More Democracy

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The cure for the ailments of democracy is more democracy.

John Dewey

I want to suggest the extraordinary notion that democracy means that ordinary people should participate in making the decisions that affect their lives. I want to talk about how we can make democracy more participatory and less alienating. I want to describe a vision of democracy as engaged public communication, democracy that is less about winning a "game" and more about listening, responding, and working through the creative tension of difference. This is democracy in which we strive for a synthesis of component voices rather than the monolithic command of a single or homogeneous majority. This is democracy as participatory public conversation.

My husband and I were sitting around the kitchen table as I was preparing to give this talk. I was trying to explain the basic idea that people should be participating in the decisions that affect their lives. So I said, "What could I call this in order that people would understand what I am talking about?" My husband said, "Well, what you're really talking about, Lani, is participatory democracy." And I said, "Oh no, participatory democracy, that's too abstract a concept. I need something catchy." So my seven-year-old son, who was eavesdropping as he loaded magnets on the refrigerator door, exclaimed, "Oh, I know what you should call it." Curious, I asked, "What's that?" He announced, "Baseball!"

† Professor of Law, University of Pennsylvania Law School. This speech is based on a transcript of remarks delivered at the University of Chicago Legal Forum Symposium, November 4-5, 1994, entitled "Voting Rights and Elections". Although I edited the remarks for publication, I have tried to retain the informal format of the original venue. Copyright rights to this article are with the author.

I paused. "Baseball?" I skeptically repeated his statement. Without missing a beat, my son responded, "Yeah, you know, you said 'catchy,' and when you're playing baseball, you go out into the field and you catch the ball." As any good law professor would, I questioned my son further. I asked, "Nikolas, do you know what we're talking about?" He answered proudly, "Yeah, democracy." I continued the Socratic interrogation. I asked, "Well, what is democracy?" He said, "It's this really weird thing where people raise their hands and vote. Now can you imagine doing that all day, just raising your hands and voting? Who would want to do that? That's really weird." I queried him further, "Well, why would people vote?" Nikolas replied, "Well, I guess you vote because otherwise the person who's President would be President for their whole life and that would be really boring."

I was intrigued. I starting thinking about a seven year old's version of democracy. I thought, "Is there some way to use Nikolas's notion that on the one hand, democracy is really weird if it is only about voting, and yet on the other hand, if you don't vote, you give up the chance to hold elected officials accountable? Voting is an essential aspect of democracy but it is 'weird' if it becomes the only condition of a genuine democracy." Some of you in the audience may think that I am just a typical mother trying to read something interesting into what is actually an off-the-refrigerator-wall comment by her seven-year-old offspring. But let me ask that you bear with me before dismissing this provocative analogy.

PBS just produced a critically acclaimed television series about baseball. An African-American philosopher was interviewed. He predicted that in a thousand years the United States of America will probably be known for three things: its form of constitutional democracy, jazz, and baseball. So, you see, others unrelated to me have perceived some connection between baseball and democracy. Baseball, democracy, and jazz are authentic American pursuits that are part of the ongoing experiment we call the United States. I want to explore with you today another way of viewing the evolution and dynamic interaction of all three indigenous experiments: constitutional democracy, baseball, and jazz.

In one sense, my son was exactly right. Democracy and baseball have a lot in common. Baseball is a highly structured and open-ended game of strategy, skill, and luck. It is often reduced to a confrontation between a pitcher and a batter, but it takes an
entire team to execute. Many people say that baseball is fun to play but boring to watch. The same can be said of democracy.

Both baseball and, unfortunately, democracy as we now practice it have become spectator sports. They are games in which the emphasis is on watching others play to win. Voters do not participate; they spectate. Elections in which voters are spectators are elections characterized by high levels of alienation and low levels of turnout. When voters merely spectate, they do not listen, learn, or engage. They keep score: Who’s up? Who’s down? Who won? Who lost? Indeed, news coverage of elections directly hyps the notion of an ongoing series of up or down, win or lose games.

Jazz is different. You don’t “win” at jazz; you collaborate in order to communicate. Jazz is highly structured—like baseball and American politics. Its goal, however, is not winning or losing but producing something of beauty that is shared as much among the musicians as it is between the musicians and the audience. Its beauty lies in the improvisation that exalts communication over mere performance. The best jazz artists are usually remembered for the way they function in a collaborative setting. The excitement might be generated by a soloist, but the soloist is almost always playing against, and with the support of, the rhythm section and the melodic themes of the piece. Dissonance, double time, improvisation, and extending the melody through different rhythmic ranges produce a new way of hearing and speaking that borrows from European as well as African roots.

I want to discuss whether democracy as we practice it in the United States could become less like a spectator sport and more like a jazz conversation. I want to talk about how we can make political participation less like a game of winners and losers and more like a medley of diverse voices working together to interpret a theme and to drive it forward. I want to explore whether democracy, like jazz music, can be an evolving experiment in public conversation.

