghill, *After the Victory Party, Frustration in the Black Community*, BUS. WK., Jan. 8, 1990, at 49.

151. In Virginia, where Douglas Wilder is the first black elected Governor since Reconstruction, some commentators have interpreted his victory as a "new black politics." *But cf.* Ayres, *Virginia Governor Baffles Democrats With Crusade for "New Mainstream"*, N.Y. Times, Oct. 14, 1990, at A22, col. 1 (Wilder considers himself "a governor who happens to be black, not a black who happens to be governor."); Smothers, *supra* note 56, at B7, col. 1. Others see Wilder's win as the triumph of a single-issue constituency in the wake of recent Supreme Court decisions on abortion. In either case, given the narrow margin of victory, Wilder's ability to govern on other issues important to the black community is considerably vitiated. Cf. *infra* notes 170, 280 and accompanying text.

152. Abrams, *supra* note 6, at 501 (Black election is a crucial aid to political morale "demonstrating to minority voters that defeat is no longer inevitable, and that there is someone in the government who will respond to their interests."); see L. COLE, *BLACKS IN POWER* 110-18, 221-23 (1976); J. CONYERS & W. WALLACE, *supra* note 111, at 6-7; Montague, *The Voting Rights Act Today*, A.B.A. J., Aug. 1, 1988, at 56 (statement of B. Grofman); Morris, *Black Electoral Participation and the Distribution of Public Benefits*, in *MINORITY VOTE DILUTION*, *supra* note 76, at 275, 277 (political efficacy and level of trust in government affect black turnout); see also A. TERNSTROM, *supra* note 67, at 122 (quoting Rolando Rios, legal director, Southwest Voter Registration Education Project) ("When Hispanic candidates do not get elected, he said, they cease to run, and without minority candidates, Hispanics do not vote.").

153. D. PINDERHUGHES, *supra* note 5 at 245 (quoting G. McWorter, D. Gills & R. Bailey, *Black Power Politics as Social Movement: Dialectics of Leadership in the Campaign to Elect Harold Washington*, 8-9 (1984) (unpublished manuscript, Afro-American Studies and Research, University of Illinois, Urbana)) (black organizations worked so closely not everybody knew "what group they were working under. Everybody seemed just to know what they were working for: the election of Chicago's first Black Mayor.") (emphasis added); *id.* at 244-47; Pettigrew, *Black Mayoral Campaigns*, in *URBAN GOVERNANCE AND MINORITIES* (H. Bryce ed. 1976) (black turnout declined second time a black candidate ran); see also S. KARNIG & A. WELCH, *supra* note 60; D. MCADAM, *POLITICAL PROCESS AND THE DEVELOPMENT OF BLACK INSURGENCY* 51 (1982); cf. Johnson, *Racial Politics: Chicago's Raw Nerve*, N.Y. Times, Feb. 19, 1989, § 6 (Magazine), at 37 (The night in 1983 Harold Washington was elected Chicago's first black mayor, "black people literally danced in the streets of Chicago. They had voted in record num-

political participation.<sup>154</sup>

The mobilization assumption measures representational effectiveness based on the ability of black candidates to increase black election day turnout. Both this assumption and the authenticity assumption presume that black voters will vote for, respect, be affirmed by, and seek services from black elected officials. Neither assumption, however, proposes an ongoing relationship between the representative and the represented. Nor do the assumptions provide a mechanism, other than electoral ratification, for measuring representativeness. In addition, authentic black elected officials may not effectively mobilize sustained black participation, even when measured by the mobilization assumption's own terms.

The mobilization assumption fails to anticipate the difficulties that black candidates in majority-white jurisdictions encounter when they seek simultaneously to appeal to white voters while retaining their black political base.<sup>155</sup> Black voters, who feel neglected and taken for granted by the black candidates "walking the tightrope," may not respond to opportunities for increased black electoral visibility.<sup>156</sup> When blacks are elected by whites with symbolic black support, their victory represents a psychological, but not necessarily substantive triumph.<sup>157</sup>

The mobilization assumption has also depended in large part on empirical evidence supplied by first-time election opportunities. The assumption fails to explain how black electoral success will generate sustained black election-day turnout.<sup>158</sup> Reelection opportunities may fail to mobilize voter participation, even in majority-black single-mem-

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bers, charging to the polls by car, by bicycle, by foot, by wheelchair. There were elderly blacks who said they had never voted before. Now, finally, they had a reason to vote.").

154. See, e.g., *McMillan v. Escambia County*, 748 F.2d 1037, 1045 (11th Cir. 1984); *Hendrix v. McKinney*, 460 F. Supp. 626, 631-32 (M.D. Ala. 1978); *Citizens for a Better Gretna v. City of Gretna*, 636 F. Supp. 1113, 1119 (E.D. La. 1986), *affd.*, 834 F.2d 496 (5th Cir. 1987); see also *supra* note 152.

155. See *supra* note 151; see, also Smothers, *Omen for Young: Low Black Turnout*, N.Y. Times, July 19, 1990, at B6, col. 4 (in Andrew Young's Georgia statewide governor's race, candidate's campaign workers cited tactical difficulties wooing whites while retaining black support; Young had to "lean right and moderate his positions for whites while counting on blacks to see this as a tactic and not a theological conversion").

156. Smothers, *supra* note 155 (Andrew Young neglected black vote in appeal to moderate whites; as a result he received fewer black votes in Georgia precincts than Jesse Jackson did in 1988 running for the Democratic nomination for President).

157. A. KARNIG & S. WELCH, *supra* note 60, at 108-09; Marable, *supra* note 24, at 21.

158. Cf. R. FENNO, *supra* note 140, at 184 (elected office becomes a way of life not just a job; incumbents enjoy the prestige, the policy influence, and name recognition); *id.* at 178 ("The first term is the hardest. If you win election a second time, you're in for quite a while."); *id.* at 172, 174 (elected officials are more involved with their constituency both before and immediately after their first election); *id.* at 191-93 (once their electoral base is solidified, their interaction with constituents decreases significantly, dwindling to providing access to a core group of constitu-

ber districts. Because it is the first opportunity to penetrate the previously all-white council that stimulates participation, once the council is integrated, the symbolic importance of electoral visibility is reduced, especially where the representative has become a legislative token, incapable of influencing policy outcomes.<sup>159</sup>

In addition to the above, by focusing exclusively on election day turnout, the mobilization assumption fails to address any theory beyond symbolic political power.<sup>160</sup> The absence of a concept of representation that demands direct, extended accountability undermines the ability of poor black constituents to participate effectively within geographically insular and politically cohesive districts. The mobilization assumption ignores the need to encourage post election participation by black voters. As a result, their interests may simply be outweighed by the advantages of incumbency and the perks of patronage.<sup>161</sup>

Even if a black candidate is elected, black voter participation within a relatively homogeneous, insular district may not seem worthwhile because one black representative may not be able significantly to alter public policy. Constituents within isolated single-member districts have little influence over the behavior of representatives from other single-member districts.<sup>162</sup>

Moreover, where blacks form a core but passive electorate, some blacks may simply "manipulate racial symbols and language" to enlist

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ents; at the end of a lengthy career in Congress, for example, one representative did not even maintain a district office).

159. See *infra* notes 185-95, 241-42 (discussing problem of extending influence beyond geographically insular, homogeneous single-member districts where the black representative is a legislative token).

160. Black electoral success both within and without majority-black districts rewards black voters with "prestige" rather than "policies." See, e.g., A. REED, *THE JESSE JACKSON PHENOMENON: THE CRISIS OF PURPOSE IN AFRO-AMERICAN POLITICS* (1986); Reed, *A Critique of Neo-Progressivism in Theorizing about Development Policy: A Case from Atlanta*, in *THE POLITICS OF URBAN DEVELOPMENT* 199 (C. Stone & H. Sanders eds. 1987) [hereinafter Reed, *Neo-Progressivism*]; (political power often ineffective in delivering to core constituency where based simply on electoral strength) Reed, *The Black Urban Regime: Structural Origins and Constraints*, 1 *COMP. URB. & COMMUNITY RES.* 1 (1988) [hereinafter Reed, *The Black Urban Regime*].

161. Especially for established incumbents, tension often develops between representing constituent interests, on the one hand, and pursuing personal influence within the legislature, on the other. R. FENNO, *supra* note 140, at 215, 216, 218 (long-term incumbent experiences gradual erosion of local orientation in exchange for perception of governmental influence; legislative influence offered as a substitute for constituency access; allocation of resources to the reinforcement of constituency support declines over length of representatives' service). Representatives in general tend to perceive a conflict between their role as ombudsman and lawmaker. M. JEWELL, *REPRESENTATION IN STATE LEGISLATURES* 2 (1982). On the other hand, for some representatives, interaction with constituents is a "security blanket." R. FENNO, *supra* note 140, at 218. The conflict between political responsiveness and career development is one that a passive, economically depressed electorate is incapable of resolving.

162. See *infra* notes 185-95 and accompanying text.

support from the poorest black constituents.<sup>163</sup> Although these elected officials do not respond to constituent needs, under the authenticity and mobilization assumptions, their election and reelection equals black empowerment. Yet, in such circumstances, neither assumption generates sustained, empowering participation in the political process.

### C. *The Polarization Assumption*

The polarization assumption is based on evidence that, absent compelling reasons to do otherwise, whites and blacks vote for persons of their own racial/ethnic background.<sup>164</sup> Thus, in majority-white jurisdictions, racial bloc voting by a white majority inevitably causes the electoral defeat of black candidates. Given racial polarization, black electoral success theory assumes that majority-black single-member districts are needed to overcome black electoral exclusion and to ensure black representational presence. The theory posits that, once elected, black representatives will garner white support and become effective minority participants in legislative negotiations and deliberations.

As a general rule whites do not vote for blacks. Numerous court

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163. Marable, *supra* note 24, at 21 ("These charlatans rely on the old nationalist rhetoric of racial solidarity, but lack any progressive content and fail to deliver on a substantive agenda because they are detached from any social protest movement for empowerment or resistance.").

164. For purposes of racial bloc voting, white ethnics are considered white. *See, e.g.,* United Jewish Orgs. v. Carey, 430 U.S. 144 (1977) (Hasidic voters proportionately represented by white elected officials). Although blacks may prefer black candidates, they often do vote for white candidates, especially where no black candidate runs. At the local level Carl Eggleston, the first black elected to the Farmville, Virginia, city council following a successful § 2 lawsuit in 1984, experienced racial bloc voting after he rose to prominence in the State Democratic Party, and tried without success to gain reelection to the council from a majority-white district when he moved his residence. Mr. Eggleston explains his defeat as follows:

I really thought I had a chance . . . There were a lot of issues in the campaign, and the incumbent had voted wrong on a number of them and in general had lost touch. But I found out that the only issue people were interested in was race. Whites voted against me not on the issues, not on any stand I had taken, but just because I'm black. . . . People would come to the polls and talk out loud — I mean out loud — saying, "We've got too many blacks on council."

McDonald, *Votes of Confidence*, Found. News, Sept./Oct. 1988, at 27, 31.

decisions,<sup>165</sup> anecdotal reports,<sup>166</sup> surveys,<sup>167</sup> and scholarly studies<sup>168</sup> have confirmed the existence of racial bloc voting. Based on this overwhelming evidence, the polarization assumption concludes that whites still harbor racial prejudice.<sup>169</sup> Thus, mechanisms to surmount this

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165. *Rogers v. Lodge*, 458 U.S. 613, 623 (1982); *Gomez v. City of Watsonville*, 863 F.2d 1407, 1417 (9th Cir. 1988); *Jeffers v. Clinton*, 730 F. Supp. 196, 198 (E. D. Ark. 1989); *Brown v. Board of Commrs. of Chattanooga, Tenn.*, 722 F. Supp. 380, 393 (E.D. Tenn. 1989); *McNeil v. City of Springfield*, 658 F. Supp. 1015, 1027 (C.D. Ill. 1987); *Busbee v. Smith*, 549 F. Supp. 494, 495 (D.D.C.) (Young deposition at 9).

166. See Applebome, *Blacks and the Election: What Was the Message?*, N.Y. Times, Nov. 18, 1990, at A30, col. 2 [hereinafter Applebome, *Blacks and the Election*] (racially charged contests bring out white voters; white incumbent in North Carolina injected racial issues into the campaign in final days to win a massive white turnout that swamped black opponent); *The 1990 Elections State by State*, N.Y. Times, Nov. 8, 1990, at B8, col. 5 (poll of North Carolina voters showed that 65% of whites supported Jesse Helms while 93% of blacks supported his black opponent); Applebome, *Racial Politics in South's Contests: Hot Wind of Hate or a Last Gasp?*, N.Y. Times, Nov. 5, 1990, at A1, col. 5 (campaign commercial used white hands crumpling rejection letter as part of racial appeal against black opponent); see also Toner, *Unseating Helms: Rival Charts Uphill Climb*, N.Y. Times, July 16, 1990, at A12, col. 6 (although survey suggests 35% of whites backed a black candidate in the North Carolina Senate race, many preselection surveys in other states found whites often reluctant to admit to unknown interviewer their prejudice against black candidates); Applebome, *Drama Is Past Tense in Georgia Race*, N.Y. Times, July 16, 1990, at A12, col. 1; *Breakthrough in Virginia*, TIME, Nov. 20, 1989, at 54.

167. *Attitudes in Black and White*, TIME, Feb. 2, 1987, at 21 (survey of attitudes); see also Guinier, *supra* note 129, at 420-21 n.123 (citing 1987 Joint Center for Political Studies/Gallup survey in which 55% of whites said they would not vote for a black mayor regardless of qualifications).

168. Hahn, Klingman & Pachon, *Cleavages, Coalitions, and the Black Candidate*, 29 W. POL. Q. 507 (1976); Halley, Acock & Greene, *Ethnicity and Social Class: Voting in the 1973 Los Angeles Municipal Elections*, 29 W. POL. Q. 521 (1976); Walton, *Black Politics in the South: Projections for the Coming Decade*, in PUBLIC POLICY FOR THE BLACK COMMUNITY, *supra* note 15, at 77-100; see also F. PARKER, *supra* note 136, at 136 n.13; Bullock & Campbell, *Racist or Racial Voting in the 1981 Atlanta Municipal Elections*, 20 URB. AFF. Q. 149 (1984); Hero, *The Election of Hispanics in City Government: An Examination of the Election of Federico Pena as Mayor of Denver*, 40 W. POL. Q. 93, 94 (1987); Hero, *Multiracial Coalitions in City Elections Involving Minority Candidates: Some Evidence from Denver*, 25 URB. AFF. Q. 342, 344-46 (1989) [hereinafter Hero, *Multiracial Coalitions*]; Hero & Beatty, *The Elections of Federico Pena as Mayor of Denver: Analysis and Implications*, 70 SOC. SCI. Q. (1989).

169. Despite increased acceptance of blacks in social settings, many whites still harbor racial prejudice. See Delgado, *supra* note 132, at 316 n.87 (citing, *inter alia*, G. ALLPORT, *THE NATURE OF PREJUDICE* 79-80, 197-202 (1954)); Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 339 n.91 (1987) (social stereotypes can and do create their own social reality; racism as a product of the unconscious is more complex than either the conscious conspiracy of a power elite or the simple delusion of ignorant bigots; racism is part of common historical experience and, therefore, culture, arising from learned assumptions as well as from patterns of fundamental social activities); Pettigrew, *New Patterns of Racism: The Different Worlds of 1984 and 1964*, 37 RUTGERS L. REV. 673, 688-89 (1985); *Poll Finds Whites Use Stereotypes*, N.Y. Times, Jan. 10, 1991, at B10, col. 2 (whites believe blacks are less hardworking, more violence-prone, less intelligent, and less patriotic). The Reconstruction era specter of black political control continued to fuel white antipathy during the Mississippi voter registration drive of 1963. T. BRANCH, *supra* note 13, at 718; see also A COMMON DESTINY, *supra* note 143, at 11 (despite substantial consensus, in the abstract, on the broad goal of achieving an egalitarian society, white resistance to equality continues, especially when contemplating frequent interracial contact of long duration); cf. C. BULLOCK & H. RODGERS, *RACIAL EQUALITY IN AMERICA* 154-55 (1975); A. CAMPBELL, *WHITE ATTITUDES TOWARD BLACK PEOPLE* ch. 7 (1971) (citing evidence of unfavorable stereotypes of blacks).

prejudice and to ensure black electoral success are justified.

According to the polarization assumption, racial bloc voting within the electorate eliminates pluralist bargaining among shifting intergroup coalitions.<sup>170</sup> Where members of the majority consistently refuse to vote for minority-sponsored candidates, blacks are unable to attract enough dissatisfied majority group members to create an effective race neutral majority.<sup>171</sup> White ethnic groups never encountered the problem because, unlike blacks, "an unjust combination of a majority of the whole,"<sup>172</sup> was never so dominant as to silence white ethnic voices over an extended period of time.<sup>173</sup>

While pluralist theories of democracy do contemplate minority losses, they do not necessarily envision a minority that never wins. In other words, Madison's reliance on checks and balances to control "factions" was both a way to monitor the "special interest" problem *as well as* a hedge against the tyranny of a hostile majority. To fight permanent majority tyranny based on prejudice, voting rights litigation focused on promoting electoral opportunities for black candidates.

The polarization assumption posits that black incumbency tends to diminish prejudice and weaken stereotypes of black incompetence.<sup>174</sup> Black elected officials will assuage white fears by engaging more intimately in legislative deliberations after the election.<sup>175</sup> Black represen-

170. See, e.g., J. ELY, *supra* note 52, at 135; Davidson, *supra* note 76, at 5-10 (hostile white majority has "panoply of weapons at its disposal"; even if minority exercises electoral influence, winning candidates do not always pay attention to minority interests after the election; postelection pressure from white constituents may nullify minority "influence"); cf. Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275, 315 (1972) ("Race prejudice divides groups that have much in common (blacks and poor whites) and unites groups (whites, rich and poor) that have little else in common than their antagonism for the racial minority. Race prejudice, in short, provides the 'majority of the whole' with that 'common motive to invade the rights of other citizens' that Madison believed improbable in a pluralistic society.").

171. W. RIKER, *THE THEORY OF POLITICAL COALITIONS* 179-80 (1962) (blacks excluded by systematic agreement among whites who fear disequilibrium if any whites defect).

