

2002

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Louis Michael Seidman
Georgetown University Law Center

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Recommended Citation

Louis M. Seidman, *Democracy and Legitimation: A Response to Professor Guinier*, 34 Loy. U. Chi. L. J. 77 (2002).
Available at: <http://lawcommons.luc.edu/lucj/vol34/iss1/4>

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Democracy and Legitimation: A Response to Professor Guinier*

Louis Michael Seidman**

I am a big fan of Lani Guinier. I admire her courage, envy her articulateness, and share her outrage. I make this point at the beginning of this response because I hope that it will put into context my criticisms of her paper. But, I do have criticisms. In this paper, at least, I believe that she is headed in the wrong direction.¹

In order to see the problem with Professor Guinier's position, we need to start by focusing on some basic facts. According to the United States Census Bureau, as of 2000, the poorest 20% of the population received 3.6% of the nation's income, while the highest 20% received 49.7%.² The Congressional Budget Office tells us that between 1979 and 1997, the average income for Americans in the top 20% went up by 50%, while the average income for the bottom 20% went down by 4%.³ The latest census shows that 31.1 million Americans are poor.⁴ Specifically, over one in five African-Americans, almost one in four households headed by a female, and 16.2% of all children are below the poverty line.⁵ According to the Department of Agriculture, over 10% of

* This response to Professor Guinier's essay, *Supreme Democracy: Bush v. Gore Redux*, 34 LOY. U. CHI. L.J. 23 (2002), was written after seeing a draft of Part IV of her article, "Response to Criticism of this Essay." Professor Guinier has since revised Part IV of her article, and I did not have an opportunity to address those revisions.

** Professor of Law, Georgetown University Law Center. These remarks, like Professor Guinier's, were originally delivered orally. I have followed her lead in retaining their informal character. My thanks to Mark Tushnet for providing comments on an earlier version of this response.

1. See Lani Guinier, *Supreme Democracy: Bush v. Gore Redux*, 34 LOY. U. CHI. L.J. 23 (2002).

2. U.S. CENSUS BUREAU, MONEY INCOME IN THE UNITED STATES: 2000, at 7 (2001), available at <http://www.census.gov/prod/2001pubs/p60-213.pdf> (last visited Nov. 25, 2002).

3. CONG. BUDGET OFFICE, HISTORICAL EFFECTIVE TAX RATES 1979-1997, at 5 (prelim. ed. 2001), available at <ftp://ftp.cbo.gov/28xx/doc2838/historicaltaxrates.pdf> (last visited Nov. 25, 2002).

4. U.S. CENSUS BUREAU, POVERTY IN THE UNITED STATES: 2000, at 1 (2001), available at <http://www.census.gov/prod/2001pubs/p60-214.pdf> (last visited Nov. 22, 2002).

5. See *id.* at 2.

American households do not always have enough food to eat.⁶ We could spend a long time arguing about the causes and cures for these facts. Whatever the causes and whatever the cures, surely the American people would not casually and unthinkingly accept this obscenity unless there were complex and powerful legitimating structures in place allowing them to distance themselves from it.

What are the legitimating structures? There are four that seem especially significant. First, Professor Guinier rightly focuses on the belief in meritocracy.⁷ For our purposes, we might define a believer in meritocracy as someone who thinks that, in a given society, people get more or less what they deserve. Hence, if there are people in our society who are poor or hungry, powerless or on the streets, they are in these predicaments because of something that they did or failed to do. In short, they are there because they deserve to be there.

I have no quarrel with Professor Guinier's attack on meritocracy as a legitimating structure. Indeed, if there is a single position that identifies the progressive tradition—or at least that part of the progressive tradition that I like to associate myself with—it is an insistence on the contingency of the distribution of power and property. Belief in meritocracy is wrong because it obscures the arbitrariness of the standards of “merit” that determine distributions and because it dulls our sense of moral outrage at the suffering of the many for the benefit of the few.

The belief in meritocracy is a powerful force in our culture, but it could not bear the weight that our current circumstances put upon it without the support of two other legitimating structures that have special appeal to elites. First, a commitment to economic efficiency supports the status quo. Unlike believers in meritocracy, people who defend the efficiency hypothesis will sometimes concede that markets operate unfairly—that is, when they are willing to concede that the concept of fairness has any analytic content at all. Nonetheless, they insist on the inevitability of market distributions on the ground that any effort to redistribute or regulate will result in a reduction in incentives and destruction of gains from trade, thereby making the total pie smaller.⁸ The efficiency argument has less emotive power than the

6. See ECON. RESEARCH SERV., U.S. DEP'T OF AGRIC., FOOD SECURITY IN THE UNITED STATES, at <http://ers.usda.gov/briefing/FoodSecurity> (last modified Nov. 13, 2002).