I want to discuss the idea of reconceptualizing democracy as participatory, public conversation in the context of race. The question I ask is: How can we have a democracy in a multiracial society in which everyone feels that they have an opportunity to participate, in which everyone feels that they have access to the forum where the debate is taking place, and in which everyone feels not only that we are playing on a level playing field, but that they have a shot at getting a chance at bat?
Now, I'm talking about race in part because race is such an important political cue in our democracy. Race, in other words, still matters. Race, unfortunately, or fortunately, depending on your perspective, still defines the political interests of many Americans, and it should not surprise us that this is true given the fact that we live in such a racially defined world.

If you look at television, for example, which is something that over 90 percent of Americans apparently do,\(^2\) you will see that we don't watch the same television shows. And what we choose to watch is very often correlated with our race. Indeed, in March of 1994, TV Guide cited a poll of the top ten most watched television shows.\(^3\) According to the TV Guide poll, there is not even one show that both whites and blacks put on their top-ten list. Not a single show on the top-ten list for whites is on the top-ten list for blacks and vice versa. Whites and blacks both watch television, but they watch different shows. Of the shows that blacks watch, most of them feature a predominately African-American cast. Of the shows that whites watch, none of them feature a predominately African-American cast, and indeed, it is only when you get to the top twenty that you find two shows that both blacks and whites watch. One of the shows is 60 Minutes and the other—it's not baseball, but it's still a spectator sport—is Monday Night Football.

Times Mirror did a study recently, a very extensive study, of American attitudes.\(^4\) One of the most interesting results was that 65 percent of white Americans now agree that it would be okay for a member of their family to date an African-American. Sixty-five percent of white Americans who were responding to this poll now agree that it would be okay for a member of their family to date an African-American. That is a huge increase from just four years ago; in fact, it is a twenty point increase from just four years ago. And yet, of the same group of white respondents, 51 percent say that we have gone too far in pushing for equal rights in this country. So, on the one hand, people are willing to make exceptions for individuals who may be of a different race,


but in terms of groups, in terms of equal rights for African-Americans as a group, we're still thinking very much along different and racialized lines.

Now, in the legal academy, on the Supreme Court, and in public discourse, many people who are committed to contemporary-equality jurisprudence and who believe that equal rights should matter nevertheless say that race should not matter. Many of those people committed to contemporary-equality jurisprudence say that race should not matter and that government must be color-blind as a normative principal. They argue that if we recognize race, we inevitably advantage some and disadvantage others, and that to recognize race in the public sphere simply reinforces existing hostilities or provides a moment at which people who are feeling stigmatized will just feel more so.

Those who say that we have to pursue a color-blind jurisprudence also suggest that we must be color-blind not only as a normative matter, but as an empirical matter. They point out that not all members of a racial group think alike. People who are members of a particular racial group do not all think alike. People do not all think alike whether it is the white majority, the Latino minority, the Asian minority, or the African-American minority. These commentators point out that, indeed, there are a range of viewpoints within each group and that to recognize race ignores the shades and the nuances of differences within those groups. In addition, those who claim that the government should be color-blind suggest that race is socially constructed, that race is not a real category, and that we don't know what race is anymore when we have so many people who don't identify solely as a member of one race or another. They argue that what should matter—these critics of race-conscious policies—is the individual, not the group.

I am here to provide an alternative viewpoint. I believe that talking about race is important to encourage biracial cooperation. I believe that recognizing racial difference is an essential precondition to multiracial collaboration. I believe that in talking about race we must acknowledge the complexity of race, but that we cannot talk about democracy in a multiracial society without also talking about race.

I am not saying that race should matter always and I am not saying that race should matter always in the same way. But I am saying that race does matter. And I am saying that in the political sphere, if we are talking about participatory democracy, if we are talking about a democracy in which everyone feels that they
have an opportunity to participate in making decisions about things that affect their lives, then we have to be aware of race. We have to be conscious of racial differences because those differences matter to many of the people that we want to participate in the political process. Racial pride, racial identity, and racial solidarity can, of course, be marginalizing “cul-de-sacs.” But recognition of race can also be empowering, affirming, and energizing. Racial awareness among racial minority group members can mobilize political participation. And that political participation can become the basis for participation across, not just within, racial groups. Indeed, when racial minority-group members are confident that they are being respected, when they do not feel the need to “racialize” an issue just to be recognized, then they can participate vigorously and confidently in cross-racial majorities. Indeed, I have argued elsewhere that it is often the refusal to recognize race that highlights and cements its salience. 

Now, when I argue that race matters, I am not saying that race is monolithic. I am not saying that we should redefine race as a fixed social category. I am not saying that we should reinforce arbitrary distinctions along racial lines. I am not saying that people who disagree or dissent from the prevailing or majority viewpoint of a particular racial group should be excommunicated and booted out of the racial category. Race does matter. But that does not mean that we have to make race the only thing that matters or that we or any group of elites have to decide for other people how they should racially identify themselves. Nor does it mean that talking about race is a means of empowering only racial minorities. Talking about race and democracy does not mean gaining the opportunity for racial minorities to do to the racial majority what has been done to them. So what am I talking about then?