172. *THE FEDERALIST* NO. 51, at 346 (J. Madison) (P. Ford ed. 1898).

173. See, e.g., B. RINGER & E. LAWLESS, *RACE-ETHNICITY AND SOCIETY* 151-69 (1989) (duality of qualitatively different political treatment of racial minorities and white immigrants structured by constitutional underpinnings sanctioning two separate political-economic systems); see also *supra* notes 76-77.

174. Black elected officials, by virtue of their status and tenure, tend to assuage white fears during their incumbency. The power of incumbency is supported by studies which suggest that black incumbents are in fact reelected with more white support. See L. COLE, *supra* note 152, at 4-5; J. CONYERS & W. WALLACE, *supra* note 111, at 143-45; see also Johnson, *supra* note 153, at 37 ("among the white Cassandras who saw in a black man's election the impending ruin of their city, hate turned to mere dislike, and perhaps even to grudging respect, as the garbage still got picked up and the streets still got plowed").

175. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 732-735 (1985) (black representatives not necessarily pariahs since familiarity may diminish hostility); Karlan, *supra* note 6, at 216-18 (local governing bodies are intimate groups with ongoing relationships that

tation is "a crucial lever for obtaining the benefits — patronage, contracts, public services — that must be bargained for in the political arena."<sup>176</sup> Regarding black interests, black representatives will "exert special influence on their colleagues," providing "internal leadership" to which people defer.<sup>177</sup>

Black electoral success advocates assume that prejudice results from ignorance and unfamiliar difference. Once knowledge of similarities is present, or familiarity with differences is facilitated, these advocates contend that black and white elected officials will rationally overcome prejudice and engage freely and equally<sup>178</sup> in pluralistic bargaining or dialogic debate.<sup>179</sup> Particularly on the local level, in small scale, intimate settings, it is hypothesized that black representatives will persuade their colleagues to consider the interests or perspective

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enable a single black legislator to build legislative bridges; continuous, open voting opportunities also foster accommodation; institutional setting with debates, amendment processes and hearings encourages active participation of minority representatives); see also L. COLE, *supra* note 152, at 222 (the presence of black elected officials sensitizes white associates); Abrams, *supra* note 6, at 500 (increasing number of black representatives creates opportunities for greater cross-racial interaction and requires white officials to hear black officials articulate black interests); see also note 178.

176. Montague, *supra* note 152, at 58; see also Morris, *supra* note 152, at 277.

177. In recent interviews, members of the House of Representatives have acknowledged the importance of black elected officials. Roberts, *Letter Critical of Israel Stirs Political Fallout*, N.Y. Times, Mar. 25, 1988, at B8, col. 4; see M. JEWELL & S. PATTERSON, *THE LEGISLATIVE PROCESS IN THE UNITED STATES 197-98*, 211-12 (4th ed. 1986) (both national and state legislators take direct cues for decisionmaking from other legislators with specialized information); see also Barnett, *The Congressional Black Caucus: Illusions and Realities of Power*, in *THE NEW BLACK POLITICS*, *supra* note 14, at 28 (black representatives seek to influence congressional legislation on behalf of blacks at every step; black elected officials are an "authority structure" within the black community).

Some proponents of the polarization assumption go even further and suggest that coalition politics within the legislature may be more effective than attempts at the electoral level to break down racially polarized voting, especially because legislators have more voting opportunities to further the process of accommodation. These scholars hypothesize that the legislative process itself may maximize opportunities for a strong proponent of black interests to persuade sympathetic but less informed colleagues.

178. Robinson & Preston, *Equal-Status Contact and Modification of Racial Prejudice: A Re-examination of the Contact Hypothesis*, 54 *SOCIAL FORCES* 911 (1976).

179. Michelman, *Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation*, 56 *TENN. L. REV.* 291, 293 (1989) (deliberative politics suggests an openness to persuasion by reasons; deliberation involves argumentative interchange among equals); Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 *FLA. L. REV.* 443, 448 (1989) [hereinafter Michelman, *Conceptions of Democracy*] (strategic interaction, or classic pluralist interest-group politics, seeks coordination rather than cooperation based on self-interested bargaining not good-faith argument); Michelman, *Law's Republic*, 97 *YALE L.J.* 1493 (1988); Sunstein, *Interest Groups in American Public Law*, 38 *STAN. L. REV.* 29 (1985); cf. Abrams, *supra* note 6, at 500 ("Collegiality requires . . . that [white officials] give a hearing to the interests articulated by minority officials."); Sunstein, *Beyond the Republican Revival*, 97 *YALE L.J.* 1539, 1548 (1988) (civic republicans emphasize rationale deliberation covering ends as well as means); see also *infra* note 179 (assuming, first, a critical mass of allies for moral support and resonance and, second, a disaggregated majority, even a lone black may effectively rely on normative persuasion or on bargains within a pluralist exchange, especially in a small body where a face-to-face encounter is an unavoidable fact of life).



of black voters.<sup>180</sup>

Black activists have long recognized that blacks cannot become an *effective political majority* without legislative allies. Yet, electing black representatives may simply relocate to the legislature polarization experienced at the polls.<sup>181</sup> Indeed, some political scientists studying “the new black politics” in Cleveland, Chicago, and Atlanta have challenged the working assumption that black electoral success will ultimately reduce polarization.<sup>182</sup> Based on empirical studies of local black officials and city council members, these scholars argue that black representatives often become an ineffective, “seen but not heard” minority in the legislature.<sup>183</sup> Because the individual black elected official may not be able to overcome polarization to “infiltrate the decisionmaking process” at the legislative level,<sup>184</sup> the election of black representatives does not, by itself, translate into intergroup cooperation.

Black representatives may be perceived as tokens or marginalized in the legislative process.<sup>185</sup> Disillusionment produced by such mar-

180. See *supra* note 175 and accompanying text; see also F. Michelman, Justice Marshall's *Bolden* Dissent 5-6 (Nov. 28, 1990) (unpublished manuscript) (classical interest-group pluralist account would claim that racial bloc voting is “harder to sustain within the face-to-face dealings among a commission of three members than in the mass-political conditions in which members are elected”; politically salient issues may split two white members and encourage alliance with lone black; from a less strategic, dialogic perspective, “immediacy of . . . Black presence . . . [and] Black voice . . . in . . . daily encounters and public deliberations . . . make the difference”; see also letter from Frank Michelman to author (Dec. 19, 1990) (on file with author) (despite distinctions between normative persuasion and pluralist exchange, within either perspective a single black may be effective within a dialogic understanding or hold critical swing vote, especially in a small legislative body where critical mass of allies more likely). But cf. *infra* notes 185, 204-09, 220-32 and accompanying text.

181. Abrams, *supra* note 6, at 502 n.269 (contemporary record of intergroup cooperation is mixed); Karlan, *supra* note 73, at 41-43 & n.159 (giving blacks some seats on a multimember body poses no immediate threat to continued white predominance in the political process; voluminous literature on “tipping points” suggests gulf between black presence and influence); cf. *Apodaca v. Oregon*, 406 U.S. 404, 412-14 (1972) (having minority group representatives on jury does not assure outcome because they may simply be outvoted by majority).

182. Nelson, *supra* note 16, at 187 (black political influence in Cleveland moving in reverse); Preston, *supra* note 16, at 159, 163 (black political representation in Chicago fairly large but ineffective); Stone, *Race and Regime in Atlanta*, in *RACIAL POLITICS IN AMERICAN CITIES* 125 (R. Browning, D. Marshall & D. Tabb eds. 1990); Reed, *Neo-Progressivism*, *supra* note 160, at 199.

183. *Supra* note 182; see also S. CARMICHAEL & C. HAMILTON, *supra* note 18, at 7; J. WILSON, *The Negro in American Politics: The Present*, in *THE AMERICAN NEGRO REFERENCE BOOK* 453 (1966) (the larger the black population, the greater the perceived threat, and thus the greater the resistance to intergroup participation and dialogue).

184. See Coleman & McLemore, *Black Independent Politics in Mississippi: Constants and Challenges*, in *THE NEW BLACK POLITICS*, *supra* note 14, at 131, 151 (blacks may enjoy individual, vicarious access through black representatives but not meaningful political access in which demands are authoritatively decided upon).

185. Abrams, *supra* note 6, at 502; see also Michelman, *Law's Republic*, *supra* note 178, at 1523-24, 1530-32; Michelman, *supra* note 129, at 50-55; see also *infra* notes 199-203 and accompanying text.

ginality may frustrate attempts at further participation.<sup>186</sup> Without allies, the mere presence of even authentic black representatives does not assure a cooperative environment where normative persuasion and open exchange of ideas prevail.<sup>187</sup>

For example, in Arkansas, blacks successfully challenged a legislative redistricting plan that had produced only four majority-black districts.<sup>188</sup> Black legislators elected from those districts testified that they were an ineffective minority in the overwhelmingly white state legislature.<sup>189</sup> White representatives, including those representing districts with a substantial, extraordinarily poor black constituency, testified that they had no black employees working on their staffs.<sup>190</sup> In addition, these white representatives admitted to using racial slurs to refer to prominent blacks when conversing with other members of the legislature.<sup>191</sup> The presence of blacks in the electorate, one of the bases for the mobilization and polarization assumptions, failed to make these white legislators responsive, even though they represented substantially black constituencies.<sup>192</sup>

Successful black candidates from majority-black districts are also frequently unable to form legislative coalitions that build on and ex-

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186. Oreskes, *See Blacks in New York: The Anguish of Political Failure*, N.Y. Times, Mar. 31, 1987, at B1, col. 3 (failure of black elected officials to penetrate governing coalitions may reduce morale and participation within the black community in general).

187. *See infra* notes 210-32 and accompanying text. In a collective decisionmaking body, decisionmaking generally proceeds from public discussion and debate of policy issues to enactment of proposals using agreed upon mechanisms or decisional rules for ascertaining collective preference. Because of prejudice and inequality, black representatives may not participate meaningfully in either the deliberative or voting stages of collective decisionmaking.

188. *Jeffers v. Clinton*, 730 F. Supp. 196 (E.D. Ark. 1989) (three-judge court).

189. Trial transcript at IV-20, IV-30, 730 F. Supp. 196 (no. 89-004). Senator Jewell sought public office to "try and come in and see if I could do something inside and do so with complete integrity"; because black concerns meet a "very negative response." Representative McGee, unable to initiate legislation on the "real issues" of black concern such as "teenage pregnancy, housing, and education reforms," "decided that [his] role should be just to try and stop bad legislation."

190. Trial transcript at IX-51, 730 F. Supp. 196 (No. 89-004) (trial testimony of Nancy Balton, Rep. from Mississippi County).

191. Trial transcript at 178-79, 730 F. Supp. 196 (No. 89-004) (trial testimony of Senator Paul Benham, Jr. who referred to Jesse Jackson as a "coon" in conversations with other state legislators); *see also* *Major v. Treen*, 574 F. Supp. 325 (E.D. La. 1983) (three-judge court) (white state legislator voted against creating a majority-black Louisiana congressional district because "we already have one nigger bigshot" in reference to the black mayor of New Orleans); *cf. Busbee v. Smith*, 549 F. Supp. 494, 500 (D.D.C. 1982) (identifying a prominent member of the Georgia legislature as a "racist").

192. *Jeffers v. Clinton*, 730 F. Supp. 196, 214 (E.D. Ark. 1989) (Rep. Nancy Balton of Mississippi County voted against bill exempting very poor people from paying taxes to appease white middle-class constituents who felt that "poor people on welfare were living better than they were." In Mississippi County, per capita income is \$5685 for whites and \$2426 for blacks; 45% of black families, compared to 13.4% of white families, live in poverty.). *But cf. infra* note 239 (black constituency size has positive impact on legislative support for black issues).

pand their numerical power base. In the Arkansas legislature, the district court found: "Some white members, on being approached by black citizens in their own districts for help, referred these constituents to black legislators representing other areas. And black members have found it difficult to get white members to cosponsor some bills of interest to black voters. . . ." <sup>193</sup> As the most visible members of a stigmatized "out-group," black officials may even be harassed by local officials attempting to suppress black political activity. <sup>194</sup> At least within the black community, the perception is credible that black elected officials are selectively prosecuted. <sup>195</sup>

On the other hand, where black officials are successful in increasing their appeal to white voters, their ability and enthusiasm for advocating on behalf of their black constituents may be undermined. <sup>196</sup> These officials may, for example, attribute their success to individual personality and campaigning rather than issues. <sup>197</sup> These representa-

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193. 730 F. Supp. at 214.

194. See 730 F. Supp. at 210-11 (felony charges instigated by the county sheriff against a black lawyer and political candidate, the court concluded, were "designed to discourage [the black candidate] in particular and black political activity in general"); 730 F. Supp. at 212 (black attorney running for county judge threatened by "individuals wearing hoods," and subjected to official harassment by the county, which, after he lost, reduced its business with his funeral home, and paid premium rates to a "white" funeral home to bury black paupers). Even when blacks are elected by a landslide, they are often the victims of hostile gerrymandering to eliminate their districts. *Buskey v. Oliver*, 565 F. Supp. 1473 (M.D. Ala. 1983); *Busbee v. Smith*, 549 F. Supp. 494 (D.C. 1982).

195. Mathews, *Hooks Says Prosecutors "Overzealous,"* Phila. Inquirer, July 10, 1990, at 10A, col. 1 (NAACP convention delegates unanimously condemned unfair treatment of black elected officials by white prosecutors, citing as examples Mayor Tom Bradley of Los Angeles, Rep. William H. Gray (D. Pa.), Atlanta Mayor Maynard Jackson and former Atlanta Mayor Andrew Young; Executive Director Benjamin Hooks criticized as overzealous even the notorious prosecution of D.C. Mayor Marion Barry for perjury and drug possession); see also Farber, *U.S. Dismisses Charges Faced By Rep. Flake*, N.Y. Times, Apr. 4, 1991, at A1, col. 3 (many blacks viewed case as latest example of selective prosecution against black elected officials); Kaplan & Miller, *Persecution or Prosecution?*, NEWSWEEK, July 23, 1990, at 21 (enough high-profile cases make the perception of racial prosecution credible).

196. A. KARNIG & S. WELCH, *supra* note 60, at 112; Reed, *Neo-Progressivism*, *supra* note 160, at 199; see also Applebome, *As a Mayor Returns, Atlanta Is Rich and Poor*, N.Y. Times, Jan. 7, 1990, at D4, col. 3 (black civic and political leaders claim Atlanta's black mayor Andrew Young "squandered" opportunity to help the poor, who are overwhelmingly black; Young "helped the rich get richer, but the poor just got poorer"; Young's record and agenda were not much different from that of Atlanta's white business-oriented mayors); cf. *infra* notes 260-283 and accompanying text.

197. See C. GREEN & B. WILSON, *THE STRUGGLE FOR BLACK EMPOWERMENT IN NEW YORK CITY: BEYOND THE POLITICS OF PIGMENTATION* 85-113 (1989); cf. R. FENNO, *supra* note 140, at 241 (House members believe that voters are "equally or more interested in using issue presentations as an opportunity to judge representative as a person"; treatment of persons, not issues, is centerpiece of representational relationship); M. JEWELL, *supra* note 161, at 14; W. RIKER, *supra* note 171, at 207-08; Freedman, *One Struggle Over, Attention Turns to Guilt*, N.Y. Times, Oct. 29, 1989, at H5, col. 1 (black elected officials consumed by "cult of personality"); Marable, *supra* note 24, at 18, 20-21 ("post-black politicians," recruited from the professional classes, favor programs with little kinship to traditional civil rights agenda).

tives may also be coopted by the dominant majority and thus may effect little substantive change in policy.<sup>198</sup>

Once assimilated into the political mainstream, black officials may define their political agenda without reference to or consultation with a community base.<sup>199</sup> Their reference point may instead become other members of the governing elite with whom they share personal experiences and comparable "rank." With access to prestige rather than power, some black politicians may simply censor themselves in order "to play ball,"<sup>200</sup> or characterize political patronage as constituent servicing.<sup>201</sup>

Recognizing that authentic black officials may not be effectively

198. R. BROWNING, D. MARSHALL & D. TABB, *PROTEST IS NOT ENOUGH: THE STRUGGLE OF BLACKS AND HISPANICS FOR EQUALITY IN URBAN POLITICS* 56-61 (1984) ("access to mayor's office did not lead to full minority incorporation into city bureaucracy"); A. KARNIG & S. WELCH, *supra* note 60, at 14; C. STONE, *REGIME POLITICS: GOVERNING ATLANTA, 1946-1988*, at 242 (1989) (Atlanta white business interests secured place in governing coalition to safeguard special privilege; business elite exercised preemptive power over black middle-class politicians); Fainstein & Fainstein, *supra* note 117, at 189 (while black elected officials produce more government jobs and contracts for middle-class blacks, they fail to redirect government programs to benefit poor blacks); see generally Nelson & Van Horne, *Black Elected Administrators: The Trials of Office*, 34 *PUB. ADMIN. REV.* 526 (1974).

199. See Nelson & Van Horne, *supra* note 198, at 529. Even where elected from majority-black districts, black officials may be rewarded for individual achievement in unrelated fields. *Gingles v. Edmisten*, 590 F. Supp. 345 (E.D.N.C. 1984), *modified sub. nom.* *Thornburg v. Gingles*, 478 U.S. 30 (1986) (testimony at trial that only black elected to county office was former football star in Wake County, North Carolina). They may be effective public speakers but not spokespersons. See telephone interview with Norman Lockman, black journalist in Wilmington, Delaware (May 22, 1990) (black city council members in Wilmington are social workers, not power brokers); interview with Jerome Mondesire, Chief of Staff for the Philadelphia office of Rep. William Gray (May 6, 1990) (blacks often elect blacks to celebrate a cause not to advocate a legislative platform). They may become preoccupied with individual rather than group opportunity. *Id.*; see also THE NEW BLACK POLITICS, *supra* note 14, at 204 (Detroit mayor Coleman Young's political alliances and policy preferences shaped by patronage and economic gain, not community service). To the extent assimilation is a legal strategy for diffusing the redemptive force of citizen's movements, coopting local leadership, and ultimately maintaining existing power arrangements, it is inconsistent with the original aspirations of voting rights activists. See generally F. PIVEN & R. CLOWARD, *POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL* 181 (1979).