7. See Guinier, *supra* note 1, at 44–50.

8. See, e.g., Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 966 (2001) (arguing that “when the choice of legal rules is based even in part on notions of fairness, individuals tend to be made worse off”); Louis Kaplow & Steven Shavell, *Why the Legal*

argument from meritocracy, and it therefore appears only occasionally in what popular discussion there is about the maldistribution of wealth. It is, however, the legitimating structure of choice for the pseudo-sophisticates of the right who, among their many recent triumphs, have made efficiency talk into something approaching the *lingua franca* of American legal education.⁹

Closely tied to the efficiency argument is the second elite legitimating structure—the rhetoric of impotence. Here, the claim is that economic maldistribution is a complex and difficult problem understood only by experts. According to this view, the absurd notion that what makes people poor is the absence of money, and that poverty might be alleviated by the provision of money, deserves nothing but contempt.¹⁰ Instead, it is claimed, the problem is tied to broad societal, economic, and cultural forces over which we have little or no control. Efforts to deal with it are bound to have unintended and counterproductive consequences, and people who think otherwise are unrepentant and unwashed radicals whose views are not worthy of serious consideration.

Each of these legitimating structures helps to support the status quo, but even taken together, they cannot do the job alone. There is a fourth structure that is even more powerful than the other three, because it has both mass and elite appeal that extends across the political spectrum. Indeed, it is so powerful that it seems to have taken in Professor Guinier. I am referring to the belief in democracy.

When democratic rhetoric is deployed to support the status quo, the claim is that the current distribution of power and wealth is justified because it is produced by a political process that is open to all. Thus, even if some people think that these outcomes are substantively unfair, it is nonetheless arrogant and elitist to insist that *their* substantive views should prevail. In a culture with widely divergent substantive views, the only fair way to resolve disputes is through democracy. Conversely, if a dispute has been resolved democratically, mere substantive disagreement with the outcome does not justify resistance.

System Is Less Efficient than the Income Tax in Redistributing Income, 23 J. LEGAL STUD. 667 (1994) (arguing that legal rules are an inefficient method of distributing wealth).

9. See Keith Aoka, *Introduction: Language Is a Virus*, 53 U. MIAMI L. REV. 961, 966 (1999) (characterizing the “‘language’ of law and economics” as “the *lingua franca* of vast stretches of legal academia”).

10. See, e.g., LAWRENCE M. MEAD, *BEYOND ENTITLEMENT: THE SOCIAL OBLIGATIONS OF CITIZENSHIP* 65 (1986) (arguing that “a benefit-oriented social policy might after a point produce more poverty rather than less, because of the behavioral changes it would induce”).

At first, it may seem paradoxical to link Professor Guinier to this structure of legitimation. After all, isn't she claiming that current distributions of wealth and power are illegitimate precisely because they have been achieved undemocratically?¹¹ In fact, however, Professor Guinier, like democratic apologists for the status quo, links legitimacy to democracy.¹² Her position suggests that if only outcomes were produced by a truly democratic process, then they would be legitimate.¹³ Put differently, her complaint seems to be not that millions of children go to bed hungry, that endless resources are wasted on a bloated defense establishment, or that there are huge differences between the kinds of lives that Americans of different social classes can expect to live. No, the problem is that we do not have proportional representation, that somehow we are aggregating votes in the wrong way, that the two-party system fails to reflect the national will, and that Florida is using the wrong kind of voting machines.¹⁴

I say that her paper "suggests" this interpretation, but I must add that there are two crucial ambiguities in her position. First, perhaps Professor Guinier is claiming that democracy is a necessary but insufficient condition for political legitimacy.¹⁵ There is no logical problem in believing both that our system is illegitimate because it is undemocratic and that, even if it were democratic, it would still be illegitimate so long as it produced severe maldistributions of wealth and power. But although this position is not illogical, neither is it very helpful if it turns out that we must choose between democracy and distributive justice. For reasons set forth below, I believe that we may well face this choice. If I am right, then an insistence that democracy is necessary will, as a practical matter, also make it sufficient.