I am basically talking about a theory or a framework for democracy that respects racial groups, that respects racial-group identity as a matter of democratic community. I am talking about a theory or a framework for democracy which does not see democratic participation purely and exclusively as a matter of individuals, but respects and acknowledges the role that groups and

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6 I thank Jerry Watts for this helpful terminology.
6 See Lani Guinier, The Miner’s Canary: Race and the Democratic Process, Dissent Magazine 521, 523-24 (Fall 1995) (arguing that the experience of the Balkans as a universal symbol of ethnic polarization stems from historic patterns of coerced silence on ethnic difference; artificial suppression of racial differences can reinforce separatist instincts and movements).
group participation play in organizing the way people think about their public roles. I am talking about a theory of democracy that helps mobilize people to participate in public activity by giving them a genuine voice in the ongoing conversation. I am talking about a theory of democracy that recognizes that such a voice often requires the ability to act in concert, the ability to organize to participate with a group of like-minded individuals, the desire to participate in a genuinely collaborative political project, and a politics in which more people participate than stay home. I am talking about a philosophy of participatory democracy in which the individual gains stature and voice in community with other like-minded individuals. Finally, I am describing a vision of cross-racial collaboration in which individuals, empowered by the opportunity to participate as members of a group in the democratic conversation, engage and communicate across racial lines to solve real problems.

What I am saying is that democratic representation cannot be understood purely and exclusively in terms of one person, one vote. One person, one vote suggests that democracy is only about voting and that voting is merely an exercise in individual empowerment and individual scoring or winning. But individuals, meaning individual voters, don't "win." Individuals don't elect people, groups of individuals do. Representative democracy presumably rewards a group for mobilizing politically cohesive voters to participate and elect representatives who advocate their interests. The first question, then, is how do you aggregate individuals into groups to determine what groups of individuals are going to elect which representatives?

The way that we commonly aggregate individuals in this society, in terms of determining what groups of individuals can elect what representatives, is through something called geographic districting. We allocate representation by drawing physical communities of political representation and we call those physical or geographical communities "districts." And then we give each district one representative. It is a way of presumably assuring that local communities have a voice in our democratic conversation. Districts are geographic groups. Districting reflects the presumption that geography is a suitable proxy, on some level, for community. By community, we mean "community of interests," i.e., territorially defined communities of political interests. We aggregate individuals into a group called a district and we then allow that group to choose a representative to represent them.
Political parties are also a form of group representation. Political parties are ideological groups more or less. Political parties are groups of people who organize along some kind of communal, cooperative, or congenial sense of what their interests are. In our democracy, we acknowledge group representation for at least these two kinds of collective aggregations: geographic collections of people in districts and partisan or ideological collections of people in political parties.

Two of the dominant concepts, at least twentieth-century dominant concepts, of democracy are communitarianism and pluralism. Both assume that groups play an important role. Therefore, in my view, these concepts are consistent with the idea that in a democracy individual rights can best be protected and acknowledged when groups of people are provided the opportunity to participate in our democratic conversation.

In communitarianism, the basic assumption is that community is fundamental to democracy. The idea of democracy depends upon a collection of individuals with a collective consciousness or a common cultural or social experience. That collection of people is the essence of democracy; that community is the primary site for citizen participation and involvement. Communitarians would argue that a sense of community and a shared set of values help to legitimate political authority, that democracy is most fruitful where intermediate groups or local communities help to generate a common fund of knowledge and information to facilitate productive and rational debate and promote interaction among citizens. In a sense, for communitarians, political groups become an alternative to neighborhood-based geographic communities, and especially in an era when modern technology permits rapid exchange of information without the constraints of space or physical proximity, voluntary interest groups function as a modern version of community.

As Americans become less tied to, and less identified with, a particular geographic locality, political groups or these voluntary interest groups become surrogate communities. Interest groups or associations of like-minded people are communities of interest or belief rather than communities of geography. Twenty percent of Americans move every year. In an age with that kind of mobility, many communitarians seek to enhance voluntary political groups or associations as a way to strengthen American democracy. Indeed, they argue that it is the absence of healthy political groups and parties that is at the root of much current apathy and skepticism about our democracy. So, communitarians say that
communities or groups are the essence of political participation and involvement.

Pluralism, another important twentieth-century concept about democracy, also assumes that groups are an important unit in democratic functioning. In a pluralistic conception, democracy is based on free competition between groups. Individuals join groups based on their perceptions about their group interests. The democratic process becomes a clash among group interests, bargains, compromises, trade-offs, coalitions, and negotiations. Groups are natural competitors because one group's advancement occurs only at the expense of another. There is not an independent common good except the compromise between competing groups. Political life then, as pluralism sees it, is a game with group winners and group losers. And group competition may replicate, on a larger scale, the self-interested individual; or, as pluralism might assert, group solidarity can help individuals transcend their private or passive conceptions of self-interest. But, in any event, groups are an important part of the political process. They provide individuals with an opportunity to organize effectively with other individuals, and they give such groups an incentive to try and win over the majority through bargains and coalitions that promote familiarity with the viewpoints of others and a willingness to work with others, including those with whom one disagrees. So, we have these two conceptions of democracy, both of which enjoy, or at least embrace, the idea of group participation as important to democratic function.