200. W. Singham, *The Political Socialization of Marginal Groups* (1966) (paper presented at American Political Science Association annual meeting), cited in S. CARMICHAEL & C. HAMILTON, *supra* note 18, at 15 n.4 (position within party hierarchy does not necessarily mean inclusion within decisionmaking process; blacks often "go along with all that talk" to make sure of continued access); see also S. CARMICHAEL & C. HAMILTON, *supra* note 18, at 12-14 (criticizing black elected officials who "play ball" to promote benefits of status and material gains for individual black constituents); R. KANTER, *MEN AND WOMEN OF THE CORPORATION* 208-09 (1977) (where minority group members are numerically dominated in a "skewed" grouping — less than 15% of an institution in which an overwhelming preponderance of another type is represented — they often have difficulty gaining peer acceptance and difficulty behaving "naturally"); C. SILBERMAN, *CRISIS IN BLACK AND WHITE* 204-06 (1964) (describing cooptation of black Chicago congressman).

201. See *supra* note 199. But see *Rutan v. Republican Party of Ill.*, 110 S.Ct. 2729, 2752 (1990) (dissenting opinion) (recognizing importance of patronage as powerful means of achieving social and political integration for excluded groups).

representing the black community does not require that we label all black politicians "as victims of 'false consciousness.'"<sup>202</sup> Authentic representatives are less able to participate effectively in intergroup deliberations primarily because of the dual effects of prejudice and minority status on group dynamics.<sup>203</sup>

To consider effectively all viewpoints, deliberation requires sustained communication and participation among equals.<sup>204</sup> Effective deliberation also demands that group members be receptive to relevant information and willing to compromise.<sup>205</sup> Members of a deliberating body should share information, exchange views, and debate the issues. In addition, the deliberation ideal contemplates consensus and cooperation derived from honest, good-faith interaction, and not heavy-handed normative pressure.<sup>206</sup>

Testimony from recent cases<sup>207</sup> and research into group processes,<sup>208</sup> however, demonstrate the corrosive power of prejudice

202. Ackerman, *supra* note 175, at 735-37. Ackerman defines false consciousness as minority group members' belief in unfavorable group stereotypes. I use the term to refer to tokenism in which individual advancement defines empowerment. False consciousness rationalizes the privileged position of some minority group members. Ackerman's critique of a "social-psychological" approach to analyzing minority legislative power may simply reflect a differing view of false consciousness or the still primitive development of legal analysis of group processes.

203. *See supra* note 169 and *infra* notes 210-29 and accompanying text. This observation affects collective decisionmaking bodies operating under either a pluralist interest group analysis or dialogic confrontation and contestation. *See supra* notes 179-80.

204. Cohen, *Deliberation and Democratic Legitimacy*, in *THE GOOD POLITY* 17, 22-23 (A. Hamlin & P. Pettit eds. 1989); *see* Sturm, *Toward a Jurisprudence of Public Law Remedies*, 79 *GEO. L.J.* (forthcoming 1991). In shifting coalitions with no repeated and continual losers, all potential participants must be "acceptable role partners." S. KASSIN & L. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES* 172 (1988) (first component of dynamic deliberation is one of independence and equality; indeed, in context of jury deliberations, courts often exclude from service people who might exert disproportionate influence); W. RIKER, *supra* note 171, at 162.

205. *See, e.g.*, Lempert, *Uncovering "Nondiscernible" Differences: Empirical Research and the Jury-Size Cases*, 73 *MICH. L. REV.* 643, 679-80 (1975); *Ballew v. Georgia*, 435 U.S. 223, 232-34 & n.21 (1978) (likelihood of compromise important phenomenon for fulfillment of jury common sense function); S. KASSIN & L. WRIGHTSMAN, *supra* note 204, at 173 (openness to informational influence is second component of deliberation ideal).

206. *See* S. KASSIN & L. WRIGHTSMAN, *supra* note 204, at 173; *see also* *Allen v. United States*, 164 U.S. 492, 501-02 (1896); Michelman, *Conceptions of Democracy*, *supra* note 178, at 448. I do not mean to imply, however, that all forms of pressure are coercive and necessarily opposed to honest interaction. Indeed, impassioned, personal, or dramatic appeals are consistent with fair political deliberation. *See, e.g.*, I. Young, *Justice, Democracy and Group Difference* 10 (Sept. 1, 1990) (unpublished manuscript prepared for presentation at American Political Science Association) (deliberative process does not require emotional detachment nor rigorous adherence to specific rules of argumentation; formal rules of argument may silence just as much as physical, economic, or political domination).

207. *See, e.g.*, *Jeffers v. Clinton*, 730 F. Supp. 196 (E.D. Ark. 1989); *Major v. Treen*, 574 F. Supp. 325, 334 (E.D. La. 1983) (three-judge court) (black legislators excluded from critical redistricting meeting).

208. *See* Latané, *Psychology of Social Impact*, 36 *AM. PSYCHOLOGIST* 343 (1981); Latané & Wolf, *The Social Impact of Majorities and Minorities*, 88 *PSYCHOLOGICAL REV.* 438 (1981). Some of the most important research is in studies of juries. The process of jury deliberation

on deliberations by collective decisionmaking bodies. Even where minorities are proportionately represented, they may find themselves without allies.<sup>209</sup>

To exert any influence, minority advocates must be consistent and confident.<sup>210</sup> Yet, to advocate consistently and sincerely on behalf of constituents with unpopular viewpoints a representative needs at least one ally.<sup>211</sup> Moreover, absent substantial minority companionship at the beginning of the deliberative process,<sup>212</sup> minority representatives may feel pressured to modify their position in response to the "considerable stress" inflicted by prejudiced majority group members.<sup>213</sup>

Black officials may not be treated with respect in a polarized deliberative process, especially if important debates take place in private, informal,<sup>214</sup> small group settings.<sup>215</sup> Formal rules and sanctions may limit public displays of prejudice and racism.<sup>216</sup> In informal settings,

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reveals much about the group dynamics of managing minority and majority viewpoints, developing consensus, and respecting the contribution of individual members. See, e.g., H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 462 (1966) (substantial minority viewpoint presence of 4 or 5 jurors out of 12 at beginning of deliberations usually necessary to influence jury outcome); S. KASSIN & L. WRIGHTSMAN, *supra* note 204, at 169-88).

209. See *supra* notes 181-83.

210. Nemeth, *Differential Contributions of Majority and Minority Influence*, 93 *PSYCHOLOGICAL REV.* 23, 26 (1986).

211. Psychologists experimenting on the effect of group pressure in a deliberating body conclude that the presence of allies is critical to minority members' integrity and influence. See R. KANTER, *supra* note 200; Asch, *Effects of Group Pressure Upon the Modification and Distortion of Judgments*, in *READINGS IN SOCIAL PSYCHOLOGY 2* (G. Swanson, T. Newcombe & E. Hartley eds. 1952); see also Williams v. Florida, 399 U.S. 78, 101-02 & n.49 (1970) (citing Asch's conformity experiments, Court reasons that in the context of jury deliberations, jurors in the minority are likely to be influenced by the proportional size of the majority aligned against them). But cf. S. KASSIN & L. WRIGHTSMAN, *supra* note 204, at 197 (it is the absolute, not proportional size that enables minorities to withstand normative pressure; the presence of a single ally is powerful determinant of ability to maintain independence).

212. See Asch, *supra* note 211; see also H. KALVEN & H. ZEISEL, *supra* note 208, at 463 (for one or two jurors to hold out to the end, a substantial minority needs to exist at the beginning of deliberations).

213. Maass & Clark, *Hidden Impact of Minorities: Fifteen Years of Minority Influence Research*, 95 *PSYCH. BULL.* 428 (1984); Nemeth, *supra* note 210, at 25 (high degree of stress may affect performance among minority group members); Nemeth & Wachtler, *Creative Problem Solving as a Result of Majority vs. Minority Influence*, 13 *EUROPEAN J. SOC. PSYCHOLOGY* 45 (1983) (majority assumes differing minority is incorrect and manifests outright "derision" towards minority); see also *supra* note 211.

214. See Delgado, *supra* note 132, at 314-18 (describing the confrontation theory and the formality/informality axis generated by the theory). "It is a sad truth that, even today, many minorities find success and relative relief from racism only in highly structured, rule-bound environments such as the Army." *Id.* at 321; see also Lawrence, *supra* note 169, at 341 n.100.

215. See *supra* notes 181, 211-12 and *infra* note 218.

216. This is the view presented in recent legal and political science literature. Delgado, Dunn, Brown, Lee & Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 *WIS. L. REV.* 1359, 1385-87; Lind, Thibaut & Walker, *A Cross-Cultural Comparison of the Effect of Adversary and Inquisitorial Processes on Bias in Legal Decisionmaking*, 62 *VA. L. REV.* 271 (1976); Thibaut, Walker & Lind, *Adversary Presentation and Bias in Legal Decisionmaking*, 86 *HARV. L. REV.* 386 (1972). Yet, "it is also true that

where conduct is less regulated, blatant "microaggressions"<sup>217</sup> against minority victims are more likely. The dynamics of informal groups within the legislature may therefore constrain black/white interaction and deliberation. The number of persons within the deliberative body may also influence the willingness of majority group members to consider minority viewpoints and to counterbalance bias. In smaller groups, minority group members may fail to make critical contributions and are less likely to participate effectively in the deliberation.<sup>218</sup>

In addition, the rules governing the deliberative process may circumscribe a minority group member's influence.<sup>219</sup> Differing decisional rules do not promote fair deliberation to the same extent. Where decisions are made by a simple majority vote, deliberation may be incomplete and less inclusive of minority viewpoints.<sup>220</sup> For example, the "social climate" of deliberation in juries using majority decision rules is more adversarial because members of the majority can reach a decision without responding to opposing arguments.<sup>221</sup>

demands for order, quiet, and 'civility' can also protect racism against effective, passionate challenge." Letter from Frank Michelman to author (Dec. 19, 1990) at 4 (on file with author).

217. Delgado, *supra* note 132, at 305 n.30 (citing C. Pierce, *Unity in Diversity: Thirty-Three Years of Stress*, Solomon Carter Fuller Lectures, American Psychiatric Assn. Meeting, Washington, D.C. (May 12, 1986)) (describing microaggressions as those "subtle, minor, stunning automatic assaults . . . by which whites stress blacks unremittingly and keep them on the defensive, as well as in a psychologically reduced condition").

218. *See, e.g.*, *Ballew v. Georgia*, 435 U.S. 223, 231 n.10, 233 (1978) (citing social science literature). Progressively smaller groups are less likely to engage in effective deliberation. R. HASTIE, S. PENROD & N. PENNINGTON, *INSIDE THE JURY* 228 (1983) (members of small dissenting factions "participate at lower rates in majority rule juries and are less satisfied with the jury verdict"). *But cf.* W. RIKER, *supra* note 171, at 51, 55 (in small groups, "considerations of maintaining the solidarity of the group and the loyalty of members to it probably often dominate considerations of maximum victory"; local governing bodies "are often operated as small groups in which considerations of loyalty and local solidarity outweigh rational calculations of advantage"; for example, in the South the zero-sum gain is between whites inside the system and blacks outside of it).

219. Some commentators have noted that public voting may pressure group members to join the majority and generally to behave less cooperatively. *See* S. KASSIN & L. WRIGHTSMAN, *supra* note 204, at 203-04 (public ballot prompts "verdict-driven style" of deliberation; formal commitment to a position creates advocates, not factfinders); J. NAGEL, *PARTICIPATION* 72-75 (1987) (voting enables an internally conflicted group to act and recognizes that legitimate differences exist within it; yet where conflict persists, use of other adversary decision procedures besides majority rule voting may be less divisive; majority rule balloting may produce a permanent minority; more inclusive would be a rule of proportionate outcomes, distributing goods on the basis of the numerical strength of competing factions or other appropriations formula, or decisional lotteries).

220. *See, e.g.*, R. HASTIE, S. PENROD & N. PENNINGTON, *supra* note 218, at 228-30 (dissenting or minority viewpoints are disadvantaged by nonunanimity rules); S. KASSIN & L. WRIGHTSMAN, *supra* note 204, at 201-02; M. SAKS, *JURY VERDICTS* (1977); Davis, Kerr, Atkin, Holt & Mech, *The Decision Processes of 6- & 12-Person Mock Juries Assigned Unanimous and Two-Thirds Majority Rules*, 32 *J. PERSONALITY & SOC. PSYCH.* 1 (1975); Nemeth, *Interactions Between Jurors as a Function of Majority Vs. Unanimity Decision Rules*, 7 *J. APPLIED SOC. PSYCHOLOGY* 38 (1977).

221. R. HASTIE, S. PENROD & N. PENNINGTON, *supra* note 218, at 112; *see also* Nemeth,

The presence of members of the minority group often exaggerates in-group solidarity among majority group members.<sup>222</sup> Whether “tokens” or proportionately represented, black elected officials may fail to generate cross-racial alliances. In groups where one race greatly outnumbered the other, group members may treat those in the minority as stigmatized racial tokens. In such “skewed” groups, cross-racial association, laden with cultural and racial overtones, is more difficult to sustain on an issue-by-issue basis.<sup>223</sup> As a result, the numerical minority may be socially segregated and stereotyped even in small, informal deliberative bodies. For example, one black elected official proportionately represented on a small city council operating by majority vote may be isolated and ignored.<sup>224</sup>

Thus, in order for minority groups to participate in winning coalitions, majority group members must be receptive to political bargaining<sup>225</sup> and deliberation.<sup>226</sup> Prejudice against minority group members inhibits admission to the governing majority, ensuring a strategically weak position as a permanent loser.<sup>227</sup> In a racially charged environment, the presence of black representatives may simply increase the

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*supra* note 220 (majority rule appears to suppress robust conflict, reduces the number of informational and opinion comments, shortens functional deliberation time, and undermines confidence in the outcome).

222. See *infra* notes 223-24, 229.

223. Some legislators resist alliance with minority group members because they fear their constituents will permanently identify them with “black” issues. See, e.g., Polman, “*Black Party*” *Image Splits Democrats*, Phila. Inquirer, Jan. 14, 1990, at A1, col. 1 (white party activists complain that Philadelphia’s Democratic Party is now seen by white voters as the “black party” since the city’s black mayor is a black Democrat); see also R. KANTER, *supra* note 200, at 209 (in racially imbalanced groups, racially dominant group controls both the group’s culture as well as the group; proportional representation of the minority, or at least 35% minority representation, is necessary to empower a minority within a working group); F. PARKER, *supra* note 136, at 135-36 (blacks have difficulty forming coalitions with white legislators on measures identified as black issues; bills identified with black caucus sponsors failed; only when white legislators take lead can blacks provide votes necessary to win).

224. See A. KARNIG & S. WELCH, *supra* note 60, at 14 (Blacks usually hold office as “one of a small minority unable to take decisive action — certainly not unilateral action.”); see also *supra* notes 218-21.

225. The model described here is essentially a pluralist one, because it remains the dominant political science explanation of contemporary political participation. See, e.g., B. BARBER, *supra* note 127, at 143-44 (pluralist model of “mainstream American political science” relies on self-interested groups formulating and aggressively pursuing private interests within a framework of competitive legislative bargaining); D. PINDERHUGHES, *supra* note 5, at 253-55 (pluralist theory presumes equivalence between all political and economic demands, and incremental decision-making based on bargainable issues).

226. See *supra* notes 179-80, 187 and accompanying text (describing deliberative ideal of normative persuasion model).

227. See W. RIKER, *supra* note 171, at 179-80 (where blacks excluded by systematic agreement among whites, no whites defect; no white factions so dissatisfied as to attempt to bring blacks into controlling coalition; black participants unable to attract dissatisfied whites because of intense fear shared by all white participants that breakup of white hegemony would yield devastating results).



value of white membership in the winning coalition.<sup>228</sup> Indeed, the majority may appear to improve its own position by refusing to meet the demands of a minority.<sup>229</sup>

Achieving some degree of reciprocity is essential to sustaining collaborative efforts.<sup>230</sup> Yet, without institutional incentives for cooperation, coalition-building serves only the temporary interests of white allies, who may limit their participation to issues that ultimately promote stability and majority rule. These allies may also choose to leave the coalition.<sup>231</sup> Thus, some scholars, most notably Professor Derrick Bell, have concluded that black rights are recognized only when and to the extent that they coincide with the interests of those in power.<sup>232</sup>

Finally, the mere presence of black officials in the legislature furthers neither the goals of the integrationists nor the nationalists. The integrationists were always concerned with coalition building.<sup>233</sup> They correctly perceived that electoral coalitions affect the ability of representatives to govern.<sup>234</sup> Thus, for some integrationists, coalition build-

228. See W. RIKER, *supra* note 171, at 95-96 (size principle reflects tendency of winning coalitions to minimize size in order to divide gains among fewer persons; role of minority opposition is to create value in coalition of the whole). Empirical studies suggest that black candidates frequently seek to create electoral coalitions with white liberals, but often fail. See, e.g., R. BROWNING, D. MARSHALL & D. TABB, *supra* note 198; see also Johnson, *supra* note 153, at 34, col. 2 (For blacks, the inevitable outcome of a rainbow coalition that does not emphasize black representation is that "black folks get all the rain and white folks get all the bows.") (quoting Thomas N. Todd); Holloway, *Negro Political Strategy: Coalition or Independent Power Politics?*, 49 SOC. SCI. Q. 534 (1968); cf. S. CARMICHAEL & C. HAMILTON, *supra* note 18, at 7 (white groups solidify when confronted with black demands).

229. See W. RIKER, *supra* note 171, at 139.

230. See, e.g., C. STONE, *supra* note 198, at 8 (in the absence of coercion, achieving cooperation requires constant effort, most often through mechanisms to ensure reciprocity). Especially where they are also dependent on support from the white majority, coalitions between minority groups may also be tenuous and susceptible "to disintegration in the crucible of day-to-day governing." Hero, *Multiracial Coalitions*, *supra* note 168, at 349; see also Guinier, *supra* note 129, at 416 ("reciprocity in bargaining requires the active promotion of black interests, not just occasional subvention" of civil rights issues; "black legislative issues can be ghettoized from the Left as well as the Right").

