Colorblind Injustice

Minority Voting Rights and the Undoing of the Second Reconstruction

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Institutions and the Struggle for Equality

Institutions and institutional rules—not customs, ideas, attitudes, culture, or private behavior—have primarily shaped race relations in America. The most important and longest lasting influence, of course, has been that of the "peculiar institution," slavery—conditioned by law, sustained by law, and, after being devastated by war, finally dispatched and interred by law. More than a generation after slavery's end, segregation and disfranchisement, which maintained white supremacy and largely excluded African-Americans and Latinos from white society and politics, were accomplished or solidified by law (see, e.g., Woodward 1974; Kousser 1974).[1] But other institutions and rules have also had profound impacts on the struggles for and against racial equality: the Constitution, the methods for aggregating votes into legislative seats, the structure and internal organization of political bodies, the regulations issued by the executive branch of government, the actions of political parties, and the pronouncements of the judiciary. The effects of these institutions on minorities have been most favorable when instants of transformation were followed by long periods of gradual change. While liberty may arrive or depart in a moment, equality requires not only eternal vigilance but also consensus and incremental improvement. Institutional stability—with the right kind of institutions—is a prerequisite for minority success. Knowing that their numbers will ultimately preserve them, large groups in a democracy can accept fluctuations in political outcomes and rules. Smaller, more isolated minorities, however, need protective institutions, which cannot be rapidly rebuilt if they are destroyed. Marx was wrong. The poor have much more to lose than their chains. Only the powerful can afford to be radical for long.

This book, which grew out of papers originally produced as part of the struggle to protect minority voting rights, examines distant and recent his-

tory in order to determine what institutions and rules are necessary to guarantee equal political opportunities to minority groups in America. It attempts to set voting rights policy straight by getting its history right. Every chapter flows, directly or indirectly, from my work as an expert witness in federal district court cases concerning minority voting rights, in which I testified for the American Civil Liberties Union (ACLU), the U.S. Department of Justice, the Legal Defense Fund of the National Association for the Advancement of Colored People (NAACP-LDF or just LDF), the Mexican-American Legal Defense and Education Fund (MALDEF), and other parties, always on the side identified with minority groups. Because I have a strong point of view on the subjects considered here, I have tried very hard to make my assumptions and arguments clear and to subject every conclusion to the most rigorous criticism that I can manage. Readers will judge where I have failed.

Although the papers began separately, here they have been considerably rewritten and blended into what I hope is a coherent, if complex, argument. At the risk of robbing the reader of the joys of denouement, I will summarize that argument here in order to indicate how the book holds together. The initial chapter considers the analogy between the First and Second Reconstructions, those of the periods after the Civil War and the Second World War, respectively. Since C. Vann Woodward introduced the term "Second Reconstruction" in the 1960s, the parallels between the two have served more as a rhetorical flourish than an invitation to systematic comparison. Focusing on African-American voting rights, I argue that the First Reconstruction failed to preserve those rights because disastrous judicial decisions, stark divisions between the Republican and Democratic parties over black suffrage, and shifting majorities in Congress prevented the necessary elaboration of federal protective laws. The Second Reconstruction has succeeded in fostering political equality for minorities because, until recently, judicial decisions have been much more favorable, partisan divisions over civil rights policy much less pronounced, and congressional lineups much more stable than those of the First Reconstruction. In the past decade, however, radical reinterpretations of the Voting Rights Act proposed by political scientist Abigail Thernstrom and Supreme Court Justice Clarence Thomas and the revolutionary reading of the equal protection clause introduced by the "conservative" Supreme Court majority in *Shaw v. Reno* (1993) and its successors have threatened to reverse the course of minority political success during the Second Reconstruction.