Now, some people don't buy into that. They think that democracy is exclusively about giving individuals access to the ballot. These commentators have the conception that democracy is really about individual political competition, about individuals voting an individual political choice. When you think about democracy as purely an individualist form of participation, then the ideal form of democracy becomes the referendum, the initiative, or the public opinion survey poll. Right? Because direct democracy—democracy by referendum or initiative—is purely individualistic in the sense that one's voice can be heard based exclusively on how one votes without necessarily taking into account collective action or organization.

Direct democracy, in the form of referenda or initiatives, aggregates individual preferences. It does not lump voters into voting units or assign them representatives. Each voter speaks for himself or herself directly and exclusively by the way he or she casts a ballot. Direct democracy or democracy by public opin-
ion poll is most closely aligned, therefore, with an individualistic view of political participation. All that voters enjoy is the right to have their opinion noted or tabulated.

I would argue that direct democracy by referenda or initiatives collapses democracy into its most crude, some would say its most primitive, form. Democracy becomes, in terms of the public opinion polls, simply an arithmetic exercise in which we count votes and award public-policy preferences to those with the most votes. And the public interest simply becomes the most popular individual interest. But this is a very passive version of democracy. It is a passive version of interest group pluralism with less incentive for interaction or for participation. You can just sit home and dial your vote.

Indeed, individualistic aggregation of opinion in my view undermines the interactive premise of representative democracy because representative democracy, which is what we in the United States presumably practice, believes that the representative can stand in for individuals because the representative has some kind of interactive relationship with *those same individuals*. The representative can act because the representative knows in fact what the individuals who have voted for him or her want. The individual voters also know what the representative is doing, supposedly on their behalf, and the individuals who are voting have the capacity to vote the representative in or out of office based on what that representative is doing. Representative democracy demands a concern for, and a familiarity with, the views of people other than oneself. In this sense, representative democracy demands a conversation between groups of individuals—called constituents—and their elected representative. It also suggests the need for a conversation between and among the constituents themselves so that the elected official can hear their message. It may not be a single message. They may not all agree, but the conversation is interactive; it requires speaking and listening. It is communication as engagement rather than performance. One participates in many more ways than merely raising one's hand and voting up or down on binary issues.

By contrast, individualized democracy or democracy by public opinion poll allows little room for interactive democratic conversation. So the metaphor that I am using for democracy—democracy as conversation, democracy as public collaboration, democracy as jazz music—really requires more than one person to be involved. And indeed, Hannah Arendt describes democracy as public conversation in a way that on some level
tracks my son's version of why voting as the embodiment of democracy is so weird. She said, and I am paraphrasing, "Voting cannot be the essence of democracy. Because if voting is the essence of democracy, it is a very private, not a public, act. Because if you look at the voting booth as the ultimate metaphor for democracy, there is only room enough in that booth for one person. That can't be democracy."

If, as Hannah Arendt suggests, democracy is about people talking to each other and participating collectively in trying to decide public policy, then I would argue that group representation and group participation is essential to a functioning democracy. Group participation, assuming the group is a voluntary association of individuals, is a way of mobilizing individuals. It is a way of dispersing authority and it is a way of creating broad-based access to that conversation.

I would argue that if democracy is a public conversation in which we want broad-based public participation, then we should also ensure representation for racial groups if those groups feel politically congenial and if those groups act in a way that is similar to other voluntary political associations. Group participation or group representation is particularly important for disadvantaged racial groups who have been denied historical access to that democratic conversation. And indeed, in my view, that is what the Voting Rights Act has tried to remedy. The goal of the Voting Rights Act is to undo the exclusion of certain disadvantaged groups who have been denied access, who have been denied the opportunity to participate as equals in our democratic conversation. So the Voting Rights Act justifies intervention, it justifies court or legal intervention to correct certain political arrangements where the majority is hoarding power and not allowing minority groups to participate in the democratic conversation. It allows or promotes intervention where the majority is not acting as a representative of the whole but is acting as a representative of its own natural self-interest.

Now, what am I talking about when I say that the majority is not representing the whole? Well, when we think of democracy, some of us think that democracy is simply winner-take-all, majority rule. Some of us think that democracy simply means that 51 percent of the people get 100 percent of the power. That is democracy, right? You vote. Whoever gets the most votes gets all the power. Well, that is one version of democracy and it is a version of democracy that we assume is fair because we assume that those with the most votes are going to disperse their power
not only to benefit themselves but to benefit everybody. We assume that the majority is really a majority or a collection of shifting coalitions. We assume that the majority is a shifting or fleeting collection of individuals, not a monolithic group that is hoarding power permanently.

I like to tell a story that again involves my son Nikolas. This time he was four years old and we were looking at a Sesame Street magazine. I was very excited because the headline on the magazine article stated, “Vote!” So I thought, “Ah, I get to teach a four year old about voting.” The magazine pictured six kids and they were trying to decide what game to play. Four of the kids had their hands raised because they wanted to play tag, and two had their hands down because they wanted to play hide and seek. The magazine said to the reader, “What game will the children play? Count the number of hands raised, count the number of hands lowered, and answer the question.” My son—the son of a law professor—bucked the hypo! Nikolas said, “First they will play tag, because four kids want to play tag, and then they will play hide and seek because there are two who want to play hide and seek.”