231. See Matsuda, *supra* note 1, at 348 (volunteers from the ranks of the privileged can leave a cause with the same privilege of choice with which they joined); *supra* notes 223, 228; see also W. MARTIN, *THE MIND OF FREDERICK DOUGLASS* 25 (1984) ("whites became abolitionists out of choice; blacks were abolitionists out of necessity").

232. See, e.g., D. BELL, *AND WE ARE NOT SAVED* (1987) D. BELL, *RACE, RACISM AND AMERICAN LAW* (1980); Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

233. See, e.g., M.L. KING, JR., *supra* note 22, at 150; Rustin, "Black" Power and Coalition Politics, COMMENTARY, Sept. 1966, at 35; Rustin, *From Protest to Politics: The Future of the Civil Rights Movement*, COMMENTARY, Feb. 1965, at 25. Dr. King consistently acknowledged the importance of coalition building. M.L. KING, JR., *STRIDE TOWARD FREEDOM* 34 (1958); T. BRANCH, *supra* note 13, at 875; 884 (quoting Walter Reuther).

234. C. STONE, *supra* note 198, at xi-xii (electoral coalition not equivalent of governing coalition; political regime dependent on getting strategically positioned people to act together); Hero, *Multiracial Coalitions*, *supra* note 168, at 343; see also B. FERMAN, *GOVERNING THE UN-GOVERNABLE CITY* (1985); J. MOLLENKOPF, *THE CONTESTED CITY* (1983); T. SWANSTROM,

ing was at the heart of governability. The nationalists also expected more than token representation. For the nationalists black political power meant significant participation in political decisionmaking.<sup>235</sup> Thus, without "more meaningful structures, forms and ways of dealing with long-standing problems," the nationalists felt that political participation did not empower black representatives who enjoyed only a token or proportionate numerical presence.<sup>236</sup>

The polarization assumption ignores these insights. The assumption's hypothesis about the nature of prejudice simply requires blacks to avoid direct electoral competition with whites. Given residential segregation, the assumption supports district election structures to reconfigure a heterogeneous, polarized electorate into a homogeneous one.<sup>237</sup> The assumption correctly perceives that district elections favor black electoral success "because black candidates seeking district seats can steer clear of direct competition with white candidates."<sup>238</sup> District elections also provide greater opportunities to elect people of

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THE CRISIS OF GROWTH POLITICS (1985) (arguing importance of coalition building and political struggle).

235. See *supra* notes 47-48 and accompanying text.

236. Some nationalists anticipated the arguments advanced here. See S. CARMICHAEL & C. HAMILTON, *supra* note 18, at 173-77 (mere election of a few blacks will not solve problem of political representation; black visibility within present institutions of political representation is not black power).

237. F. PARKER, *supra* note 136, at 136, 147 (black representation limited by number of majority-black legislative districts); Note, *Law and Racial Geography: Public Housing and the Economy in New Orleans*, 42 STAN. L. REV. 1251, 1265 nn.79-80 (1990) [hereinafter Note, *Racial Geography*] (black physical/geographic solidarity necessary for political power). *But cf.* Gomez v. City of Watsonville, 852 F.2d 1186 (9th Cir. 1988) (for geographically dispersed minority living in pockets of residential segregation, minority districts may not capture all, or even most, minority voters; those outside the district are merely "virtually" represented). Compare Gingles v. Edmisten, 590 F. Supp. 345, 383 (E.D.N.C. 1984), *modified sub. nom.* Thornburg v. Gingles, 478 U.S. 30 (1986) (no judicially manageable way to measure black influence in majority-white districts). In a residentially segregated community, district elections use a territorially defined constituency as a proxy for interest representation. The use of single-member districts is also premised on the "ubiquity of territorially based representation in American government"; see F. Michelman, Justice Marshall's *Bolden* Dissent 9 (Nov. 28, 1990 draft) (unpublished manuscript).

238. A. KARNIG & S. WELCH, *supra* note 60, at 29. Most research reveals significant links between district elections and greater black electoral success. See, e.g., Davidson, *supra* note 76, at 5-6; see also Campbell & Feagin, *Black Politics in the South: A Descriptive Analysis*, 37 J. POL. 129, 143 n.28 (1975); Engstrom & McDonald, *The Election of Blacks to City Councils: Clarifying the Impact of Electoral Arrangements on the Seats/Population Relationship*, 75 AM. POL. SCI. REV. 344 (1981); Gelb, *Blacks, Blocs and Ballots*, 3 POLITY 45 (1970); Jones, *The Impact of Local Election Systems on Black Political Representation*, 11 URB. AFF. Q. 345 (1976); Karnig, *Black Representation on City Councils*, 12 URB. AFF. Q. 223, 223 (Dec. 1976); Karnig, *Black Resources and City Council Representation*, 41 J. POL. 134 (1979); Kramer, *The Election of Blacks to City Councils: A 1970 Status Report and a Prolegomenon*, 1 J. BLACK STUD. 443, 449 (1971); Robinson & Dye, *Reformism and Black Representation on City Councils*, 59 SOC. SCI. Q. 133, 133-34 (1978); Taebel, *Minority Representation on City Councils: The Impact of Structure on Blacks and Hispanics*, 59 SOC. SCI. Q. 142, 151 (1978).

lower income, education, and status.<sup>239</sup>

Thus, the assumption's predominant enforcement mechanism is black representational control of majority-black districts. This enforcement mechanism enables blacks, through their representatives, to put their case to the legislative majority. Given the prejudices and desires of that majority, however, the mechanism hardly guarantees blacks any real legislative influence.

Although efforts to increase black representation have an independent value,<sup>240</sup> prejudice may simply transfer the "gerrymandering"<sup>241</sup> problem from the electorate to the legislature. Black electoral visibility is useless if district-based electoral arrangements gerrymander legislative decisionmaking and reproduce in the legislature a mirror image of a racially skewed electorate. With few exceptions, the litigation and activist strategy has thus far failed to anticipate the inevitable third-generation problem: the deliberative gerrymander.<sup>242</sup>

Blacks elected from black single-member districts are less empowered to influence their white colleagues, whose homogeneous white single-member district base enables them to ignore black interests without adverse electoral consequences. For this reason Thernstrom and other conservative critics of the assumption's enforcement mechanism assert that the preoccupation with creating majority-black districts "ghettoizes" black issues.<sup>243</sup> These critics argue that "minority

239. See, e.g., F. PARKER, *supra* note 136 (single-member districts dramatically increased number of black elected officials in Mississippi); S. WELCH & T. BLEDSOE, *URBAN REFORM AND ITS CONSEQUENCES* 35-36, 42-46, 50 (1984) (district electoral system helps new urban forces of ethnic-minorities, neighborhood-based groups, and those groups most spatially segregated, such as blacks, to balance political power of conservative urban organizations; at-large systems disproportionately favor those with greater financial resources); cf. Ackerman, *supra* note 175, at 726-28 (discrete, insular minorities enjoy district-based organizing advantages).

240. See *supra* notes 124-33, 145 and accompanying text; cf. *Holland v. Illinois*, 110 S.Ct. 803, 816 (1990) (black jurors' citizenship right to serve on juries affirms their status as equal participants in criminal justice administration); *Batson v. Kentucky*, 476 U.S. 79, 87 (1986) (same).

241. As generally used, the term gerrymandering refers to political manipulation that unfairly excludes or disadvantages a distinctive group within the process of drawing district boundaries. See *Gomillion v. Lightfoot*, 364 U.S. 338 (1960) (classic gerrymander altered municipal boundaries, created uncouth 28-sided figure and removed all but 4 blacks from city limits); McDonald & Engstrom, *Detecting Gerrymandering*, in *POLITICAL GERRYMANDERING AND THE COURTS* 178 (B. Grofman ed. 1990); see also *infra* notes 315-16 and accompanying text.

242. Deliberative or "legislative gerrymander" is a term suggested to me by my colleague Seth Kreimer. See *infra* notes 315-17 and accompanying text (describing deliberate exclusion and diminution of black legislators from critical policymaking meetings or from sharing critical appropriations authority).

243. A. THERNSTROM, *supra* note 67, at 7; Schuck, *What Went Wrong With the Voting Rights Act*, WASH. MONTHLY, Nov. 1987, at 51, 55; Thernstrom, "Voting Rights" Trap, NEW REPUBLIC, Sept. 2, 1985, at 21, 23. This same argument was made by congressional opponents to the 1982 amendments. See S. REP. NO. 417, 97th Cong., 2d Sess. 103 (additional views of Sen. Orrin Hatch) (arguing that majority-black single-member district would be nothing more than "political ghettos for minorities" in which "minority influence [would] suffer enormously").

representation might actually be increased not by raising the number of black officeholders [elected from black-districts], but by increasing the number of officeholders, black or white, who have to appeal to blacks to win."<sup>244</sup>

Both conservatives and liberals underestimate the enduring significance of racial polarization to minority empowerment. Thernstrom's call for virtual representation of minority interests by white politicians elected at large reinforces existing unfairness. By ignoring the phenomena of racial bloc voting and white prejudice, Thernstrom rationalizes current distortions in legislative deliberation and bargaining.<sup>245</sup> Similarly, liberal justifications of majority-black districts overlook the negative impact that a prejudiced majority legislative faction may have on the effectiveness of black voters. Black representatives may transcend electoral polarization only to reexperience legislative exclusion because of third generation legislative or deliberative gerrymandering.

Recent voting rights scholarship also fails to consider fully the legislative implications of the polarization hypothesis. For example, Professor Abrams' model of interactive participation suggests that black interests are best represented by aggregating minorities and sympathetic whites within multiracial districts.<sup>246</sup> Abrams' extended, interactive participation model fails to recognize, however, that intergroup cooperation in a polarized environment requires structural support at each stage of the political process if black political influence is not to be contained at every opportunity.<sup>247</sup>

Professor Karlan's cogent process-based civic inclusion theory is

244. Thernstrom, *supra* note 243 at 21.

245. See *supra* notes 185-92 and accompanying text.

246. For example, Abrams promotes minority sponsored white candidates, elected from within a geographically splintered districting plan, to represent blacks. But these representatives may experience, despite the multiracial nature of their constituency, the same hostility from their colleagues as do black representatives. As a result, such coalition candidates may fail to advocate aggressively on behalf of their least popular, namely black, constituents. Instead, they may compromise the needs of the more stigmatized members of their electoral base in order to obtain any success on behalf of the coalition. See J. CONYERS & W. WALLACE, *supra* note 111, at 144-45 (some black officials elected by multiracial coalitions feel obligation to satisfy white constituents); cf. Guinier, *supra* note 129, at 394, 427-29 (describing dilemma of black voters who are either taken for granted or ignored).

For Abrams, the "generation of cooperative political behavior" is independent of black representation, and a development that voting rights enforcement should pursue without prerequisites. This unwillingness to recognize the polarization hypothesis undermines her otherwise important contribution.

247. For blacks, in whose embryonic political life each gain has been both hard fought and ultimately evaded, special protection from normal political behavior is considered necessary before they can answer the question Abrams asks — "How do those who exert themselves effectively within the system behave?" Abrams, *supra* note 6, at 490 n.218. Without structural support to protect blacks from majority prejudice and to insure effective representation of black interests, Abrams' interactive model of political influence is indeterminate and inaccessible.

also flawed. Essentially the theory would broaden the scope of judicial inquiry from current concerns about geographic districting to more substantive issues such as direct minority participation and decisional responsiveness to minority interests. Enforcement of dilution claims, if based on civic inclusion values, would transcend current judicial preoccupation with majority-black single-member districts and other easy-to-apply mathematical rules.<sup>248</sup>

Karlan's response to the polarization assumption, however, ends with legal protection to ensure minority presence.<sup>249</sup> In this sense, Karlan's vision is as optimistic as Abrams. Both scholars fail to consider the enduring effect of racism and prejudice on members of both the majority and minority group throughout the political process.<sup>250</sup>

#### D. *The Responsiveness Assumption*

The responsiveness assumption suggests that black representatives share the original civil rights vision, which targeted the least well off members of the community. In this assumption, black voters gain substantive policy influence by electing racial compatriots with special attachment to and understanding of the black community and its distinctive interests.<sup>251</sup> The assumption also portrays black elected repre-

248. Informed by the value of civic inclusion, Karlan's vision of voting rights litigation is interactive like Abrams' but more committed to authentic minority representation. Karlan, *supra* note 6, at 218 (promoting diversity of representation to ensure fuller deliberation based on a richer perspective and to legitimize the governing body as a democratic instrument).

249. Karlan attempts to answer the wrong question: whether blacks are better off with several mildly sympathetic whites or one aggressive "black" representative. In casting her vote with the "authentic" black representative, Karlan maneuvers around the implications of the deliberative gerrymander. For Karlan, a process in which black voters elect black representatives who fail, because of majority prejudice or minority cooptation, to advocate forcefully on behalf of their constituents can still be a fair process as long as black representatives are allowed to participate within legislative deliberation and dialogue.

250. Abrams denies its influence on voter choice. Karlan understands profoundly the pervasiveness of polarization within the electorate, and she also takes important preliminary steps to address structural barriers that deny black representatives civic legislative inclusion. Karlan, *supra* note 6, at 237-48 (discussing supermajority decisional rules and the rotation of powers as potential remedies to legislative exclusion). But Karlan still tends to measure success by the number of blacks elected. Although Karlan acknowledges the Voting Rights Act's goal to reconstruct society, a civically inclusive society would be more open, more accessible, but not necessarily more equal. Legislative inclusion, although critical, does not produce equal outcomes dependably, especially when relying primarily on the ameliorative role of familiar, intimate association in small, collegial decisionmaking bodies. *Id.* at 240: "[W]hile the claim for equal political access is always legitimate, the claim for a particular substantive outcome to the governing process is not."

251. See *supra* note 177; Hamilton, *Public Policy and Some Political Consequences*, in PUBLIC POLICY FOR THE BLACK COMMUNITY, *supra* note 15, at 237; see also *Extension of the Voting Rights Act: Hearings on H.R. 3112 Before the Subcomm. on Civil and Constitutional Rights of the House Judiciary Comm.*, 97th Cong., 1st Sess. 365-80 (1982) (testimony of Henry Marsh, Mayor, Richmond, Va. and Michael Brown, Coordinator, Va. St. Conf. of NAACP); *id.* at 590-742 (testimony of Laughlin McDonald, Director, Southern Regional Office, ACLU); J. ELY, *supra* note 52, at 86-87; D. GLASGOW, *THE BLACK UNDERCLASS: POVERTY, UNEMPLOYMENT, AND*

sentatives as the first line of defense against racist legislation.<sup>252</sup>

Advocates of the responsiveness assumption believe that black elected officials will discharge their official duties differently than white officials.<sup>253</sup> Black elected officials will intuitively understand the positions favored by their black constituents.<sup>254</sup> Their black constituents also will enjoy a special relationship with black representatives.<sup>255</sup> Thus, increasing the number of black representatives effectively influences legislative policy debates and leads to more favorable substantive political outcomes.

Empirical evidence of racial bloc voting supports the assumption that blacks, to a great extent, are ideologically homogeneous on many issues.<sup>256</sup> Black voting patterns reflect two decades of consensus on

ENTRAPMENT OF GHETTO YOUTH 22 (1980). Thus, membership in the "victimized" group suggests a special sensitivity and loyalty to a victim perspective. T. BRANCH, *supra* note 13, at 895; S. WELCH & T. BLEDSOE, *supra* note 239, at 23 (issue of concern to most black city council members appears to be civil rights); Matsuda, *supra* note 1, at 326, 333-35 (black Americans are the paradigm victim group of our history with distinct normative insights); Morris, *supra* note 152, at 277.

252. See *supra* note 52.

253. See, e.g., F. PARKER, *supra* note 136, at 134-35; see also Applebome, *King Holiday Observances Point Out Both Pain and Triumphs*, N.Y. Times, Jan. 16, 1990, at B4, col. 1 (first black mayor of New York City greeted marchers observing the Martin Luther King, Jr., National Holiday, while marchers critical of white predecessor had been stopped by barricades holding them at the edge of City Hall Park; quoting march leader, "Today we marched as the included. The last time we marched in protest. Today we march to participate."). The core idea of the black advocacy perspective is that doing something about the problem of racial discrimination means attention to issues from the perspective of those experiencing discriminatory conditions. Freeman, *supra* note 7, at 98; see also Ackerman, *supra* note 178, at 733 n.35, 735, 744-45.

254. L. COLE, *supra* note 152, at 114, 233. Black representatives themselves acknowledged special insights. "If you are a minority person you know what's needed. And what you do is go about the business of trying to fill that need." *Id.* at 89.

255. M. JEWELL, REPRESENTATION IN STATE LEGISLATURES 94 (1982) (black constituents do have special relation to black representatives, who represent a broader constituency than electoral district); see also Gingles v. Edmisten, 590 F. Supp. 345 (E.D.N.C. 1984), *modified subnom.* Thornburg v. Gingles, 478 U.S. 30 (1986) (trial testimony of Frank Ballance; black in North Carolina considered his own representative in the 1950s to be Harlem's black congressman Adam Clayton Powell, Jr.). J. ABERBACH & J. WALKER, RACE IN THE CITY (1973); Sears, *Black Attitudes Toward the Political System in the Aftermath of the Watts Insurrection*, 13 MIDWEST J. POL. SCI. 515 (1969) (blacks believe that black elected officials more trustworthy than white elected officials); see also Jeffers v. Clinton, 730 F. Supp. 196 (E.D. Ark. 1989), *modified* 756 F. Supp. 1195, *affd.* 111 S. Ct. 662 (1991) (three-judge court) (some white state legislators refer black constituents from their electoral districts to black legislators representing other areas); L. COLE, *supra* note 152, at 109, 111; Lee, *The Black Elected Official and Southern Politics*, in THE BLACK POLITICIAN *supra* note 64, at 85-86 (black elected official effective because of identification with frustrations of blacks who "know what it feels like to want someone in government who can be trusted"). *But cf.* Joint Center for Political and Economic Studies, FOCUS MAGAZINE, TRENDLETTER, 2 (Apr. 1988) (reporting results of 1987 Gallup survey) (blacks write letters and lobby to a much lesser extent than whites).