Chapters 2 through 6 present case studies of the adoption of electoral laws and redistrictings in Los Angeles County, California; Memphis, Tennessee; and the states of Georgia, North Carolina, and Texas. I begin in Los Angeles in order to emphasize that southern blacks have not been the only victims of

minority vote dilution and to demonstrate that it is possible to discern the intent of redistricters from a pattern of circumstantial evidence alone.[2] From 1959 through 1981, the five Los Angeles County supervisors, who oversaw the government of the most populous local jurisdiction in the country, repeatedly redrew the boundaries of their districts to insure that Latinos could not elect their most preferred candidates. Comprising 28 percent of the county's population by 1980, Latinos had not placed a Latino representative on the Board since 1875. To establish that racial motivation, and not other hypotheses, best accounts for the behavior of the supervisors and their employees, I not only reconstruct maps and demographic statistics but also closely analyze the actions and statements of the large and sophisticated cast of characters involved. The Los Angeles County example represents real racial gerrymandering, redistricting that denied members of a distinct, subordinate group a fair and equal opportunity to elect candidates of their choice.

Chapter 3 moves to Memphis, one of the largest cities in the Deep South. As African-Americans threatened to elect one or more of their group to Memphis's government in the 1950s and 1960s, the city fathers passed laws requiring that candidates run in at-large elections for designated posts, instead of allowing voters to elect the four or more candidates with the highest vote totals, and requiring that they receive a majority vote, rather than a plurality, in what was then a majority-white city. When city leaders completely revised the city charter in 1966, they insured continued white control by requiring that the majority of members of the city council and school board be elected in citywide elections, rather than in separate single-member districts. Numerous indiscreet statements, the history of the city since the 1870s, and the pattern of actions by the voters and by leaders who proposed the changes in electoral laws add up to an overwhelming case that the predominant motive for the passage of these laws was to perpetuate racial discrimination against blacks.

Similar, though not quite so plentiful, evidence establishes the primacy of a racial motive in Georgia's passage of a statewide majority-vote requirement in 1964, discussed in Chapter 4. Even before the passage of the Voting Rights Act (VRA) in 1965, a strong civil rights movement centered in Atlanta fanned out across Georgia to register black voters. Fearing that burgeoning black political organizations would elect African-Americans or their white liberal allies to office, as they had done in the 1950s in Atlanta and Macon, "moderates" eagerly endorsed a hard-line segregationist's proposal to reduce the possibility that a disciplined black minority could rule or even strongly influence elections. Contentions by participants in a lawsuit a generation later that the runoff statute reflected a sudden concern with corruption, long notorious in Georgia elections, or a dedication to individual equality and majority

rule—by the leader of the faction most committed to segregation and malapportionment!—do not bear scrutiny. Racial purposes clearly predominated in the adoption of the majority vote.

In *Shaw v. Reno* (1993) and other cases, Justice Sandra Day O'Connor has asserted that before 1991, Americans had adhered to such "traditional districting principles" as compactness, contiguity, and preserving county or municipal boundaries, implying that they have deviated from them only recently, in order to grant special privileges to underrepresented ethnic minorities. Chapters 5 and 6, which document the long tradition of antiblack and anti-Latino gerrymandering as well as partisan and incumbent protection in redistricting in North Carolina and Texas before 1991, cast doubt on the justice's unevidenced assertion. From 1872 through 1900, when blacks were largely disfranchised in North Carolina, they were "packed" into one overpopulated, heavily black congressional district, the "Black Second." When African-Americans began to register in eastern North Carolina in large numbers after 1965, the boundaries of the congressional district with the largest black concentration, still the Second, were repeatedly manipulated, especially in 1981, in order to insure that blacks could not control its politics. As losers in the redistricting battles freely and frequently charged, districts sprawled all over the state to insure outcomes favorable to particular persons, parties, and ethnic groups. Partisan, personal, and ethnic advantage were the real "traditional districting principles" in North Carolina.