Moreover, even if we don't face this choice in a pure form, we must still decide whether to focus limited political energy on issues of democratic self-governance or on issues of substantive distributions. By focusing on procedure, however, we risk becoming distracted from more important issues of substance. We must also be concerned that, through a kind of rhetorical slippage, the claim that our system is illegitimate because undemocratic will be translated into the logically distinct but easily confused assertion that once made democratic, the system thereby becomes legitimate. A reader of Professor Guinier's

11. Guinier, *supra* note 1, at 25–28.

12. *Id.* at 51–58.

13. *Id.* at 58–64.

14. *Id.* at 51–64.

15. *Id.* at 70–71.

essay might well ask why she is willing to expend so much energy to reform putatively undemocratic structures if this reform, once achieved, would still leave the system fundamentally flawed. The reader might be forgiven for inferring from this willingness that Professor Guinier believes that her reforms would accomplish something really important, and that the problems left untouched by the reforms are therefore relatively unimportant.

The issue of tactics leads to a second, closely related, ambiguity in Professor Guinier's position. It is unclear whether she really believes in democracy as a matter of deep principle, or whether her position is only tactical. The way to test which view she holds is to ask whether she would still favor democracy if it resulted in a substantive outcome that she abhors—if, for example, it served to entrench rather than destabilize a deeply unjust social order. I must confess that I am not sure what answer Professor Guinier would give to this question. On the one hand, Professor Guinier insists that democracy is not “a tactic to achieve particular substantive ends, but . . . an end in itself.”¹⁶ Yet on the other hand, her paper is studded with references to the likely success of a “broad, multiracial and progressive coalition”¹⁷ that, she believes, would emerge if only we adopted truly democratic procedures. Toward the end of her paper, she claims that her “vision of democracy will, [she] hope[s], result in the substantive social justice that [we] both worry about.”¹⁸ By relying on this “hope,” Professor Guinier manages to slide off the hard question of whether her belief in democracy trumps her belief in social justice. Because I am authentically uncertain which position she holds, I will address each in turn.

Suppose that Professor Guinier is adopting only the rhetoric of democracy in order to achieve a set of substantive ends that is conceptually independent from democratic governance, and that she would abandon democracy as soon as it conflicted with her version of social justice. Instrumental arguments for democracy make some sense if, in fact, they are likely to achieve those ends. There are nonetheless two objections to the instrumental position. First, it is disingenuous. As noted above, Professor Guinier sometimes presents her position as a matter of principle that transcends disagreement about social policy. If her democracy rhetoric is, nonetheless, merely a tactic for putting into power a “progressive coalition,” then that part of her audience that does not favor such a coalition deserves to be told so. Put differently,

16. *Id.* at 64.

17. *Id.* at 53.

18. *Id.* at 72.

Professor Guinier's substantive proposals should be debated on their own merits. It is deeply misleading to pretend that opposition to these substantive claims is rooted in disregard for transsubstantive, foundational principles of political fairness.

Second, even if one puts aside qualms about candor, the trouble with the instrumental use of democracy rhetoric is that it is unlikely to work. This tactic has a long pedigree, and its history should give us pause. For decades, the feminist movement was organized around the battle for the right to vote. It was thought that if only women could exercise the franchise, our politics and culture would be transformed. Of course, equal suffrage is a worthy goal on its own terms, but the fact remains that the Nineteenth Amendment left our politics mostly unchanged, and its passage turned out to be a disaster for the feminist movement. By cleverly giving women what they were demanding, men successfully delayed real movement toward gender equality for two generations.¹⁹ Similarly, passage of the Fifteenth Amendment, removing formal legal obstacles to the right to vote, did virtually nothing to change the status of African-American citizens.²⁰ The result produced by the 1965 Civil Rights Act is more ambiguous, but I don't think that any sensible person believes that it has produced the racial transformation that its advocates had hoped for. Although some progress has been made, it is sheer myth to suppose that the extension of the franchise has ended black subjugation.²¹

Given this sorry history, why should anyone suppose that Professor Guinier's version of democratic revival would fare any better? The argument that democratization will produce progressive, substantive outcomes rests on a large *non sequitur*. Suppose it is true that our current political structures fail to represent fairly the interests of certain groups. It simply does not follow that these groups would be thrust into power if only they were fairly represented. On the contrary, it is entirely possible—indeed likely—that these groups would be outvoted under a wide variety of different structures designed to aggregate

19. See JAMES MACGREGAR BURNS & STEWART BURNS, *A PEOPLE'S CHARTER: THE PURSUIT OF RIGHTS IN AMERICA* 170 (1991) (arguing that passage of the Nineteenth Amendment "resulted in little concrete change in most women's lives" and "led to the collapse of the woman's movement as a collective force").