256. See e.g. C. Hamilton, *Measuring Black Conservatism*, in THE STATE OF BLACK AMERICA 47-51 (ed. J.D. Williams 1982); Seltzer & Smith, *Race and Ideology: A Research Note Measuring Liberalism and Conservatism in Black America*, 46 PHYLON 98 (1985); Welch & Combs, *Interracial Differences in Opinion on Public Issues in the 1970's*, 7 WEST. J. BLACK STUD. 136 (1983). Black voting patterns reflect near unanimity in contests in which a viable

the need for greater civil rights enforcement, social welfare expenditures, and government intervention in domestic affairs.<sup>257</sup> Thus, advocates of the responsiveness assumption claim that if more blacks are elected, black voters will be able to reshape the way laws are made and tax dollars are spent to reflect their interests.<sup>258</sup>

Four difficulties exist with the responsiveness assumption. First, the assumption relies too heavily on the singular advancement of authentic individual black officials to transform the status of the group as a whole. Depending on black politicians to shoulder so much of the burden of redistributing resources and power is naive.<sup>259</sup> Even when genuinely concerned, the status of black representatives as "assimilated" members of the political establishment may threaten their commitment to community-based models of reform.<sup>260</sup> Thus, although feasible, the civil rights movement's goals of government intervention on behalf of the poor may not be generally acceptable to many politicians.<sup>261</sup>

Second, the responsiveness assumption fails because of the message already conveyed to black elected officials by the authenticity assumption. The authenticity assumption converts black elected officials into group spokesmodels without continuously articulating either the basis for a cohesive, community agenda or the responsibility to develop any

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black candidate competes and in presidential contests in which blacks overwhelmingly support the Democratic candidate. See T. CAVANAGH, *INSIDE BLACK AMERICA* (1985).

257. See *supra* notes 41-46 and accompanying text; cf. *Thornburg v. Gingles*, 478 U.S. 30, 51, 57 n.25 (1986) (black representatives are those black-community-sponsored candidates whose election reflects the community's "distinctive minority group interests"); S. WELCH & T. BLEDSOE, *supra* note 239, at 23 (civil rights is issue of concern to most black city council members). Some social science studies tend to support the assumption of consensus. See R. BROWNING, D. MARSHALL & D. TABB, *supra* note 198; N. NIE, S. VERBA & J. PETROCIK, *THE CHANGING AMERICAN VOTER* 253-55 (1979) (no other group as distinctly liberal as blacks as a group in terms of position on central issues).

258. See Herring, *Legislative Responsiveness to Black Constituents in Three Deep South States*, 52 J. POL. 740 (1990); Marable, *Foreword to THE NEW BLACK VOTE*, *supra* note 48, at 1; Morris, *supra* note 152, at 271. But cf. Bullock, *Congressional Roll Call Voting in a Two-Party South*, 66 SOC. SCI. Q. 789 (1985); Whitby, *Effects of the Interaction Between Race and Urbanization on Votes of Southern Congressmen*, 10 LEGIS. STUD. Q. 505 (1985).

259. A. KARNIG & S. WELCH, *supra* note 60, at 13-14 (some people have clung to unrealistic hopes about black elected "supermen and superwomen" who could "cure the ills of three centuries overnight").

260. See *supra* notes 196-201 and accompanying text. See generally Reed, *supra* note 4, at 67; Austin, *supra* note 124; J. Bond, *Winning the Ballot, Losing the War: The Paradox of Minority Empowerment*, HARV. C.R.-C.L. L. REV. Symposium, Mar. 3, 1990, at 3 (transcript on file with author) (lack of mobilized constituency base to provide "will" for change causes black elected officials to limit their agenda; in addition, class of locally elected black officials has been captured by black entrepreneurs rather than black community based activists).

261. A. KARNIG & S. WELCH, *supra* note 60, at 14; see also D. PINDERHUGHES, *supra* note 59, at 109 (to serve constituents' interests black politicians in Chicago in the first decades of this century faced paradox of highlighting issues that provoke strong resistance from other organized groups).

agenda. The role model is a spokesmodel simply by virtue of being a black elected official.

Yet, as already discussed, black politicians may be electorally successful without being authentic.<sup>262</sup> The authenticity assumption implicitly encourages black representatives to view their personal advancement as a group advantage and to position themselves to seek higher status based on the attendant privileges of seniority.<sup>263</sup> Elected from "safe" districts, black representatives can afford to spend less time "at home."<sup>264</sup> Thus, black representatives may act even more independently than the responsiveness assumption contemplates.

Third, the vision that prompted the shift from protest to politics may have overestimated the transformative possibilities of electoral activity. Electing individual candidates, even those who are effective and accountable, may fail as a means of creating and redistributing political power and economic wealth.<sup>265</sup> Of course, black electoral success alone cannot transform the depressed political and economic state of the black community, especially given that blacks are concentrated in politically impotent and economically isolated parts of urban metro-

262. See *supra* notes 196-201 and accompanying text. This is consistent with game theories of leadership incentives. See, e.g., W. RIKER, *supra* note 171, at 203-08 (pluralist system devises reward structure that encourages opportunism; system prefers leaders who want absolute power, prestige and maintenance of position). The benefits of incumbency may insulate the beneficiary from electoral pressure, undermining the assumption that electoral ratification insures substantive policy advocacy. Abrams, *supra* note 6, at 487 n.214; see W. RIKER, *supra* note 171, at 207-08. The promotion of professional political careers, exemplified in the 98% reelection rate of incumbents to Congress, affects white as well as black politicians; but then whites' expectation for government attention is lower. Even within state legislatures, the trend is toward longer tenure and professionalization of their positions. See M. JEWELL, *supra* note 161, at 5.

263. See *supra* notes 147-51, 196-201. This is similar to the critique of the message conveyed by black middle-class success as that of individual advancement at the expense of social and group consciousness.

264. See *supra* notes 160-63. *But cf.* S. WELCH & T. BLEDSOE, *supra* note 239, at 24 (black city council members appear more conscious of constituents and are more likely than whites to schedule regular meetings with them; casework may simply be more important to more needy black constituents).

265. See *supra* note 198; Barnett, *supra* note 15, at 41 ("hodge-podge of well-meaning but limited social programs [cannot] actually end poverty"). White ethnic groups are often cited as successful models for political empowerment. But these groups used politics to legitimize and enhance preexisting social and economic assimilation. They viewed political participation as a primary means of assisting and facilitating the redistribution of economic and social goods that was already ongoing. See J. ELY, *supra* note 52, at 80-81; Barnes, *supra* note 149, at 264 (difference in assimilation for whites and blacks is that "other ethnic groups haven't felt as deprived socially and economically as the blacks," (quoting Professor Seymour Lipset, Stanford University)); Wildstrom & Stodghill, *supra* note 162, at 49; *cf.* Pohlmann, *Race-Ethnicity and Society* (Book Review), 105 POL. SCI. Q. 165 (1990) (urban political machines had diminished as assimilation agents when racial minorities attempted to press for political power). White ethnic groups, who were not as deprived socially and economically as are blacks, relied on politics for symbolic status recognition, not wealth redistribution. Barnes, *supra* note 149, at 264 ("What these other groups were looking for is sort of symbolic status recognition — 'We've made it in America.' The blacks are looking for more," (quoting Professor Lipset)).



polititan areas where racial polarization continues.<sup>266</sup> The limitations of black electoral success are also evident when blacks are concentrated in the least influential positions<sup>267</sup> or are elected to posts in largely black municipalities without significant economic resources.<sup>268</sup> The theory is problematic regardless of whether black electoral mobilization positively correlates with white legislative support for black issues.<sup>269</sup>

In response, one might argue that if the goals of poor blacks are restated to appeal more universally to poor and working class whites,<sup>270</sup> then platforms benefiting blacks disproportionately need not alienate whites.<sup>271</sup> Yet, as discussed in conjunction with the polarization assumption, representatives who retain a community-based or generally progressive consciousness may still be ineffective in a polarized legislature. In addition, empirical evidence suggests that race, not class, more often defines political preference.<sup>272</sup>

Fourth, the responsiveness assumption presumes that elections provide the policy issue control postulated by early political scientists of representation.<sup>273</sup> Advocates of the assumption assert that constituents recruit like-minded candidates, who offer descriptive representation. In addition, constituents can vote out officials whose policy views or performance disappoint voter expectations or preferences. This latter assertion assumes that constituents monitor official behav-

266. Blacks are concentrated in urban cities in which, as a result of continued white prejudice and white flight, the resident "managerial" class of politicians administer a declining tax base in a crime infested urban environment. *Cf.* Freedman, *supra* note 197, at H5, col. 1 (black elected officials, with few exceptions, have become bureaucrats and caretakers).

267. S. KARNIG & A. WELCH, *supra* note 60, at 24 (blacks have least representation in most desirable and prestigious posts).

268. *See id.* at 155 (black representation concentrated in city councils where elected officials least likely to affect public policy).

269. *See supra* notes 159, 262.

270. *See* Wilson, *How the Democrats Can Harness Whites and Blacks in '92*, N.Y. Times, Mar. 24, 1989, at A31, col. 1.

271. Some black activists, consistent with their protest roots and civil rights philosophy, have begun to promote a black political agenda of resource allocation that suggests certain social goods — health care, housing — are recognized as basic entitlements. *See* Hamilton, *supra* note 14, at xix-xx; *cf.* Cavanaugh, *South Politics After Super Tuesday*, (rights to basic social services an integral part of public policy in other industrial democracies). Many of these programs would also benefit poor whites, although a black agenda might target spending as "reparations" or geographically to benefit majority-black, inner city neighborhoods.

272. A. Glazer, K. Brace, B. Norrander, R. Griffin, V. Campagna, D. Brady & L. Handley, *Three Variations on a Theme by V.O. Key: Race and Politics, Race and Politics, and (the ever popular) Race and Politics* (paper presented at Annual Meeting of Am. Pol. Sci. Assn., Sept. 1988) (describing decline of class and the rise of race as fundamental cleavage line in American politics); *cf.* Guinier, *supra* note 129, at 414-17.

273. *See, e.g.*, Miller & Stokes, *Constituency Influence in Congress*, 57 AM. POL. SCI. REV. 45 (1963).

ior beyond election day.<sup>274</sup>

The responsiveness assumption adopts this theory of electoral accountability based on the belief that constituents will punish unresponsive representatives at the polls. Where constituents are poor, however, electoral activity may prove too costly,<sup>275</sup> particularly if it involves organizing and campaigning against an incumbent.<sup>276</sup> Even where constituents are not poor, electoral activity inevitably presents collective action problems.<sup>277</sup> In addition, electoral ratification may simply reflect symbolic activity and not any in-depth knowledge of politics.<sup>278</sup> Unless the concept of political participation transcends election day activity, a constituent is not providing much substantive direction simply by casting a ballot.<sup>279</sup>

In addition, election day votes may not adequately convey latent issue conflict within the black community if voters are encouraged to vote for authentic, but not necessarily reformist, black candidates.

274. This is consistent with political science literature finding incentives for individual members of Congress to respond disproportionately to constituent monitoring. See Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U. PA. L. REV. 1567, 1605-07 (1988).

275. S. REP. NO. 417, 97th Cong., 2d Sess. 29 n.114 (Poverty depresses political participation.).

276. See *supra* notes 160-63 and accompanying text. Contemporary empirical evidence suggests that most voters are ignorant of their representatives' policy preferences and are insufficiently motivated even to participate in elections. See, e.g., Preston, *Black Politics and Public Policy in Chicago: Constituent Representation*, in *THE NEW BLACK POLITICS*, *supra* note 14, at 167; Polman, *U.S. Election Fund Drops as Public Abstains*, *Phila. Inquirer*, July 29, 1990, at A1, col. 1; *Primary Results: Setting the Stage for November*, *N.Y. Times*, June 7, 1990, at B6, col. 3; Reinhold, *As Primary Victor, Feinstein Becomes Democrats' Hope*, *N.Y. Times*, June 7, 1990, at B6, col. 1; see also Oreskes, *Low Voter Turnout*, *supra* note 144, at B16, col. 4.

277. See generally M. OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1971).

278. Empirical observations about the electoral process suggest the electorate is guided not by enforcing representative responsibility — the classic view that electoral ratification is the main technique for holding the representative responsible — but by vague moods about public policy in general. See, e.g., Eulau, *Changing Views of Representation*, in *THE POLITICS OF REPRESENTATION* 49-50 (H. Eulau & J. Wahlke eds. 1978); Wahlke, *Policy Demands and System Support: The Role of the Represented*, in *id.* at 74-75 (few citizens think about, communicate, inform themselves or are interested in legislative functioning and do not realize that voting is an opportunity for making policy demands or choices). Spokesmodels, for example, reflect the growing involvement of elected representatives in candidate-centered activities, promoting personal trust rather than an issue-based reason for voting. See *supra* note 197. Thus, even if black election turnout exceeds that of their socioeconomic cohorts, voting for a candidate, without more finely tuned issue identification, provides primarily symbolic ratification. Electoral ratification is also an empty gesture if the representative does not seek reelection or faces only token opposition or opposition that does not focus on the representative's record. See *infra* note 279. Of course, some political theorists would argue that the failure to vote, or to cast an educated vote reflects contentment with the status quo, and performs the same function as extended political participation might.

279. See *supra* notes 148-51, 163 (elections are imperfect devices for preference aggregation); see also *supra* note 255 (blacks tend not to lobby or write letters to their representatives, or to engage in the extended political process in proportion to their electoral participation or comparable to white participation). But cf. R. FENNO, *supra* note 140, at 207 (policy change most likely by replacing representatives not by converting them).

Although poor and working class blacks may be at the heart of a black electoral majority, they may not form part of the governing coalition put together by middle-class black politicians.<sup>280</sup> Black electoral success theory discourages poor blacks, who may not identify with their middle-class counterparts on every issue, from looking beyond their common racial identity.<sup>281</sup>

In fact, issue cohesion within the black community is generated by common concern about civil rights enforcement, government intervention on behalf of the poor, and increased opportunity for black mobility.<sup>282</sup> On these issues, black representatives may intuitively represent their constituents. But, unless the responsiveness assumption understands the value of sustained voter participation over time and across issues, the emphasis on election day turnout may not forge a common identity if the opponent is also black, nor ensure responsive government if the official must contend with countervailing pressures from white business elites.<sup>283</sup>

### III. BEYOND BLACK ELECTORAL SUCCESS

Black electoral success theory has two major failings. First, the theory abandoned the civil rights movement's transformative vision of politics. In that vision, the purpose of political equal opportunity was to ensure fairness in the competition for favorable policy outcomes, not just fairness in the struggle for a seat at the bargaining table. In addition, legislative responsiveness would not be secured merely by the election day ratification of black representatives. Rather, legislative responsiveness would depend on citizen participation, legislative presence, and legislative success in meeting the needs of a disadvantaged group.

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280. C. STONE, *supra* note 198, at 205-07, 241 (challenge for black politics is finding a way to bring the poor into a coalition of the white business leadership and the black middle class; instead of promoting redistribution toward equality, Atlanta governing coalition of middle-class blacks and white business elites perpetuates inequality); *see supra* notes 148-51, 155-57, 160-63, 196-99.

281. Barnes, *supra* note 149; *see also supra* notes 160-63, 266.

282. *See supra* notes 256-57 and accompanying text.

283. C. STONE, *supra* note 198, at 189-91, 195, 216 (selective incentives and business control shape Atlanta governing coalition; effectiveness of business centered civic network possible because voter contact shallow and ephemeral); Nelson *supra* note 16 (black regimes adopt "corporate center" development strategy that undermines reform platform); Reed, *The Black Urban Regime*, *supra* note 160 (political institutions and entrenched patterns of political behavior constrain black mayors' impact on budgetary allocations, including service delivery patterns and composition of public employment; black regimes unable to affect high levels of poverty and unemployment); Reed, *Neo-Progressivism*, *supra* note 160, at 212-13 (proposals to reformulate allocative element of business development agenda to include niche for blacks are not redistributive; consensus around development policy derives from political processes in which interests of black poor are not represented); *see supra* notes 196-200.

Second, black electoral success theory misses the point of the polarization hypothesis. The theory contains three proceduralist assumptions: one, that technical access usually entails meaningful access to the political process; two, that procedural rules that ensure visibility and technical access draw a neutral line between majority rule and minority rights; and three, that political choices should be made openly and within a process that includes minority representatives. If, however, the majority constitutes itself based on prejudice, as the polarization hypothesis declares, then simply providing technical access for the minority group representatives yields very modest results at best.<sup>284</sup>

Building on these criticisms of black electoral success theory, I propose to shift the analysis of black political empowerment in two ways. First, as a matter of broader democratic theory, voting rights activists and litigators should begin to worry more about the fundamental fairness of permanent majority hegemony in a political system whose legitimacy is based solely on the consent of a simple, racially homogenous majority. Consistent with fairness, equality, and legitimacy, the original civil rights vision suggests fundamentally different tradeoffs between majority rule and minority rights.

Second, I propose to refocus on the problems affecting marginalized groups within the legislative decisionmaking process. This renewed focus builds on the civil rights movement's view that the values for which our society stands are defined by what we do for the dispossessed. Thus, a theory of representation that derives its authority from the original civil rights' vision must address concerns of qualitative fairness involving equal recognition<sup>285</sup> and just results.<sup>286</sup> For those at

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284. Cf. Baker, *Neutrality, Process, and Rationality: Flawed Interpretation of Equal Protection*, 58 TEXAS L. REV. 1029, 1044-45, 1048-50 (1980) (process-based approach does not require equalization of political influence; decisions to continue subordination of minorities can occur even if political process considers their interests); Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1077 (1980) (protecting minorities requires theory of substantive rights).

285. By "equal recognition," I mean equal status as full participants in politics. See Baker, *supra* note 284, at 1079 (describing equality of respect model).

286. Beitz, *Equal Opportunity in Political Representation*, in EQUAL OPPORTUNITY 155, 167-68 (N. Bowie ed. 1988) (any satisfactory doctrine of political equality must simultaneously address three concerns of democratic decisionmaking about public policy: (1) its value by virtue of public cooperative enterprise, (2) the content of legislation it produces, and (3) its contribution to political education of its citizens). The ultimate aim would be the promotion of just legislation:

Although it may be too much to expect that by manipulating the structure of representation just legislation can be systematically promoted, it may at least be possible to minimize some of the familiar dangers to which representation schemes have historically been prone. . . . [especially] the danger that the majority in the legislature will pay too little attention to the interests and rights of popular minorities.