Nikolas implicitly challenged the basic premise that those with the most votes should always decide each and every game. Nikolas did not assume that the preference of the majority, the four who wanted to play a particular game, should control every decision. Nikolas declined to award 66 percent of the kids 100 percent of the power. The magazine, by contrast, assumed that the majority should decide for everybody what game to play. The magazine assumed that two-thirds of the children could and should act on behalf of all of the children.

This assumption, that the four who wanted to play tag would be acting democratically by deciding for everybody what game to play, is based on two conditions. First, we assume that the majority is operating on the golden rule. We assume that the tag majority is going to treat the hide and seek players with some respect, that at some point they are going to say, “Okay, we will now play hide and seek because that is what you guys want to play.” Second, we assume that the tag majority is not monolithic; we assume the tag majority is not homogeneous; we assume the tag majority is not permanent. We assume that the tag majority is a majority today, but that it has to worry about being a different minority tomorrow. The tag majority, we believe, worries about defectors. Some of those who want to play tag may join forces with the hide and seek players on a different issue to forge
a new majority. We believe, therefore, that today's majority is going to treat today's minority fairly because today's majority does not want to be treated any differently when it becomes tomorrow's minority.

What if these two conditions are absent? What if the majority is disrespectful and monolithic? What if the majority of today is also the majority of yesterday and of the year before that and of the year before that and has every likelihood of being the majority of tomorrow? What if the majority of today is not treating the minority of today with respect; what if the majority is not worrying about what the minority thinks because the majority is assured permanent power. In this case, the majority does not have to worry about the minority because the majority is not a group of shifting individuals but is a single monolithic group. I have litigated cases in which that in fact was the problem.

I have litigated many such cases, including cases that I tried with my colleague, Pam Karlan, who was then working with me at the NAACP Legal Defense Fund, who is now a very distinguished professor of law at the University of Virginia and a visiting professor at Harvard, and who is here in this audience. Professor Karlan and I litigated a case in which the majority in Phillips County, Arkansas was a monolithic group hoarding power. Even though blacks were about 44 percent of the electorate in that community, they had never been able to elect a representative of their choice to any of the seven countywide governing positions in this century. Blacks were unsuccessful in county elections because voting in the county was racially polarized. Racially polarized voting meant that whites would vote for whites and blacks would vote for blacks. Voting in Phillips County was not only racially polarized, it was extremely polarized. Our expert witness testified that there were some precincts in which no whites voted for any black running for office.

We had testimony in that case that a white Republican, a very independent-minded gentleman, attended a Jesse Jackson rally. This Republican iconoclast went to a Jackson political rally, not because he wanted to vote for Jesse Jackson, after all he was a Republican, but because he was curious. He had heard Jesse Jackson was a good speaker. He thought maybe Reverend Jackson would give a good speech. Well, our Republican witness testified that he was the only white person at the rally. After the

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event, he returned home. There he found his neighbors buzzing around his house, demanding to know what he—a white man—was doing in a Jesse Jackson rally!

There was also testimony that in this particular community, whites would not publicly support black candidates for office even when they thought those black candidates were the most qualified. One of our witnesses testified that he ran several times without success for public office in Phillips County. Our witness was a black attorney. He described the time he ran in a three-person race. In the primary, the black attorney came in first but with less than 51 percent of the vote. Because there was a majority-vote requirement in Phillips County, whoever won had to get 51 percent of the vote. So, there had to be a run-off because none of the candidates got “a majority” of the vote. Prior to the second election, the majority-vote, run-off election, the losing candidate—the person who came in third in the first primary—came up to the black candidate and said, “You know, Mr. Whitfield, I believe you are the most qualified candidate, but I cannot say that publicly because I am a farmer and my wife is a school teacher and if we are going to continue to live in this community, and we are white—I cannot support you.”

So, Phillips County, Arkansas represented a majority that is a self-centered, monolithic group. Because of racially polarized voting, winner-take-all majority rule is not working as we assume it should. It is in those instances that I believe the Voting Rights Act suggests that a court should intervene to protect the interests of a minority that is being ignored or excluded by the permanent majority. But, the question becomes, even if a court should intervene because the minority has been excluded and has been excluded because of racial prejudice, what is the remedy? How do you remedy that exclusion? And that is where the issue is joined right now in terms of the debate about group participation in voting and elections and the Voting Rights Act of 1965 as it has been amended in 1982.

It is at that stage—how do you remedy the violation?—that I proposed those remedies that got me into so much trouble. And even though Dean Baird in introducing me said that there is not a lot in common between Judge Frank Easterbrook and myself because Judge Easterbrook is more concerned with corporate law, one of the remedies that I proposed is used in corporations to elect their boards of directors; it is called cumulative voting. It
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was also used in Illinois; it was called bullet voting. It was used in Illinois to elect members of the state legislature for many years in the middle of this century.