20. In the immediate wake of Reconstruction, African-American people voted in large numbers. However, by the 1890s, southern states had adopted measures like literacy tests and poll taxes that effectively replaced the formal ante bellum barriers to African-American voting. See Michael J. Klarman, *The Plessy Era*, 1998 SUP. CT. REV. 303, 308 (1998).

21. Professor Guinier herself has been in the forefront of those who have exposed the myth. See Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077 (1991).

preferences. Sadly, American leftists never seem to learn that our politics are played on a very small margin. A large segment of the electorate is fundamentally conservative and complacent, sanctimonious and satisfied. Although there are many poor people, they are nonetheless a minority, and for so long as they remain distant—geographically, culturally, and empathically—from suburban soccer moms, no amount of tinkering with the forms of democracy is likely to achieve social justice. Even if everyone had an equal voice in determining political outcomes, the legitimating structures I have already mentioned make it unlikely that these facts will change any time soon. The fundamental problem, then, is not with counting votes, but with changing minds.

Of course, these concerns have no force if Professor Guinier is not making an instrumental argument and, as noted above, Professor Guinier sometimes seems to reject the instrumental approach.²² If we are to take these protestations seriously, then she must believe that democracy is a necessary condition for political legitimacy even when it leads to the defeat of the policies she favors. That is, after all, what it means to believe in democracy on principled grounds. But why should anyone hold this belief? Why should we be willing to trade off substantive justice for procedural justice?

It is important here to dispel two misunderstandings that confuse the debate between democrats and their critics. First, there is a difference between a commitment to democracy and a commitment to political organizing. I share Professor Guinier's admiration for the United Farm Workers' ("UFW") organizing efforts in the 1960s and 1970s.²³ She is right to insist that "bottom-up" organizing is often superior to the "top-down" version.²⁴ Still, as someone who claims to value the "superior wisdom" of those without "book learning,"²⁵ she might have paid more attention to what the UFW chose to organize about. At least as I remember it, the workers themselves did not organize around the intricacies of democratic theory. Instead, they raised substantive issues of social justice—decent working conditions, reasonable pay, and the fundamental right to self-respect.²⁶ If I understand her correctly,

22. See Guinier, *supra* note 1, at 64 (arguing that democracy is not "a tactic to achieve particular substantive ends, but . . . an end in itself").

23. *Id.* at 71–73.

24. *Id.* at 71.

25. *Id.* at 68.

26. My recollection is confirmed by Professor Guinier's colleague, Charles Ogletree, who points out that Cesar Chavez "fought for higher wages, for adequate living conditions, for safe transport to and from the fields, and for the right to bargain collectively." Charles J. Ogletree, Jr.,

Professor Guinier thinks that this choice was a large mistake. Instead of following the UFW's example today, she would have us use our limited political resources to promote a procedural agenda that Cesar Chavez could not have cared less about.

This leads to a second confusion: skepticism about democracy is not the same thing as an arrogant refusal to think seriously about arguments offered by others. It is therefore simply not the case, as Professor Guinier asserts, that the difference between us is that she alone doesn't "know in advance what the most just outcome is in all situations or how to achieve it,"²⁷ and that she alone believes that "the people themselves have superior wisdom in so many ways to those of us who have superior book learning."²⁸ I must confess to some skepticism that, at this stage in her career, Professor Guinier is likely to soon change her mind about "what the most just outcome is" after a conversation with, say, a blue collar Reagan conservative lacking in "superior book learning." On the contrary, as I understand her, she is quite prepared to discount the views of "working-class whites [who] support a conservative political agenda," as she once expressly stated,²⁹ apparently because people of this sort don't belong to unions.³⁰ But if I am wrong about this—if she is in fact as commendably open-minded as she claims—this trait has nothing to do with a commitment to democracy. Of course, before one forms an opinion, one should listen to the argument on the other side. Of course, even after the opinion is initially formed, one should remain as open as possible to subsequent revision of one's views. And of course, if many people reach a different judgment, that fact alone provides a good reason to reconsider one's own opinion.