*Id.* Young, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship*, 99 ETHICS 250, 261 (1989) ("[A] democratic public . . . should provide mechanisms for the effective

the bottom, a system that gives everyone an equal chance of having their political preferences *physically represented* is inadequate. A fair system of political representation would provide mechanisms to ensure that disadvantaged and stigmatized minority groups also have a fair chance to have their policy preferences *satisfied*.

While at one level such an inquiry might explore basic issues of democratic principle, the scope of this article is more limited. I simply invite voting rights activists and litigators to consider on behalf of the Act's intended beneficiaries a different conceptual, remedial, and pragmatic approach to the immediate problem of legislative responsiveness within the statutory framework of the 1982 Voting Rights Act. To achieve this limited but important objective, I propose the concept of "proportionate interest"<sup>287</sup> representation. Proportionate interest representation is a general term subsuming a number of implementation strategies. Proportionate interest representation addresses the black electoral success model's failure to develop a realistic enforcement mechanism for achieving legislative responsiveness.

#### A. *Proportionate Interest Representation*

Proportionate interest representation disavows the pluralist conception of fairness, which falsely assumes equal bargaining power simply based on access, or numerically proportionate electoral success for all groups.<sup>288</sup> Fairness and responsiveness should be related objectives. Yet, in a racially polarized environment, some systems may be procedurally fair but fundamentally unresponsive.<sup>289</sup> For example,

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representation and recognition of the distinct voices and perspectives of [disadvantaged constituent groups].")

287. "[P]roportional representation systems are non-zero-sum at the electoral level, since [those with less than a plurality] as well as [those with a plurality] are elected." W. RIKER, *supra* note 171, at 184 n.10. By contrast, in an at-large election system, or in a legislature governed by a simple majority, it is possible to get no seats or no legislation with 49% of the vote. *See, e.g.*, B. Cain, *Voting Rights and Democratic Theory: Toward a Color-Blind Society* 4-5 (Oct. 19, 1990) (unpublished paper prepared for The Brookings Institution Conference on the 25th Anniversary of the Voting Rights Act of 1965) (proportional representation minimizes the number of wasted or nonwinning votes; wasted votes are those votes cast for a nonwinning candidate or in excess of the minimum needed to win a seat).

The term "interest" refers to self-identified interests, meaning those high salience needs, wants and interests articulated by any politically cohesive group of voters. Interests, however, are not necessarily descriptive of an essentialist concept of group identity but are fluid and dynamic articulations of group preferences. Others use different terms to refer to a similar concept. *See, e.g.*, I. Young, *supra* note 206 (arguing for a communicative theory of democracy based on specific group representation).

288. Presuming fairness based on a naked, self-interested system of bargaining is not consistent with information about prejudice. *See supra* notes 207-229.

289. Baker, *supra* note 284, at 1061 (full counting of minority group preferences in process-based model overtly favors powerful and oppressive elements of status quo); Tribe, *supra* note 284, at 1079; Young, *supra* note 286 (political equality depends on social and economic equality).

while improving the prospects of black electoral success, black single-member districts may undermine the possibility of effecting true policy change. In a system shaped by irrational, majority prejudice, remedial mechanisms that eliminate pure majority rule and enforce principles of interest proportionality may provide better proxies for political fairness.<sup>290</sup>

At this stage, I am simply assuming, without definitive explication, that qualitative fairness is incompatible with majority bias, where such bias systematically tends to produce inequalities in preference satisfaction<sup>291</sup> because of prejudice.<sup>292</sup> This assumption makes sense in light of our ostensible national commitment to ensuring that blacks achieve meaningful legislative representation, or "a fair chance to influence the political process."<sup>293</sup> The implications of qualitative fairness as a principle of remediation, and its complementary premises and enforcement

290. The single-member district enforcement mechanism uses the maximum electoral potential of minority voters as a baseline for fairness. Proportionate interest representation suggests an alternative remedial standard, more closely related to the civil rights vision benchmark of policy responsiveness. If interest proportionality were a proxy for assessing political fairness at the remedy stage, it might be potentially more judicially manageable than unresponsiveness was as a measure of the violation itself. As a direct evidentiary proxy for establishing a violation, unresponsiveness early on proved unworkable as a judicially manageable standard. *See supra* note 88. Notwithstanding its remedial value, however, interest proportionality may not be most viable as a litigation strategy. Unlike single-member district remedies, which are still rooted in a majoritarian and territorial tradition, proportionate interest representation, once it is more fully developed, may be feasible primarily as a settlement or political strategy. *Cf. infra* notes 304-05, 313-14, 317, 351 and accompanying text.

291. This conception borrows liberally from the work of Charles Beitz, who contends:

[E]veryone has an equal right to have his or her political preferences satisfied; but since it will normally be impossible to satisfy all political preferences simultaneously, some compromise is necessary, and the only compromise consistent with equality is that political decisions should satisfy the [legitimate] preferences of each member of the population an equal proportion of the time.

Beitz, *supra* note 286, at 165. Remediation of inequalities in preference satisfaction also involves equality of respect to cleanse pluralist politics of racist preferences. This is an intermediary, but more just version of pluralism, from which a civic republican model might follow.

Although some may object to the arbitrary, checkerboard implications of this conception, those implications are not the only possible ones. *Cf. A. LIJPHART, DEMOCRACY IN PLURAL SOCIETIES* 39-40 (1977) (proposing linkage as a partial solution to the checkerboard problem of proportionality); Young, *supra* note 286, at 261-62 (specific group representation for disadvantaged groups requires (1) group self-organization, (2) mechanisms forcing decisionmaker to take group perspective into consideration, and (3) group veto for policies directly affecting group). I intend to explore further alternative implications. *See L. Guinier, Beyond Majoritarianism: The Political Equality Paradox* (unpublished manuscript).

292. Prejudice is defined here by two criteria: (1) the presence of a permanent, hostile, fixed majority which dominates the policymaking agenda; and (2) the resulting absence of interest satisfaction for disadvantaged minorities on issues of greatest concern. Where there is prejudice against a politically cohesive, permanent minority, that minority may be disproportionately disadvantaged or in the extreme case excluded altogether.

293. *Davis v. Bandemar*, 478 U.S. 109, 133 (1986) (equal protection violation may be found "where electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively"); *see also supra* notes 2, 69 and *infra* note 332 and accompanying text.

mechanisms, can best be understood by referring to a concrete example.<sup>294</sup>

Suppose a jurisdiction contained two kinds of people: the yellow and the blue. The yellow people constituted 75% of the population, were geographically dispersed around the jurisdiction's perimeter, and were politically cohesive to the extent that a substantial majority would only vote for yellow candidates. A small group of yellow people were more tolerant. Their interests were subsidiary, however, because they represented only 17% of the jurisdiction's total population. The blue people, who were concentrated in the jurisdiction's inner center, were also politically cohesive. As a numerical minority of 25%, however, they never elected any blue people to the jurisdiction's four governing positions.

Black electoral success theory would criticize the exclusionary at large election format<sup>295</sup> in this jurisdiction because essentially it would allow a bloc voting racial majority to control all four of the elected positions. Because exclusionary at large elections require a 50% plus one majority to win *any* representation, 58% of the population (the yellow people minus the more "liberal" contingent) would decide 100% of the elections. The blue minority would be permanently excluded from meaningful participation. In this situation, black electoral success theory would focus on electing more blue officials by creating one majority-blue single-member district. With one blue legislator out of four, however, the blues would only be technically represented if the other three districts contain only the politically cohesive yellows.

A remedy based on qualitative fairness would retain the at large format but modify the threshold of exclusion.<sup>296</sup> Instead of requiring the 50% plus one vote for election jurisdiction-wide, the votes needed for election would be reduced, for example, to 20% plus one of all votes cast.<sup>297</sup> Any candidate receiving more than 20% of the votes

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294. I propose the proportionate interest representation approach primarily as a remedial alternative for statutorily protected groups. At this preliminary stage, I am not advocating proportionate interest representation as the sole basis for finding a statutory violation, for judicial review in general, or as a universal principle of equal protection.

295. An exclusionary format would utilize numbered posts, staggered terms and/or a majority vote requirement to reduce election competition to head-to-head contests.

296. The threshold of exclusion is the largest possible proportion of the vote which fails to guarantee election. Rae, Hanby & Loosemore, *Thresholds of Representation and Thresholds of Exclusion*, 3 COMP. POL. STUD. 479, 480 (1971). In exclusionary at-large elections, the threshold of exclusion is 50%.

297. The degree of modification necessary could be determined on a case-by-case basis taking into consideration the local factors presently addressed in voting rights litigation such as the extent of polarization, the degree of socioeconomic disadvantage, and the use of other mechanisms, including those within the legislative process, that reduced minority influence. Alterna-

would be elected. All voters would be given four votes. They could, however, use their votes to express the intensity of their preferences through cumulative voting.<sup>298</sup> In other words, voters could “plump,” or cumulate, all four of their votes on any one candidate. As a result, a politically cohesive numerical minority of at least 20% could elect one legislator.<sup>299</sup>

In addition, because 17% of the population in our hypothetical jurisdiction are “liberal” yellows, the proportionality principle permits a cross-racial electoral coalition.<sup>300</sup> Assuming the blues could be organized to take maximum advantage of their political cohesion, only 84% of the blues (21% of the total jurisdiction electorate and just over

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tively, an across-the-board minimum threshold of exclusion could be set to meet the concern that the tiniest politically cohesive minority not be empowered merely to fragment or destabilize the ability to govern. Depending on the number of open seats, the threshold would be more than 1% but less than 50% to recognize sizable minorities with reasonable expectations of representation and legislative influence. This reflects the intuition that a group of 15% or 20% is less likely to accept the legitimacy of a system in which they are the permanent losers. Also given their size, their disaffection would be more destabilizing of the system in general. Finally, fringe groups with illegitimate preferences would be represented but if their preferences prevailed, the resulting legislation would be vulnerable under existing constitutional analysis.

An across-the-board threshold of exclusion could also be developed on a state-by-state basis rather than nationwide, to take into account the varying state percentages of minority population and other local conditions. Whatever the exclusion threshold, it would be no more arbitrary than existing determinations establishing the number of seats on a council or local commission.

298. Cumulative voting is a semiproportionate electoral method widely used in the corporate context to protect minority shareholders' interests. See R. CLARK, *CORPORATION LAW* 361-66 (1986); C. WILLIAMS, *CUMULATIVE VOTING FOR DIRECTORS* (1951); Glazer, Glazer & Grofman, *Cumulative Voting in Corporate Elections: Introducing Strategy into the Equation*, 35 S.C. L. REV. 295, 296-97 (1984) (explaining that the purpose of cumulative voting is to permit minority interests to gain proportional representation on the board of directors roughly commensurate with their share of ownership; each shareholder has number of votes equal to number of shares multiplied by the number of directors to be elected; shareholders may distribute those votes among many candidates; by strategic distribution of votes, minority shareholders may attain roughly proportionate representation on board). Some state constitutions or statutes contain provisions requiring cumulative voting to protect the interests of minority stockholders against potential abuses of the majority rule principle. See 5 W. FLETCHER, *CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* § 2048 nn.10-11 (rev. perm. ed. 1987) (noting nine constitutional and ten state statutory provisions). The coexistence of cumulative voting rights with a corporate tradition of one vote per share and majority vote approval at both the director and shareholder level (with two-thirds vote required for certain fundamental changes) suggest potentially valuable analogies to the democratic political rules being considered here. Other devices to ensure minority representation in the corporate context, such as supermajority quorum requirements and weighted voting, are also relevant to the concept of proportionate interest representation and will be further explored elsewhere. See Guinier, *supra* note 291; see also Note, *Alternative Voting Systems as Remedies for Unlawful At-Large Systems*, 92 YALE L.J. 144, 153-60 (1982).

299. The formula for determining under cumulative voting the threshold of exclusion is one divided by one plus the number of seats. See, e.g., Still, *Alternatives to Single-Member Districts*, in *MINORITY VOTE DILUTION*, *supra* note 76, at 249, 255-56. Cumulative voting allows minority voters to make precise calculations as to how many representatives they can elect. See *infra* note 309 and accompanying text.

300. Cumulative and limited voting systems are election methods that foster and reinforce coalitions. Because these methods lower the thresholds of exclusion, blacks can successfully express their candidate preferences despite their minority status. Whites who share the civil rights vision of political transformation can also join with blacks to support progressive candidates.



the threshold of exclusion) would be needed to elect a blue candidate.<sup>301</sup> Thus, the blues could use their otherwise wasted votes (16% of the blues, 4% of the total electorate) to join the 17% "liberal" yellows. Given the 20% plus one threshold of exclusion, the blue/yellow coalition of 21% would also have enough votes to elect a representative. The legislature would then contain one blue member, one "green" member, and two yellows. The two yellows would no longer enjoy complete majority hegemony and the blue member would finally have a green "ally" to second her motions and to join with her in demanding access to the governing coalition. In this way, proportionate interest representation would disaggregate the majority.

If modifying the exclusion threshold alone did not yield proportionate interest representation, winner-take-all majority rule by a permanent, hostile legislative majority could be modified. Where majority representatives refuse to bargain with representatives of the minority, simple majority vote rules would be replaced. "A minority veto" for legislation of vital importance to minority interests would respond to evidence of gross "deliberative gerrymanders."<sup>302</sup> Alternatively, depending on the proof of disproportionate majority power, plaintiffs might seek minority assent through other supermajority arrangements, concurrent legislative majorities, consociational arrangements, or rotation in office.<sup>303</sup>

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301. The threshold of exclusion is only the threshold of victory under the most adverse circumstances. If more than five yellow candidates run, the blues might elect someone with less than 20% of the vote.

302. Alternatively, a minority veto reserved for issues of majority concern would force the majority to bargain. See *infra* note 317. See generally, A. LUPHART, *supra* note 291, at 36-38 (fact of veto more important than its use). The minority veto is a form of supermajority rule. Unanimity or supermajority decisional rules give numerical minorities power to protect their interests and provide incentives for more thorough and inclusive deliberation and decisionmaking. See *City of Mobile v. Bolden*, 446 U.S. 55 (1980) (consensus building voting rule ordered as part of the remedy on remand for structural vote dilution). Deviations from pure majority rule that force everyone into indispensable coalitions could provide real power to minority representatives. Minority group members would become "acceptable role partners." See W. RIKER, *supra* note 171, at 95-96 (within a theory of minimum winning coalitions, the role of the minority opposition may be to create value in the majority coalition unless the minority is perceived as an "acceptable role partner," meaning a potential coalition follower or leader). I treat these issues more comprehensively elsewhere. See L. Guinier, *supra* note 291.

303. *Id.* The concurrent majority is a particular type of supermajority requirement. It was initially promulgated by John Calhoun to protect the minority interests of the South. J. CALHOUN, *A DISQUISITION ON GOVERNMENT* 25, 28 (1943) (in order to pass, legislation would need the support of a majority of minority representatives, however defined, as well as a majority of majority representatives); cf. A. LUPHART, *supra* note 291, at 25-52 (defining comparable idea of consociational democracy in terms of four essential elements of communal representation: grand coalition of political leaders from all significant population segments; mutual veto or concurrent majority; proportionality; and segmental autonomy). Rotating officials may also empower blacks throughout the jurisdiction and invite alliances with white voters. See, e.g., *Dillard v. Crenshaw County*, 649 F. Supp. 289 (M.D. Ala. 1986), *affd. in part and remanded in part*, 831 F.2d 246 (11th Cir. 1987); see also *First Woman in Swiss Cabinet Quits; Husband Is Scrutinized*, N.Y.

Coalition building has always raised two issues: one, how to encourage alliances between members of the dominant white majority and economically depressed minorities; and two, how to keep those alliances reciprocal and empowering. Interest proportionality, complemented by a minority veto, addresses both problems.<sup>304</sup>

Proportionate interest representation would urge courts, lawyers, and voting rights activists to consider black voters' claims in the context of remedies that "soften the harshness of majority rule." Although remedies that deviate from pure majority rule may not always be feasible in litigation, such proposals may be experimentally implemented through settlement negotiations or political initiatives.<sup>305</sup> Three examples, two actual cases and one open-ended hypothetical situation, suggest distinctions between an agenda driven by black electoral success theory and one that envisions remediation based on proportionate interest representation.

*Example 1.* The first example involves a judicial interpretation of legislative unresponsiveness in Durham, North Carolina. In Durham, a black had been consistently elected over ten years to the North Caro-

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Times, Dec. 13, 1988, at A3, col. 1 (under Swiss rotating executive system, first woman was scheduled to become vice-president); *Blacks and Whites Share Control in Selma*, N.Y. Times, Aug. 29, 1990, at B7, col. 1 (city council agreed to appoint 10 voting members on school board, five white and five black with a chair rotating annually between the two racial groups; when asked how the board would operate, the white mayor who helped negotiate agreement said, "Well, you're going to operate with the art of compromise").

304. Proportionate interest representation gives black voters the opportunity to form cross-racial electoral and/or legislative constituencies through voluntary bargaining. This might seem inconsistent with the authenticity principle. If proportionate interest representation encourages cross-racial coalitions at the electoral level, candidates with broad appeal might prevail over candidates with strong community-based credentials. The concern that coalitional candidates will succeed at the expense of accountable representatives is legitimate, but not necessarily dispositive. Authenticity and coalitional politics are not inherently inconsistent goals. First, proportionate interest representation allows a numerically significant group based on the threshold of exclusion to elect their most preferred candidate. Thus, the option of electing authentic black representatives is available. Proportionate interest representation allows the voters themselves to determine the importance of authentic representation. Second, it allows self-defined voluntary constituencies to evolve because it disaggregates the majority into groups that may perceive their own self-interest sympathetically with black self-interest. Third, even if tension exists between the authenticity and coalitional values and blacks choose the latter, at least blacks are in a position to keep the coalition reciprocal. Under proportionate interest representation, they have many more options to leave one coalition in favor of another. In other words, blacks are less permanently locked into a particular bargaining strategy or particular set of allies.