Where the majority is not functioning to protect and include the minority, I have proposed a system of nondistricted elections—basically, a system in which the voters district themselves by the way they cast their ballots. It is a system in which if you have, for example, a seven-person governing body, every voter gets seven votes. The conventional approach would be to divide that governing body into seven single-member electoral districts. The conventional approach would protect the excluded minority by giving that minority a district in which it is the majority. The conventional approach would protect the minority by carving out from control by the governing majority a special district in which the minority becomes the majority and can then elect its own, minority, representative. I have suggested an alternative that does not involve districts. I have suggested giving each voter the same number of votes, in this case seven votes, and letting them district themselves by the way they cast their ballots. If they want to put all seven of their votes on one candidate because that person reflects their most preferred, most deeply held preferences, they can. If they want to put six on one candidate and one on another, they can. If they want to put seven on seven different candidates, they can. It is up to the voter to district him or herself by the way he or she casts or distributes the seven ballots.

Now what does this have to do with the idea of participatory democracy? Well, basically, I believe that if you give voters the choice to district themselves, if you give voters the means of deciding what is important to them, and if you give voters multiple votes to cast, it is a way of including more people in our democratic conversation. It is a way of telling voters, “Your votes do count.” It is a way of ensuring a principle that I call “one vote, one value”: everyone’s vote should count towards the election of someone who has a good chance of getting elected. Not just black voters’ votes should count, not just Latino voters’ votes should count—all voters’ votes should count.

One vote, one value is based on three fundamental democratic principles: (1) all voters should be able to help elect someone; (2) members of self-identified groups should be able to participate in the democratic conversation as a group; and (3) self-identified groups should enjoy the opportunity to exercise a fair share of political power. Everyone should get a chance to vote for representatives of their choice, everyone who identifies with a common
and significant set of interests (significant as measured by a locally defined threshold) should get to have those interests articulated and represented in the conversation we call democracy, and everyone should be represented commensurate to their ability to mobilize and organize political support. This principle applies not just to racial minorities, but to any politically cohesive minority; so women, gays, religious minorities, Republicans in Democratic cities, and Democrats in Republican suburbs all can use this approach to gain political representation. In this way, empowering racial minorities opens up democratic participation for many underrepresented groups.

One of the reasons that all voters' votes should count is because democracy is not just about the symbolic ritual of casting a ballot. It is not just about going into that secret space—that anonymous voting booth—and exercising private preferences. Political participation is about joining with other people with whom you have shared interests and trying to see those interests represented in public discourse, in that public space, in that public conversation that we call democracy.

Democracy is not just about voting; it is not just about winning. Democracy is about participating. Participation matters. It matters because the decisions that governments make affect everyone. Respect for those decisions, including those with which we disagree, demands meaningful participation in the decision making process. People have to be able to express their preferences, but more importantly, people have to participate in the formation and the implementation of preferences. In this project, voting is a necessary but hardly sufficient condition to achieve more democracy.

In other words, democracy is about public participation that demands communication, sustained interaction, and coalition building. Participatory democracy depends upon opportunities for genuine and engaged deliberation. Research into jury deliberations is instructive. Researchers have found, for example, that the greater the number of different arguments a juror hears in favor of a position, the more likely she is to be persuaded to that side. Researchers have also discovered that voting may have the

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opposite effect. Voting, too early or too often, promotes or reinforces conflict. Those juries which begin their deliberations with an up/down vote tend to be more polarized. On the other hand, juries in which everyone goes around the room and simply restates the evidence are more likely to come to a consensus and are also more likely to have an accurate recollection of the facts. Deliberation can lead to a fuller consideration of new and potentially transformative choices. Deliberation is tied to the goals of consensus and legitimacy.

This point carries forward the idea that I started with: democracy should be more like jazz music and less like watching others play baseball. A democracy that treats voters as spectators and elections as games converts public debates into public fights. Discussion and deliberation, important elements of debate, are lost in the push to win.

If democracy, like jury service, is about public participation, then democratic participation depends upon opportunities to communicate and opportunities to hear opposing points of view. Cumulative voting, even if primarily a heuristic, can help us rethink these basic assumptions about the relationship between participation, deliberation, and democracy. Cumulative voting may help us see that we may not want to lock people into a particular set of preferences—which we call districts—which must last for ten years between census enumerations. We may need a decision-making process that is more dynamic; we may need to consider a process that allows people to ascertain their preferences—and to organize in conjunction with like-minded other people—based on a full discussion of the issues that emerge at each election.

Many people, not all people, but many people think of their interests along racial lines. If that is true, and that is important to them, and they choose to vote along racial lines, then it is democratic, in my view, to allow them to participate as a racial group. But we must allow people to self-identify so that if they do not want to vote along racial lines, they don’t have to. Nobody is forcing them. Cumulative voting or nondistricted elections provide exit opportunities for people who do not want to vote along

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9 See Richardson R. Lynn, *Jury Trial Law and Practice* 193 (John Wiley & Sons, 1986) (finding that early voting can relieve tension with the jury, but that it tends to hinder discussion).