Larger, more urban, and more socially and economically complex than North Carolina, Texas also had a unique brand of rough-and-tumble politics, which spilled over into redistricting. In the Lone Star State, redistricting resembled a revenge play more than it did Justice O'Connor's civics textbook exercise. Whether leaders preferred protecting friends to knifing enemies is difficult to say, for the same moves often accomplished both at once. By 1981, the Republican party was strong enough in Texas to control the process, in alliance with conservative Democrats. Conservatives agreed that the redistricting should disadvantage minorities and Anglo liberals as much as possible, and only federal court intervention prevented them from doing so. In fact, until 1991, minorities had only very limited influence on the redistricting process, and that influence came primarily as a result of lawsuits. In Texas, as in North Carolina, bitter struggles over redistricting in 1981, centering on minority communities, set the stage for hard-fought rematches in 1991.

The redistricting processes and plans of the 1990s appear very different when placed in the context of previous election laws than when considered as isolated instances, as if the story had begun in 1990 or as though the history of redistricting had been a simple tale of the application of widely shared principles of fairness by unprejudiced, civic-minded nonpartisans.[3] Chapters 2 through 6 reveal a nationwide pattern of electoral laws adopted before 1990

with the intent and effect of discriminating against underrepresented minorities. Whether in cities, counties, or states; for councils, school boards, state legislatures, or Congress; by Democratic or Republican politicians, closely supervised bureaucrats, or independent commissions, the story has been the same, and it is possible, if one digs deeply and evaluates the evidence systematically, to uncover it. There was nothing new about the consideration of race, party, or incumbency in 1991. Every redistricting since the 1960s in any state or locality with a substantial percentage of minorities had concerned itself primarily with such issues. To pretend, as Justice O'Connor did in *Shaw v. Reno,* that the oddly shaped districts adopted in the 1990s uniquely emphasized race, as if race had been invisible in American public policy or electoral law before then, is a considerable distortion. Nor were deal-making or the careful craftsmanship of district lines innovations. After all, the term "gerrymander" originated in 1812. What was different in 1991 was that, for the first time, because of the VRA, minorities enjoyed considerable power during redistricting.

Justice O'Connor's majority opinion in *Shaw v. Reno* stated that for a district to be unconstitutional, it had to be strangely shaped and race had to be the "sole" motive for its boundary, while Justice Anthony Kennedy's majority opinion in *Miller v. Johnson* (1995) held that race need only be the "predominant" motive and that even the most compact district might be illegal. The last sections of Chapters 5 and 6 examine the North Carolina and Texas reapportionments in light of these contradictory standards and determine that racial factors were neither the only nor the most important reasons for the boundaries finally adopted in those states. But how do the Supreme Court's standards in the "minority racial gerrymandering" cases from *Shaw v. Reno* onward compare to its criteria in previous litigation over minority vote dilution and other equal protection cases?

Chapters 7 and 8 turn from the history of redistricting and other electoral laws per se to the history of the development of Supreme Court doctrine. Chapter 7 treats the Court's considerations of the issues of intent and effect in equal protection law, particularly electoral law, from the 1880s through the 1980s. After vacillating for nearly a century on the questions of whether judges could or should be concerned with legislative purpose, of what was the legal relationship between the motives for laws and the impact of those laws, and of whether it was necessary to show one or both to determine that a law was unconstitutional, the Court in the 1970s and 80s settled on an equal protection standard that required proof of both a discriminatory intent and a discriminatory effect. Because this is now settled law, it is important to try to establish a systematic method for organizing the evidence in inquiries into intent. And because intent and effect are essentially empirical rather than legal questions, a historian may have something useful to say on the subject. Focus-

ing on election laws, I propose explicit standards for determining the intent of laws, using Chapters 2 through 6, my experiences in other cases, and the opinions of a number of scholars and judges as guides to general principles.