305. Given the firmly entrenched mythology surrounding majority rule, see *Whitfield v. Democratic Party*, 686 F. Supp. 1365, 370 (E.D. Ark. 1988), *affd. by equally divided court*, 890 F.2d 1423 (8th Cir. 1989) (en banc) (majority vote a "bedrock ingredient of democratic political philosophy"), proportionate interest proposals to deviate from pure majority rule may be contemplated initially only by parties in settlement negotiations or as political initiatives. See *supra* note 303 (as result of negotiations between city council and two black civic clubs, Selma School Board to operate with a rotating racial majority); Engstrom, *Cincinnati's 1988 Proportional Representation Initiative*, 9 ELECTORAL STUD. 217 (1990) (describing 1988 Cincinnati proportional representation referenda).

lina General Assembly from a three-person multimember district. Nevertheless, in 1982, black Durham voters challenged the use of the multimember district format.<sup>306</sup> Influenced by black electoral success theory, plaintiffs argued that blacks, who constituted slightly more than 30% of the Durham voting population, would be better represented by a black elected from a majority-black single-member Durham subdistrict. Plaintiffs asserted that persistent racial bloc voting caused the one black representative to be elected only as a result of single-shot voting by blacks.<sup>307</sup>

Although supported by Durham black voters, the successful black candidate also depended upon support from some moderate to conservative whites. To appease the white voters, the successful black did not "effectively represent" plaintiffs' interests in the legislature. He "sail trimmed" and relied on black legislators elected from majority-black single-member districts elsewhere in the state, to protect the interests of blacks in Durham.<sup>308</sup>

Black electoral success theory, however, gave the Supreme Court no mechanism through which to examine, under section 2, the quality of the representative's legislative participation. Black electoral success theory apparently convinced the Court that nothing more than proportionate, "descriptive" representation was required. On remand, this aspect of the case was ultimately dismissed.

A lawsuit informed by the concept of proportionate interest representation would highlight plaintiffs' concerns with legislative participation. Evidence that racial bloc voting in an unmodified at large system disabled the descriptive black representative in Durham from representing *within the legislature* the interests of his black constituents would substantiate the violation. If a violation were established, a court could order as a remedy, or plaintiffs could attempt to negotiate

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306. *Gingles v. Edmisten*, 590 F. Supp. 345 (E.D.N.C. 1984), *modified sub. nom.*, *Thornburg v. Gingles*, 478 U.S. 30 (1986).

307. Single-shot or bullet voting exists where voters voluntarily abnegate their right to vote for a full slate of candidates, casting only one ballot, for example, although three seats are open. By limiting its votes to express the intensity of their preference, Durham's politically cohesive black community maximized their voting strength, because racial bloc voting limited their ability to influence all three election contests. Single-shot voting, however, is unfair when compared to the threshold-lowering schemes proposed here. Single-shot voting forces a minority to limit its vote while the majority exercises its control over the full slate. As plaintiffs demonstrated in Durham, even with single-shot voting by blacks, whites still selected all three candidates: the two whites and the one black who were elected. Moreover, single-shot voting alone does not ensure any black election. The election of one black is conceivable only with the support of some whites and the wasting of votes by other whites. Even if black voters single-shoot for a black candidate, it is equally conceivable that under some circumstances only three whites will be elected.

308. *Gingles*, 590 F. Supp. 345 (trial transcript) (plaintiffs could not run their most preferred candidate who might aggressively advocate their views but never command enough white support to get elected); see also *supra* notes 150-5, 159-62.

through settlement, a modified at large system with a threshold of exclusion lower than 51%. In this case the threshold would be 26%.<sup>309</sup>

*Example 2.* The second illustration, which arises in the context of the 1990s "dispersal gerrymander," responds to criticism that proportionate interest representation fails to protect the autonomy of black neighborhoods.<sup>310</sup> For example, housing controversies erupted when recently developers were encouraged to provide low income housing in outer perimeter "urban villages" in exchange for tax abatements and other benefits. Some black politicians and scholars claim that these relocation plans will erode the black political base.<sup>311</sup> These black electoral success proponents argue that black voting strength is realistically recognized only to the extent that it is concentrated in inner-city neighborhoods capable of electing a black representative.<sup>312</sup>

A ballot initiative similar to one attempted by the Rainbow Coalition in Cincinnati, however, could lead to at large proportionate interest representation.<sup>313</sup> Elections would be jurisdiction-wide with a lowered threshold of exclusion. Thus, no matter where blacks lived they could assert their political preferences on a self-identified basis. If implemented as part of a voter initiative, blacks could take advantage of both proportionate interest representation and intergroup solicitude without litigation.<sup>314</sup>

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309. Using cumulative voting, for example, the 30% black voting population could expect proportionate interest representation from a representative directly accountable to their interests. Using the formula of one divided by one plus the number of seats, *see supra* note 299, blacks who were more than 25% of the population could not be denied representation if they plumped all three of their votes on a representative. The modified system would be more fair than single-shot voting because blacks were now casting as many votes as whites and the black representative would be directly accountable to black interests. Moreover, because their numerical strength exceeded the threshold of exclusion, with foresight some blacks could use their extra, otherwise wasted votes to join with liberal whites to influence the election of one of the two white candidates.

310. *See* Letter from Jim Blacksher to author (Aug. 15, 1990) (on file with author) (majority-black districts important to recognize ethnic community autonomy).

311. *See, e.g.,* Note, *Racial Geography*, *supra* note 237, at 1264-65 nn.78-80 (citing scholars who criticize housing integration for overlooking necessity of black solidarity to black power, where voting rights determined along geographic lines); Transcript of tape number seven from a debate among John Calmore, Jean Charn, and John Powell sponsored by The New Public Interest Law Conference and entitled *Race and Space: Housing and Minority Communities* (comments of J. Calmore) (spatial equality, not racial integration, needed to redress black's socioterritorial disadvantage, meaning isolation and containment of inner city; integrationist strategies "dilute central city Black voting strength" and "rob central city Black communities of . . . representation").

312. Similarly, politicians faced with redistricting decisions after the 1990 census must decide which black neighborhoods to aggregate into majority-black districts. *See infra* notes 343, 348.

313. Engstrom, *supra* note 305, at 223-24 (cumulative voting remedy prompted by concerns over dispersal of the black community and likely gerrymandering).

314. In the § 2 litigation context, however, several courts have approved these alternative remedies where blacks were geographically dispersed, making a single-member-district remedy implausible. *Dillard v. Crenshaw County*, 831 F.2d 246 (11th Cir. 1987); *Dillard v. Chilton*

*Example 3.* The final example addresses the third generation “deliberative gerrymander.” In Etowah and Russell Counties, Alabama, a successful black challenge to the at large election system resulted in a court imposed majority-black single-member district, and the election of the first black county commissioners.<sup>315</sup> Once elected, however, these black commissioners were gerrymandered out of the one resource the commission controlled: the road shops. The holdover incumbent white commissioners, representing now majority-white districts, refused to share fiscal responsibility for appropriating tax dollars to maintain the roads. A three-judge court considering a subsequent challenge to this legislative exclusion dismissed the case because it did not involve the diminution of the minority constituents’ electoral power. Rather, the challenge addressed the legislative influence of the black representatives.<sup>316</sup>

Guided by the concept of proportionate interest representation, the lawsuit could have helped the court understand legislative exclusion as a serious threat to a “meaningful vote,” comparable to direct interference with the right to cast a ballot. Based on statutory language ensuring a right “to participate equally” throughout the political process, plaintiffs could have asked the court to institute a minority veto for road shop resource allocations or to rotate fiscal responsibility among the commissioners.<sup>317</sup>

### B. *Criticism of Proportionate Interest Representation*

By making black representatives necessary participants in the governing process, by giving minority groups additional bargaining power, and by granting blacks a minority veto on issues affecting vital minority interests, proportionate interest representation helps protect substantive minority interests. Proportionate interest representation may split fixed, racially homogeneous majority constituencies into subgroups who would enjoy greater political leverage through preelection coalition building with other politically cohesive electoral

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County Bd. of Educ., 699 F. Supp. 870 (M.D. Ala. 1988), *affd.*, 868 F.2d 1274 (11th Cir. 1989) (adopting magistrate recommendation that cumulative voting be used for election of county commission and school board); Dillard v. Town of Cuba, 708 F. Supp. 1244 (M.D. Ala. 1988) (limited voting scheme acceptable under § 2 for city council elections).

315. Mack v. Russell County, No. 90-712 (M.D. Ala. Aug. 1, 1990) (three-judge court) *cert. pending* 59 U.S.L.W. 3460.

316. Mack, No. 90-712.

317. See Letter from S. Issacharoff to author (Sept. 24, 1990) (if plaintiffs establish nonresponsiveness, not as a matter of an evidentiary requirement of liability, but as proof of the scope of the remedial concern, then no policy should be effectuated on the areas of nonresponsiveness without the assent of the minority representative).

minorities.<sup>318</sup>

In addition to its strategic value, proportionate interest representation serves the collegial function of encouraging more open deliberation. To the extent that legislators would be accountable to a larger, more heterogeneous electorate, threshold lowering arrangements might influence legislators to be more "public regarding" because technically, each legislator would be elected from the entire constituency. By giving dignity to strongly held sentiments of minorities, interest proportionality principles may also produce more reasoned, just decisions.<sup>319</sup>

Finally, proportionate interest representation structures political competition so as to formalize coalitions and intergroup interaction. For example, formalizing intergroup coalitions might ultimately promote minority political parties by causing changes in election structures.<sup>320</sup> Formal coalitions, negotiated by a political party representing minority political interests, might be preferable to diffused minority presence within an umbrella political organization.<sup>321</sup>

The proportionate interest representation principle proposed here is therefore based on a view of politics that is both interest-based and deliberative.<sup>322</sup> I self-consciously reject, however, several assumptions held by Abrams and Thernstrom, as well as the more idealistic views of some civic republicans. Proportionate interest representation does not assume, as both Abrams and Thernstrom apparently do, that the interests of black voters are fungible with those of whites.<sup>323</sup> Thus,

318. It is this process of factionalizing the majority constituency and empowering politically cohesive minorities that raises concerns about the stability and efficiency of proportionate interest systems. Others call this the grand coalition. A. LIPHART, *supra* note 291, at 25-31. I intend to explore these issues elsewhere. See Guinier, *supra* note 291.

319. Recognizing minority and dissenting viewpoints stimulates dialogue to enhance the political discourse. See *supra* notes 175, 179; see also Nemeth, *supra* note 220 at 38.

320. If minority political factions were electorally sanctioned and empowered, they would enjoy a more formal role in formulating government policy. Existing umbrella political parties would be replaced by a proliferation of parties formally committed to expressing more intensely minority viewpoints. See *infra* note 348 and accompanying text. But cf. *supra* note 318. On the other hand, organized groups of black voters could also coalesce to demand formalization of intergroup coalitions.

321. Formal rules assist in exposing the contradiction between behavior and public norms. Similarly, the "confrontation" theory posits that formal public settings are safer for minorities. See *supra* note 214 and accompanying text. Structured, public settings better enforce the highly principled norms which inform the "American creed" to reject racism, unfairness, and inequality. G. MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* 80 (1962).

322. By deliberative I mean "an argumentative interchange among persons who recognize each other as equal in authority and entitlement to respect." Michelman, *Conceptions of Democracy*, *supra* note 178, at 447.

323. See *supra* notes 134-39, 246-47; cf. Guinier, *supra* note 129, at 427-29 (Blacks "are in greater need of government sponsored programs and solicitude which whites often resent and vigorously oppose.").

authentic, black-community-based interest identification and representation are important.

Moreover, the concept does not assume, as some civic republicans seem to, that coalitions can be sustained by appeals to conscience or sympathy. Coalitions require more than dialogue and deliberation by civically virtuous representatives. They require institutional changes in the structure of deliberation, formal incentives for interracial cooperation, and political protection for minority groups. Unlike either Abrams or Thernstrom, I therefore assume that coalitions are only possible between relatively equal groups that are in deliberative environments where majoritarian controls are modulated.<sup>324</sup>

As an interest-based approach, proportionate interest representation nevertheless may be criticized on the ground that it contains all of the flaws of the pluralist bargain without its stabilizing thrust of majority rule. According to some critics, the potential for promoting special interest representation is a fatal defect. These critics argue that despite institutional structures or incentives for fair minded bargaining special interest representation may not yield transformative politics. Proportionate interest representation is actually construed by some as an argument for legislative set-asides, electoral quotas, or equality of representation based simply on the election of descriptively black representatives.<sup>325</sup>

Proportionate interest representation arguably weakens the two-party system by facilitating the formation of minor parties.<sup>326</sup> By proliferating the number of parties, and by highlighting the importance of interests, proportionate interest representation may facilitate the representation of extremist viewpoints, make compromise more difficult, and simply lead to political paralysis or ungovernability because of the absence of a governing majority. In particular, disadvantaged minorities with an interest in changing the status quo may not find salvation

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324. See *supra* note 289. Some civic republicans do profess concern with reducing the influence of exogenous inequalities. The response of others seems focused on ensuring proportionate "descriptive" representation and insulating all representatives from constituent pressure. See Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 34, 82-85 (1985). Proportionate descriptive representation fails to provide safeguards for the minority group from majority domination even within a "civically virtuous" deliberative process. I also claim that pressures toward cooptation affect minority group representatives who, like all other representatives, cannot be trusted to deliberate effectively on behalf of their constituents in the absence of constituent monitoring. Insulation from constituent pressure would simply enhance existing majority control. Yet, I share the civic republican desire to perfect the legislative process.

325. The statutory disclaimer in § 2 was drafted to address similar fears. See *supra* notes 2 & 134. The statutory language suggests that a litigant cannot make a prima facie case based only on the disproportionate absence of descriptively black members of the legislature.

326. A. LIJPHART, *supra* note 291, at 46-47, 78, 137 (because of the low threshold of exclusion, proportionate representation linked to multiplication of parties).

by deviating from majority rule. Rules that protect minorities against unfriendly legislation may also make it more difficult to pass friendly legislation.

Some scholars contend that district representation strikes a better balance between group representation and stalemate. Although district representation assumes geography is an adequate proxy for interests, it does not emphasize unyielding interest representation. District-based representation simply facilitates community organization because it focuses on a smaller geographic area and promotes knowledgeable voters whose representative is more socially and geographically accessible.<sup>327</sup>

Finally, many commentators object to proportionate interest representation on separation of powers and judicial management grounds. Given the demand for justiciability that irresistibly shaped the black electoral success litigation strategy, judicial monitoring to remedy inequality of consideration within the legislative process is arguably neither feasible nor desirable. Legal intervention to change legislative procedural rules may seem unlikely when those rules ensure that each person can put issues on the agenda, propose solutions, and offer support or criticisms of proposals.

I am undeterred by these criticisms for five reasons. First, I emphasize the importance of disaggregating majority interests in a system dominated by irrational prejudice. By disaggregating the majority, proportionate interest representation promotes democratic decision-making by a more diverse and engaged electorate. This result is consistent with the original civil rights vision.<sup>328</sup>

Thus, proportionate interest representation emphasizes the illegitimacy of majority rule where the majority is permanent and constituted on the basis of prejudice.<sup>329</sup> Proportionate interest representation weighs the illegitimacy of a permanent majority more heavily than concerns about efficiency and stability, which are used to

327. See *supra* notes 237, 239 and accompanying text.

328. A. LIJPHART, *supra* note 291, at 194 (proportionate representation promotes compromise and consensus rather than majoritarianism). Proportionate interest representation awards representation and political leverage in relation to voting shares, but it does not give all the power to the majority winner. It would no longer be possible for one group to exert complete dominance over the entire political system. A. LIJPHART, *DEMOCRACIES: PATTERNS OF MAJORITARIAN AND CONSENSUS GOVERNMENT IN TWENTY-ONE COUNTRIES* 23-30 (1984); see *supra* notes 287, 290.

329. Winner-take-all systems undermine the legitimacy of governmental decisions where they create permanent minorities who are unable, because of widespread prejudice, to recruit defectors from the winning coalition. Systems empowering a simple majority exaggerate that group's power and "dilute" the minority group's power by increasing the number of minority votes cast in a losing cause. M. DURVERGER, *POLITICAL PARTIES* (1964); D. RAE, *THE POLITICAL CONSEQUENCES OF ELECTORAL LAWS* (1971).



justify majoritarian regimes.<sup>330</sup> The argument for proportionate interest representation therefore starts with a legitimacy critique. Mirroring the theory of black electoral success, proportionate interest representation relies heavily on legitimacy considerations: people who have a meaningful voice in governmental decisions are more willing to lend their consent to decisions with which they disagree.

Second, although proportionate interest representation rests on legitimacy derived from minority representation, the concept is not essentialist. Proportionate interest representation is an attempt to construct a deliberative decisionmaking body that represents, in proportion to their presence in the population, minority group interests<sup>331</sup> not minority group voters. The concept is, however, also consistent with the one person/one vote principle because each voter gets the same number of votes.<sup>332</sup>

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330. See B. Cain, *supra* note 287, at 5-7 (critics of proportionality weigh the trade-offs between legitimacy, efficiency, and stability differently).

331. These interests are not altogether independent of minority group status, experience with racial discrimination, or historic and cultural identity. Cf. *supra* note 145 and accompanying text. Interest representation simply allows voters to define the relative salience of these respective variables for themselves. It reduces the number of supporters needed for a winning coalition, or "threshold of exclusion," to something less than 51% by allowing voters to plump or cumulate their votes to express the intensity of their political preferences. Thus, proportionate interest representation allows all politically cohesive interest groups, which are numerically relevant under the threshold of exclusion, to determine which interests are most important. Politically cohesive groups are not all composed of minority group members. Proportionate interest representation is therefore not necessarily race-based and allows for the possibility that not all members of a minority group share common interests or common perceptions of their interests. Nor does it assume that all members of the majority group are hostile to minority interests.