10 See John Guinther, *The Jury in America* 85 (Facts on File Publications, 1988) (stating that jurors which consider and discuss the evidence first are more thorough in their discussion and more open to new and opposing points of view from other jurors).
with the majority of their particular racial-minority group. Cumulative voting provides racial “dissenters” the opportunity to form coalitions, biracial coalitions. But it also provides racial minority groups with a chance to reach out to other groups.\textsuperscript{11} Because it minimizes “wasted” votes, meaning votes cast for political losers, cumulative voting enables groups to reach out beyond their racial “cul-de-sac” and negotiate and bargain excess votes on particular issues or at particular elections.

Cumulative voting does not eliminate the need for compromise. It changes, however, the timing and the atmosphere of the compromise. Compromises are made in the open; compromises are made after open exchanges of views. Compromises are not hidden in order to confuse voters; compromises are not suppressed in order to pretend one is all things to all people.

Now some people might argue that the problem with cumulative voting, the problem with race-conscious districting, and the problem with any remedy for the exclusion of minorities from the democratic conversation is that it will balkanize the electorate. It will further divide us; it will fragment us. It will reinforce race as a meaningful interest when we should be erasing race.\textsuperscript{12}

\textsuperscript{11} An alternative election system also may provide opportunities for different, more female, voices to be heard. Studies suggest that female candidates do better in modified at-large electoral systems like cumulative voting. For example, Richard Pildes and Kristen Donoghue found that more women Republican school board members were elected in Chilton County, Alabama when the County began using cumulative voting. See Richard H. Pildes and Kristen A. Donoghue, \textit{Cumulative Voting in the United States}, 1995 U Chi Legal F 241, 275-76. They report, “Only one woman was on the Board before 1988, but in the cumulative voting election that year, two women, both Republicans, were elected. A third woman, a Democrat, was nearly elected but placed eighth, one position away from a seat.” Id (footnotes omitted). Similarly, Pildes and Donoghue report that the unfamiliarity of a new system may actually revive interest in political participation by both voters and candidates. See id at 285 (finding that the system may have encouraged more people to run for office in Chilton County, Alabama and that this broadening of candidates has “spawned greater interest in elections”).

\textsuperscript{12} Other criticisms are that cumulative voting might produce indecisive legislative bodies, might facilitate and thus legitimate the representation of extremist or marginal political groups, might increase campaign costs because candidates must compete within a large jurisdiction rather than a single-member subdistrict, and, like any at-large based representational approach, cumulative voting might undermine local knowledge or the connection representatives have to local communities. See generally, Pildes & Donoghue, 1995 U Chi Legal F at 256-57 (cited in note 11).

Without detailing all of the possible responses to these criticisms, it is important at least to note at the outset that I advocate cumulative voting as an interim aggregation device for consolidating decisions in order to promote the value of consensus over time. The “consensus value” means that participants in decision making are satisfied a fair number of times, not that they agree with the merits of each decision. To be satisfied means that the final decision is acceptable because it took one's views into account; it does not necessarily mean that a collective decision making body adopted one's initial proposal.
My response to that is, they may be right. But maybe and are not the same. They may be right, but in my view we are already balkanized. We are not watching the same television shows. We are not living next door to each other. We are not going to the same elementary and high schools together. So we are already balkanized. And the question is, how do you deal with that? Do you deny that the balkanization is there and pretend that everything is fine and that we are all color-blind; do you sacrifice the demonstrated virtues of a robust pluralism for fear of the potential excesses of unbounded factionalism; or do you acknowledge that there are differences, respect those differences, and then, having acknowledged, recognized, and respected those differences, invite everyone into that democratic conversation?\(^3\)

as its final decision. Moreover, the consensus value does not mean a uniform ideology; nor does it mean only the articulation of hard-core political views. Consensus requires compromise; but it assumes that compromises made after full and open participation of a diverse range of viewpoints are both more legitimate and more efficient in the long run.

\(^{13}\) Some worry that recognizing racial minorities also requires recognizing all minorities, including fringe groups. They point out that it is impossible to reach any decision if some participants are committed to disruption rather than resolution. In this sense, the participation of “extremist”—meaning intensely ideological—groups raises two questions. First, should they participate within the formal political process; and second, should that participation be recognized by according them some representation?

My answer is complicated. Yes, they should participate because participation from varying perspectives often leads to a better decision and certainly affords that decision greater legitimacy among those affected by the decision. Moreover, participation may have a moderating effect as representatives of previously excluded groups must negotiate for power within the system. This “socialization effect” is often noted, although some might dismiss it as “co-optation.” Certainly, the tendency of some groups to insist on hard-core positions softens once they achieve recognition as “equals” or at least are treated with respect. Or, as Pildes and Donoghue note, at least in local government, structural features (such as the pragmatic nature of local elections and the incentives that local officeholders have to “fit in” for reasons of financial support from political parties or for future prospects for higher office) may moderate the theoretical possibility that cumulative voting enhances the electoral chances of fringe candidates. Pildes & Donoghue, 1995 U Chi Legal F at 293 (cited in note 11). Moreover, in the Alabama county that Pildes and Donoghue studied, the more centrist black candidate has been more successful than other black candidates with important endorsements. Id. Finally, for those groups that refuse to commit to “political” solutions, their role can be negotiated depending on how high a jurisdiction sets the “threshold of exclusion.”