There nonetheless comes a point when all these factors have been considered and given appropriate weight and when the time to act has finally arrived. The question Professor Guinier fails to answer is why at this crucial moment of decision, one should subordinate one's own deeply held all-things-considered beliefs about political justice to majority preferences. There are serious people who have thought that we should do so, but Cesar Chavez was not among them. Neither were

The Quiet Storm: The Rebellious Influence of Cesar Chavez, 1 HARV. LATINO L. REV. 1, 7 (1994). Professor Ogletree provides no support for the proposition that either Chavez or the movement that he led ever became enmeshed in the intricacies of democratic theory.

27. Guinier, *supra* note 1, at 68.

28. *Id.*

29. In an earlier draft, Professor Guinier made this statement, which has since been removed through the editing process. (Unpublished draft on file with *Loyola University Chicago Law Journal*.)

30. See Guinier, *supra* note 1, at 51–54.

Martin Luther King, Mahatma Gandhi, or Henry David Thoreau. Does Professor Guinier really want to place herself on the other side of this argument?

This Essay is not the place for a full-blown discussion of democratic theory. Indeed, part of my position is that in our present circumstances such a discussion is deeply beside the point. Still, it is worth examining the difficulty that Professor Guinier's argument for a foundational commitment to democracy gets her into. The difficulty begins with the brute fact that in contemporary political discourse there is reasonable disagreement about what precisely democracy entails. Professor Guinier offers a powerful argument for a particular conception of democracy, but we need to understand that her conception is contested. Perhaps regrettably, not everyone agrees that her particular version of proportional representation would make our system more democratic. No one has an uncontroversial solution to Condorcet's Paradox,³¹ to cycling problems, to putting in place the necessary preconditions for democracy, or to the difficulty of measuring the intensity of preference.

If we treat democracy as foundational, this disagreement leads to a vicious circle. Democratic theorists might be expected to favor democracy as the means by which these disagreements about democratic theory could be resolved. Thus, we should not be surprised when Professor Guinier, the good democratic theorist that she is, laments the constitutionalization of democracy. For example, she attacks *Bush v. Gore*³² as being a judicial interference with democratic processes.³³ Similarly, she decries the tendency of some progressives to rely upon the Supreme Court to achieve social change.³⁴ As a democrat, Professor Guinier understands that her commitments must be put to a democratic test and should not be imposed by judicial fiat.

But there is an obvious difficulty with using democratic processes to define what democratic processes amount to. I stand second to no one in my disgust and dismay at the Court's performance in *Bush v. Gore*,³⁵ but one does have to understand that the majority's self-conception was that it was enforcing, rather than undermining, democratic principles.

31. Condorcet's Paradox holds that when there are three or more parties, each with well-ordered preferences, faced with three or more policy choices, no single choice may be the choice of a majority. For a good explanation, see JERRY L. MASHAW, *GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW* 12-13 (1997).

32. *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam).

33. Guinier, *supra* note 1, at 24.

34. *Id.* at 68-70.

35. See Louis Michael Seidman, *What's So Bad about Bush v. Gore? An Essay on Our Unsettled Election*, 47 WAYNE L. REV. 953 (2001).

Thus, the conflict between the *Bush* Court and its critics is not a conflict about whether we should have democracy, but about what democracy means. It should be clear that attempting to resolve this conflict through democratic processes leads to a circle. In order to resolve these disagreements democratically, we would have to have already settled the very disagreement we are trying to resolve.

The only way to avoid this circle is to admit what Professor Guinier wants to deny—that democracy cannot be foundational. Put differently, we cannot rely on democratic processes to put in place and legitimate a particular instantiation of democracy. Professor Guinier seems to have an inkling of this as well. Hence, she criticizes the Supreme Court for failing to intervene in cases where it has refused to order third-party participation in debates or where it has not invalidated political gerrymandering.³⁶ Her attack makes sense if one thinks, as I have argued, that we cannot rely on democracy to put democracy in place. But Professor Guinier should not attempt to have it both ways. She cannot both attack the “constitutionalization of democracy”³⁷ and then attack the Court for *failing* to constitutionalize democracy. She wants to have it both ways, because otherwise it will become obvious that, by insisting on her particular version of democracy, she, like those she criticizes, is trying to resolve a legitimate disagreement by fiat.

This problem, in turn, leads to a second series of contradictions. Suppose that we concede for the sake of argument that Professor Guinier’s particular version of democracy is the “right” version. Of course, her complaint is that this version is not presently in place in the United States and, because it is not in place, the current political process does not provide people with a fair opportunity to have their views reflected in public policy. Why would anyone who believes this suppose that such an unfair system, stacked against the disadvantaged, could reform itself? If the system is as undemocratic as Professor Guinier believes, does it not follow that this unfairness will be reflected in resistance to the change she demands? Put the other way around, if the kind of grassroots political actions that Professor Guinier favors would indeed be successful, would not this success demonstrate that the system as currently constituted is more democratic than she allows?