332. At the electoral level, proportionate interest representation clearly satisfies one person/one vote concerns. Indeed it may do so for more people than a district-based system and for any voluntary, self-defined minority. But proportionate interest representation also contemplates enforcement of the qualitative fairness principle at the legislative level. Here it is specifically limited to disadvantaged minorities specially protected under the Voting Rights Act. At the legislative level, proportionate interest representation defines procedural equality in the *Reynolds v. Sims* sense of fair representation, 377 U.S. 533, 565-66 (1964), meaning an equal voice in government or an equal opportunity to influence decisions. I do not argue that the one person/one vote standard requires procedural equality defined as more than just procedural access. I do suggest that procedural equality at the legislative level is not necessarily inconsistent with existing equality norms as long as the majority is still proportionately represented. See *United Jewish Orgs. v. Carey*, 430 U.S. 144 (1977) (proportionately represented white voters had no complaint against a compensatory or race conscious remedy to increase minority representation). Even the minority veto might justify its deviation from pure mathematical equality in some historic circumstances, see *Gaffney v. Cummings*, 412 U.S. 735 (1973), at the local level, *Abate v. Mundt*, 403 U.S. 182, 185 (1971), to facilitate intergovernmental cooperation, *Avery v. Midland County*, 390 U.S. 474, 485 (1968), and to equalize the likelihood that minority representatives can cast the decisive vote on legislation in relationship to their proportion of the population. See *Iannucci v. Board of Supervisors*, 20 N.Y.2d 244, 252, 229 N.E.2d 195, 199, 282 N.Y.S.2d 502, 508 (1967); *Franklin v. Krause*, 32 N.Y.2d 234, 298 N.E.2d 68, 344 N.Y.S.2d 885 *reargument denied* 33 N.Y.2d 646, 303 N.E.2d 71, 348 N.Y.S.2d 554 *and* 33 N.Y.2d 658, 303 N.E.2d 710, 348 N.Y.2d 1030 (1973), *appeal dismissed*, 415 U.S. 904 (1974) (approving plan that eliminated 100% voting power for 56% population majority); *League of Women Voters v. Nassau County Bd. of Supervisors*, 737 F.2d 155 (2d Cir. 1984) *cert. denied subnom.* *Schmertz v. Nassau County Bd. of Supervisors*, 498 U.S. 1108 (1985) (constitutional principle of one person/one vote does

Moreover, proportionate interest representation recognizes that proportionate "descriptive"<sup>333</sup> representation, as implicated by the authenticity assumption in black electoral success theory, may supply some legitimacy to an otherwise majoritarian regime. Simple descriptive proportionate representation, however, offers no guarantee that voters will have equal chances of seeing their policy preferences satisfied.<sup>334</sup> Majority bias may still control the integrated legislature.

Third, the promotion of self-identified, rather than geographically predetermined, interest preferences arguably sharpens issue conflict while it helps alleviate social conflict and political alienation. Black representatives elected under the proportionate interest model would be potentially more effective within legislative deliberations because they would not be elected from isolated districts.<sup>335</sup> If the minority also had a mutual veto, blacks would enjoy a valuable, strategic, bargaining position, which assures that the majority would be able to get anything done without their assent.<sup>336</sup>

Fourth, the concept specifically addresses the mobilization and responsiveness aspects of representation. Once elected, minority representatives would be more responsive to their constituents because individual incumbents would not be assured of reelection.<sup>337</sup> Effective representatives would be continuously engaged in issue identification and articulation. Indeed, proportionate interest representation hypothesizes increased black turnout as elected officials respond to core black interests.<sup>338</sup>

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not require a state to give absolute majority control to a population majority; *cf.* *Town of Lockport v. Citizens for Community Action at the Local Level, Inc.*, 430 U.S. 259 (1977) *motion denied* 431 U.S. 902 (1973) (concurrent majority referendum requirement approved as constitutional method for recognizing constituencies with separate and potentially opposing interests).

333. *See supra* note 114.

334. Beitz, *supra* note 286, at 155, 162. "All that is promised is that the legislature will mirror in some sense the political preferences of the electorate as the voters themselves identify them. Popular minorities will be represented, but their representatives will constitute legislative minorities, unable except through compromise to effect their constituents' will."

335. *See supra* note 304.

336. *See supra* notes 302, 328.

337. Thus, even after the first symbolic victory, black officials might face competitive electoral contests. Because these election structures are more complicated, the candidates would need to develop political organizations that educate the electorate, keeping them informed about the candidate's policy views and mobilizing their support on an issue-based agenda. In addition, interest representation provides a more flexible tool for resolving conflicts between the elected incumbent and her constituents. Because her constituents are not geographic captives, they more easily switch allegiance if their interests are not represented.

338. *Cf.* Applebome, *Blacks and the Election*, *supra* note 166, at 30, col. 2 (noting decline in black voting in mid-term elections because, "This is not 1964. Blacks aren't thrilled to death just because they have the right to vote. They have to have someone to vote for. One cost of moderating the message by Democrats is that they aren't exciting their most loyal voter core"; widening gap between black and white voter turnout attributed to the failure of the political parties to address civil rights and other concerns of blacks); *supra* note 153.

In addition, the concept of proportionate representation would not deplete the electoral energy generated by black electoral success theory. That proportionate interest arrangements depend on political cohesion and organization is a potential advantage for the black community. Despite their disproportionately depressed socioeconomic status, political activity is salient for blacks.<sup>339</sup>

Fifth, by modifying the threshold of exclusion in at large election systems, proportionate interest representation also avoids the gerrymandering problem common to district-based systems. By avoiding the need to draw subdistrict boundaries, proportionate interest representation obviates contemporary preoccupation with redistricting decisions.<sup>340</sup> Any system that relies on district representation, no matter how subtly gerrymandered, cannot equalize prospects of electoral success as effectively as a proportionate interest system.<sup>341</sup> Given geographical constituencies, some voters will always vote for losers. In addition, even where blacks are extremely geographically insular, they may not all be captured in a single relatively compact district. Some blacks will thus reside outside the district, and will be unrepresented or only *virtually* represented.<sup>342</sup> Other blacks, for reasons of political expediency, may be "packed" into a majority-black district, where their votes will be wasted.<sup>343</sup>

In other works, I explore further the implications of interest proportionality for democratic representation in general and separation of

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339. Once convinced of political possibilities, blacks are able to mobilize collectively, creating "historical moments" of "magical quality." G. McWorter, D. Gills & R. Bailey, *supra* note 153, at 8-9, 23, 27 (Afro-American Studies and Research, University of Illinois, Urbana). Controlling for income, blacks are consistently more politically active than their white demographic cohorts, and may also be more politically specialized and motivated. See D. PINDERHUGHES, *supra* note 5, at 232, 244-49; Ackerman, *supra* note 175; Jones, *Study Finds Americans Want News But Aren't Well Informed*, N.Y. Times, July 15, 1990, at 13, col. 1 (survey found higher proportion of blacks than whites were consistent news consumers).

340. See *infra* note 349. Proportionality achieved in the legislature via "gerrymandered district representation" yields at best the *presumed* ranking of voters' interests according to the designers of the district. Beitz, *supra* note 286, at 163. The degree of fit between voter interest and voter residence is an empirical question which I intend to explore elsewhere.

341. *Id.*; see also R. DAHL, *DEMOCRACY IN THE UNITED STATES* 115, 117-19 (1981) (single-member districts with plurality elections, although consistent with popular assumptions regarding democratic principles, do not ensure minority representation).

342. See *supra* note 135. This is particularly important where blacks are dispersed throughout the jurisdiction. See, e.g., *McGhee v. Granville County*, 860 F.2d 110 (4th Cir. 1988); *Gomez v. City of Watsonville*, 852 F.2d 1186 (9th Cir. 1988).

343. Parker, *supra* note 99, at 85, 96 (packing involves the overconcentration of minority voters in a single district). This is certain to become a critical issue in the redistricting efforts that follow the 1990 census where the number of black voters necessary to maintain a "safe" black district will be the source of contention between black incumbents interested in packing their districts to retain their seats and black activists committed to expanding the black community's base of power.

powers in particular.<sup>344</sup> My response here is limited to the feasibility concern. If it is true, as I have argued, that representatives are equal only if existing distributions of power, resources and prejudices do not play an "authoritative" role in their deliberations,<sup>345</sup> then it is not clear that the remedial goal of equal political participation in the form of a fair and equal distribution of preference satisfaction is realistic, especially within a litigation context.<sup>346</sup>

Even if doctrinally acceptable as a remedial strategy, proportionate interest representation may be politically unsuccessful in a time of retrenchment and regression. The political status quo factors that defeat the traditional electoral success model will predictably dilute any concerted litigation effort to improve legislative performance on behalf of black interests.<sup>347</sup> It may be that no electoral strategy, unaccompanied by a protest-based model of insurgent politics, can mobilize sustained commitment either to incremental reform or to more substantive conceptions of political justice. Moreover, the transformative effect of political power at the local political level is questionable.

While formidable, these concerns do not alter the proposal's political and doctrinal plausibility at the electoral level and its aspirational value for legislative deliberation. Proportionate interest representation disaggregates the majority to benefit some whites as well as blacks. At the electoral level, lowering the threshold of exclusion potentially empowers all numerically significant groups, including minority political parties, organized groups of women, the elderly, as well as any group of working class or poor people presently politically disadvantaged under a majoritarian model.<sup>348</sup> Retaining at large elections eliminates

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344. See Guinier, *supra* note 291.

345. See Cohen, *supra* note 204, at 22-23.

346. Cf. *supra* notes 290, 314 and accompanying text. The concept of proportional interest representation and the concept of proportional interest satisfaction, however, are not coterminous and objections to the interest satisfaction approach do not necessarily vitiate the value of interest representation.

347. Indeed, one might draw the lesson from my critique of black electoral success theory that no process-based reform, even one which attempts to enforce a substantive justice standard, may ultimately make a difference. One certainly could argue convincingly that blacks will never achieve political equality until they first achieve social and economic equality. As Professor Bell suggests with reference to the interest-convergence dilemma, see *supra* note 232, any alternative with real potential effectiveness will face fierce and politically powerful opposition. Others have also described this theme of pyrrhic victories. See Delgado, *When a Story Is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95, 106 (1990) (describing Law of Racial Thermodynamics in which "[r]acism is neither created nor destroyed" but merely has different guises, including "procedural" racism of seemingly neutral rules that predictably handicap black).

348. Hybrid forms of electoral representation, such as those I have advocated to satisfy proportionate interest representation, are better than exclusionary multimember election systems for all these groups. Depending on the particular facts, they are probably even preferable to single-member districts that waste votes within the district presumably controlled by the group and do not use efficiently group member votes in other majority-controlled districts. In any event, self-

the decennial contestation over political power, including the inevitable fight between incumbent politicians and minority groups seeking representation.<sup>349</sup>

At the legislative level, though much more problematic, pursuit of a radically different litigation strategy is still worthwhile. As applied to legislative decisional rules, these proposals are necessarily fact specific. Given the special historic, social, and political circumstances of a particular case, alternative remedies may be desirable, even preferable.<sup>350</sup>

The constitutionality of alternative threshold lowering electoral approaches has been upheld in a number of states,<sup>351</sup> although few courts and voting rights litigators have actually expressed a preference for these alternatives. But, even if litigators approach the *violation* stage of a voting rights case much as they do now, it may still be possible to strengthen, through proofs and briefs incorporating the proportionate interest principle, the remedial side of the judicial inquiry.

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defining, voluntary political constituencies including blacks will probably not come out worse under a hybrid form of representation and probably will come out much better, because they will be able to preserve both authenticity and reciprocity values. These distinctive self-defined groups will be able not only to elect candidates of choice but to become members of a coalition large enough to influence policy outcomes.

In addition, hybrid election reform “discards only the discriminatory part of the at-large system — the voting rule itself — and retains the part that is permissible — the underlying multi-member district and the form of the elected body.” Note, *supra* note 298, at 158-59 (citation omitted).

349. See Berke, *G.O.P. Tries a Gambit with Voting Rights*, N.Y. Times, Apr. 14, 1991, at D8, col. 4 (white Democratic incumbents who do not want to cede seats because of shifting demographics complain about “unholy alliance” between Republicans and minority groups seeking majority minority single-member districts).

350. See Still, *Voluntary Constituencies: Limited Voting and Cumulative Voting as Remedies for Minority Vote Dilution in Judicial Elections*, YALE L. & POL. REV. (forthcoming 1991). Of course, at the legislative level those cases will be hard to prove. Plaintiffs will have to put the local government on trial. This is problematic both as to a quantitative evidentiary analysis as well as the divisiveness with which any such inquiry is necessarily associated. A court might see fit to order a qualitative fairness remedy for legislative decisional rules only if plaintiffs prove high polarization thresholds and obviously discriminatory policy outputs over an extended period of time. This is also true if legislative remedies are implemented following proof of a violation at the electoral level.

351. See, e.g., *Cintron-Garcia v. Romero-Barcelo*, 671 F.2d 1, 6 (1st Cir. 1982) (limited voting scheme for election of Commonwealth representative is “reasonable” and facilitates minority representation); *Orloski v. Davis*, 564 F. Supp. 526 (M.D. Pa. 1983) (limited voting for Commonwealth Court); *Hechinger v. Martin*, 411 F. Supp. 650 (D.D.C.) (three-judge court) (upholding limited voting scheme for D.C. city council elections); *LoFrisco v. Schaffer*, 341 F. Supp. 743 (D.Conn. 1972) (three-judge court) (limited voting for school boards); *Kaelin v. Warden*, 334 F. Supp. 602, 605 (E.D. Pa. 1971) (limited voting scheme does not violate equal protection clause as long as each voter casts the same number of votes); *Blaikie v. Power*, 13 N.Y.2d 134, 243 N.Y.S.2d 185 (1963), *appeal dismissed*, 375 U.S. 439 (1964) (limited voting for New York City Council); cf. *Engstrom*, *supra* note 305 (challenges to basic plurality format increasing in U.S. driven by minority voter dissatisfaction with that representational format; number of local governments have adopted, through settlements in voting rights lawsuits, semi-proportional arrangements).

Moreover, as referenda or ballot initiatives, it may be useful and practical to explore further the qualitative advantages of an interest proportionality principle employed in conjunction with legislative decisionmaking changes.<sup>352</sup>

### CONCLUSION

The concept of proportionate interest representation represents an initial foray into a previously neglected field of research critically exploring pluralist theories of black political participation. Proportionate interest representation, however, does not address all the defects I identified in black electoral success theory. I have argued, for example, that black electoral success theory fails to address issues of false consciousness, cooptation, and the representational relationship between black voters and their representatives. By raising but not addressing concerns about the internal dynamic between black representatives and black voters, I have left open several related, additional responses to this dimension of the process of representation.<sup>353</sup>

I have merely assumed the possibility of developing a black representative who can listen to her constituents as well as her colleagues without becoming coopted, and who may be held accountable to black interests by political parties or community-based arrangements.<sup>354</sup> Similarly, the "role model" hypothesis and its delineation of the expectations and responsibilities in black elected officials warrants further analysis.<sup>355</sup>

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352. See Engstrom, *supra* note 305; *supra* notes 290, 302-05, 314.

353. For example, a participatory model of "strong democracy" may be compelled based on further inquiry into the importance of interactive, continuous communication between the black representative and the voter. See, e.g., B. BARBER, *supra* note 127. In this sense, the representational dynamic may require reviving a more activist, protest model for electoral processes. See, e.g., J. BUTTON, *BLACKS AND SOCIAL CHANGE* 236-41 (1989) (pluralist assumption flawed that conventional politics alone produces major change for outgroups; protest and unconventional politics are important supplements to mobilize and make visible the claims of disadvantaged groups).

354. This new black representative is, or can become, an effective listener, Williams, *supra* note 1, at 411 (bridging gaps requires "listening at a very deep level to the uncensored voices of others"), who can bridge a dual consciousness, W.E.B. DUBOIS, *supra* note 133, at 3 (describing double consciousness of being black and being American); cf. Barnes, *Race Consciousness: The Thematic Content of Racial Distinctiveness in Critical Race Scholarship*, 103 *HARV. L. REV.* 1864, 1866 (1990) (describing dual consciousness as conscious perception of people of color that their lives and concerns are valued differently by the white majority). The new black representative consistently and confidently transforms constituent consciousness into mainstream discourse and appropriates the transformative power of mainstream texts. Matsuda, *supra* note 1, at 333-42 (defining transformation in contrast to cooptation).

355. For example, I plan elsewhere to investigate the nature of community-based leadership to analyze how merely focusing on the symbolic achievements of black elected role models distracts from their more important mentorship, teaching, and leadership functions. In particular, I will argue that spokesmodels have an affirmative responsibility to their constituents to create

The critique also contains the seeds for developing a model of community-based political parties organized around a specific set of demands or interests.<sup>356</sup> Within this conceptual framework, even bolder attempts to dismantle existing district-based election systems may be necessary to promote and reinforce political organizations or third political parties dedicated to expressing minority viewpoints.

Although my ideas are not yet completely formed, I offer this set of suggestions as a political and remedial position most advantageous to civil rights advocates. Proportionate interest representation contains strategies for reform at both the electoral and legislative level to address some of the process defects in black electoral success theory that have failed to yield substantive justice. Proportionate interest representation is tied both to the congressional and the civil rights vision underlying the Voting Rights Act. The proposals discussed here apply whether civil rights advocates adopt an exclusively pluralist conception of political bargaining or a civically virtuous notion of deliberation.

By extending my speculative reconstruction of political equality to legislative deliberations, however, I am not articulating a grand moral theory of politics. Nor do I argue that these proposals are statutorily or constitutionally required. My purpose has been to attempt to conceive of a deliberative process in which racism does not control all outcomes. I do not articulate a general principle of judicial review, but have limited my suggestions to the specific context of racial discrimination as a remedial approach to statutory violations.

Without regard to the fact that these proposals may not be immediately implemented, at least political and civil rights activists can measure the failures of the current model assisted by an understanding of political equality that begins to define a future vision. Even if unrealistic, proportionate interest representation serves as an ideal to guide further efforts. Proportionate interest representation is an empowering concept to the extent it enables black voters to "name [their] political reality"<sup>357</sup> or to develop their political imagination.

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their own template of how the representational role should be carried out, and ought not rely for legitimacy simply on their role model "status."

356. See, e.g., J. Bond, *supra* note 260, at 27 (formation of independent political parties at the local level can promote minority interests in cross-cultural coalitions); letter from D. Cunningham to author (Sept. 24, 1990) (on file with author) (effective interest representation builds on organizational models of trade unions, community-based nonhierarchical Baptist churches, and civil rights protest organizations such as the SNCC and SCLC); cf. Fitts, *supra* note 274 (strong political parties help discipline representatives).

357. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1336 (1988) (describing blacks' greatest political resource as the ability to "name [their] political reality").