These answers may provide an adequate rebuttal for those arguing that cumulative voting promotes the election of fringe candidates, but the answers generate an important criticism from the left. Cumulative voting may not allow internal competition within a minority group. This suggests a difficulty with cumulative voting from the perspective of those seeking political, not just racial, diversity. See id at 297-98 (quoting local political observer who stated that cumulative voting puts a premium on minority organization and cohesiveness with the consequent loss of fulsome debate among divergent positions within the minority community). Interestingly, cumulative voting may have the practical effect of eroding traditional partisan affiliation. See id at 291-92 (finding that the interests of indi-
My view is that it is premature to deny those differences when they are so important to so many people. That is not to say that you want ultimately to reinforce those differences as our goal or as our vision. But it does mean that if you are going to get people to the point where they can converse together and communicate across these differences, the first thing that you have to do is respect and recognize those differences. And having respected and recognized those differences, in my experience, you will find that people are much more willing to engage in conversation about the common good and about our common interests because their differences don’t become so key to their self-definition. You have already recognized and respected those differences, so every conversation doesn’t have to be about those differences which you’ve already recognized and respected. It’s a way of transcending race ultimately. But in order get there, you must first recognize race.  

Thinking about democracy in terms of group participation is also important to revive our confidence in democracy as a public, not a private, activity. Group activity in a public space is a way of reclaiming democracy for all of its citizens. Group participation...
is necessary to overcome the profound alienation that many people observe among members of our electorate. Just as the term-limits movement reflects a desire to mobilize voters “to take back their government,” alternative election systems can respond to the profound alienation that is corroding our public discourse.

One hundred years ago the National Civic League organized in Philadelphia to root out public corruption. Last month they gathered once again in Philadelphia to celebrate their anniversary centennial, rededicating themselves to fighting public cynicism. They understood that people move from political apathy to political participation when that participation becomes a vehicle for improving their daily lives.

My focus on participatory democracy is, thus, part of an effort to take back the democratic space from which American citizens have been evacuated by the increasingly angry, bitter, and polarizing terms of talk radio, negative television ads during election campaigns, winner-take-all electoral politics, and gridlock governance. It is another way of looking at democracy—as a well-conducted conversation. But no conversation is interesting if we don’t think we will get a chance to speak and be heard.

If we are going to be serious about public, participatory democracy, then we need to rethink the nature of democracy’s conversation. We need not proceed in an entirely adversarial model in which we vote to determine the winners and losers. We need not showcase only the most extreme viewpoints on a subject in a flawed effort to get balance. Individuals, empowered by their association with other like-minded individuals, can be subjects rather than objects of democracy’s conversation. Individuals, acting in concert, can transform our democratic project.

Ultimately, what participatory democracy means is that governance must be first and foremost about a well-conducted conversation—a conversation in which we all get a chance to speak, to listen, to be heard, and to collaborate to solve our problems. To local citizens, participatory democracy is not just insider talk about or among winners. To make America a genuine democracy, we must all be encouraged to partake actively in its conversation. The challenge is to imagine a democratic system that permits a range of views to be represented—not just in the streets or on talk radio, but in the sturdy halls of the legislatures and other public spaces constructed to house vigorous debate and true deliberation—in order to restore trust, overcome antago-
nism, regain government's legitimacy, and achieve our collective wisdom.

I am basically suggesting that the goals of the Voting Rights Act, as a matter of political philosophy, can and should be defended by framing them within a theory of group representation in which the claims of racial minorities are not resolved to benefit racial minorities alone. Empowering previously excluded racial minorities is important; empowering those minorities in a way that enhances democracy for all voters is transformative. This approach enables the Voting Rights Act to achieve its original objectives. It accomplishes Congress's goal to enfranchise victims of racial discrimination. But it also accomplishes an important secondary goal of answering the Act's critics. By potentially empowering politically cohesive and politically mobilized groups, a theory of democratic group representation suggests the possibility of transforming the political process to benefit all voters.

Like jazz music, this is an approach that originated within or on behalf of a racial-minority group. It is designed to empower that racial minority. But, like jazz music, it is also a distinctly and thoroughly American phenomena. Familiar melodies are reconstituted and disassembled, but not erased. It is not a mere collection of soloists, but of musicians who are deeply committed to integrating the contributions of other players. Individual musicians work together to produce a whole bigger than any of them could produce on their own. That is also the nature of successful governance. Participants learn to see nuance, to see complexity, and to respect differences, even with those with whom they disagree. We all may learn that where you sit determines what you see, but if we listen carefully, we may come to understand that those with whom we disagree may have a point, not just a point of view. Things that sound funny to ears trained to hear only one kind of music in fact can add to the way in which we all appreciate the beauty of our peculiar American form of constitutional democracy.

In other words, like jazz, democracy holds the promise of producing a system that respects individuals and groups, that doesn't lock people into a hierarchy of perpetual winners and losers, and that makes room for the tiniest voice to contribute to the composition. With a collaborative approach to the challenges of a multiracial democracy, we can implement the Voting Rights Act as it was intended—to achieve more democracy, not less.