In fact, I think it is foolish to suppose that this country is on the verge of a fundamental rethinking of our political system. There is not going

36. Guinier, *supra* note 1, at 32–33, 41–44.

37. *Id.* at 24 (citing Richard Pildes, *Constitutionalizing Democratic Politics*, in *A BADLY FLAWED ELECTION: DEBATING BUSH V. GORE, THE SUPREME COURT, AND AMERICAN DEMOCRACY* 155 (Ronald Dworkin ed., 2002)).

to be proportional representation. There are not going to be viable third and fourth parties that drive the Democrats to the left, and if there are, the only result will be to further entrench a conservative, Republican plurality. There is not going to be a large mass movement demanding popular democracy of the sort that Professor Guinier envisions. Optimism is great, but we need to face the facts, and the facts are that we may well end up with conservative Republican presidents for as far as the eye can see.

Of course, there are also serious difficulties in using the present system to implement a redistributive substantive agenda. But at least efforts to accomplish this goal are directed at changing people's minds in a way that would actually matter. In contrast, Professor Guinier's strategy depends on a sort of indirection that is too clever by half. In progressive circles, one endlessly hears a lament that goes something like this: "If only we had real campaign finance reform, then we could get Congress to pass X." This observation is a little like saying, "if only there were not gravity, then we could fly." It is always a mistake to suppose that our opponents are stupid. People who do not want X will block authentic campaign finance reform precisely because they know that if it were enacted, it would lead to the passage of X. Conversely, if we had the votes to pass campaign finance reform, we would not need to do so because then we would already have the votes to pass X.

I do not want to accuse Professor Guinier of falling into the democracy trap, only to fall into the impotence trap myself. It is important, therefore, to recognize that even though we are operating in a very unfavorable political environment, there are things that can be done. But the main thing that has to be done is changing people's views about X, not passing campaign finance reform. I have two specific suggestions about how we might go about doing this.

First, I agree with Professor Guinier that the dispossessed should be empowered to choose their own destinies.³⁸ For just this reason, however, it seems foolish to try to organize those left out of American society around arcane issues like proportional representation. As Cesar Chavez understood, people with nothing lack the luxury of debating process. They want to talk about what really matters, and what really matters is substantive outcomes. I had thought that after a long struggle, the American intellectual left had finally freed itself from the trap of process. It is therefore dismaying to see Professor Guinier go

38. *Id.* at 70–71.

over the same tired ground that people like John Hart Ely wore out a generation ago.³⁹

Second, in this environment, preaching to the choir with rhetoric that convinces only those who need no convincing is the height of self-indulgence. The few victories that are to be had require painful, sometimes unprincipled, compromise, postponing demands that cannot in justice be postponed, and carefully constructing coalitions with partners we secretly detest.

Perhaps, too, we need to secretly detest fewer partners. Building coalitions among people of color or among the dispossessed of all colors is fine, but these coalitions are unlikely to be large enough to accomplish what needs to be done. If we are to expand beyond these groups, we must in fact do what, I'm afraid, Professor Guinier only pretends to do. We must be authentically open to changing our own minds even as we try to change the minds of others. For example, we simply cannot afford to dismiss the views of politically conservative blue-collar workers on the grounds that they are not unionized. We need, instead, the moral imagination to understand why someone might believe that these views are right. We need to cultivate the ability to understand that our opponents are neither idiots nor moral monsters and to see how it could be possible that someone who is not an idiot or a moral monster can end up being our opponent. And yes, perhaps we even need to tone down some of the rhetoric about legitimating structures with which this Essay begins.

We need to do all these things because, in the end, we can only expect to be taken seriously by others if we take them seriously as well. No one said that this would be easy or fun, but it is possible. Changing minds is hard, but it can be done if we approach the task with the openness and discipline, focus and humility, that the task requires. There is no hope that it can be done if we expend our energy worrying about counting votes rather than changing minds. As things stand now, we do not have the votes however they are counted. My hope, then, is that Professor Guinier will change her mind and use her considerable talents to help change the minds of others.

39. Professor Ely is famous for his effort to reduce many substantive constitutional principles to controversies about democratic processes. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).