Chapters 8 and 9 bring the book full circle by considering the undoing of the Second Reconstruction in *Shaw v. Reno* and its progeny and applying the lessons of history to those decisions. Just as no treatment of *Shaw* is complete without a detailed discussion of the history of race and election law in America, no history of race and politics written in the 1990s can be complete without a careful examination of those cases. Defenders of the decisions contend that they are merely the logical outgrowths of the original, "colorblind" goals of the civil rights movement, in particular, of *Brown v. Board of Education* (1954). The "conservative" majority on the Court, they maintain, is the real embodiment of the legacy of Martin Luther King Jr., the true guardian of the equal protection clause of the Fourteenth Amendment, the nonpartisan, idealistic voice of the best intentions of the First Reconstruction. History shows, they believe, that the best governmental policy on racial matters is to ignore racial discrimination, past and present. In any event, they assert, minorities no longer need protection, because white racism is now so insignificant and institutions so fair that the chief hindrances to a world where race no longer matters are quotas and preferences for African-Americans and Latinos. They conclude that the decisions were both inevitable and wholly commendable, because they represent a straightforward and consistent effort to deny special privileges that are sought only by minority politicians and a captured bureaucracy in the Justice Department (Blumstein 1995; Butler 1995, 1996; Thernstrom and Thernstrom 1995; Thernstrom and Thernstrom 1997, 286–312, 462–92; Thernstrom 1995).

By contrast, critics charge that the *Shaw* line of cases represents a counterrevolution, a new "redemption" like the "redemption" of the South from "black Republican rule" after Reconstruction. While critics agree that white racial attitudes have liberalized in many respects, they believe that racial egalitarianism is far from consensual, and that rules that discriminate against minorities are widespread. "Colorblindness," they think, is just a euphemism for a continuation of discrimination, as "separate but equal" was. Far from being descendants of the racially liberating judicial decrees of the 1950s and 60s, or even consistent with each other, *Shaw v. Reno* and the subsequent minority racial gerrymandering decisions are, their opponents declare, heavy-handed, unprincipled interventions into a political process that was finally giving minorities a fair chance. According to *Shaw*'s critics, history demonstrates that minorities need governmental protection from economic, social, and political discrimination against them, and the Reconstruction amendments attempted to guarantee such protection.

The critics, I will argue, have the better case. I go beyond previous dissenters from these decisions by considering their likely practical consequences for the redistricting process following the 2000 census, by showing that the cases are not only riddled with inconsistencies but also with politically and racially biased exceptions and by arguing that *Shaw* fits squarely into a tradition of abstract, formalistic judicial actions, emblemized by the infamous *Dred Scott v. Sandford* (1857) and *Plessy v. Ferguson* (1896) decisions, which did so much to buttress white supremacy. Fortunately, there is another Supreme Court tradition, a practical one that draws on history and other social sciences, instead of on easy slogans; that respects other governmental entities, instead of striking for unfettered judicial supremacy; that protects relatively powerless minorities, instead of ripping apart sheltering institutions—the tradition of *Brown v. Board of Education* and of the key 1973 voting rights case, *White v. Regester*. In order to continue the progress of the Second Reconstruction and to fulfill the egalitarian aims of the First, the Court should return to its pragmatic, realistic precedents. *Shaw* should be reversed.

A SCHEMATIC overview is not meant to convince any reader, and it should not. Persuasion is in the details. There are many of them in the succeeding pages, for three reasons. First, scattered anecdotes are unreliable sources for firm generalizations. To obtain solid answers to such questions as why black voting declined after the First Reconstruction, to the point where blacks could be substantially disfranchised, while it rose and became more potent as the Second Reconstruction wore on, requires a systematic look at election laws, congressional actions, and court decisions in two lengthy periods. To determine whether *Shaw* and its successors are consistent with earlier decisions and with each other necessitates close readings of many judicial opinions. Second, humans are complex, and so is determining their motivation. In the passage of election laws, there are always multiple actors and many potential explanations for their behavior. To choose a hypothesis about the motivation of a particular action as more adequate than the rest, one has to consider arguments and evidence for and against many hypotheses. Third, the easiest way to seem to win an argument is to ignore the best evidence and logic of one's critics. That has often been the practice in debates on voting rights, and one can overcome the possibility of avoiding evidence that doesn't fit only by considering a lot of it. Defenders of *Shaw* sometimes seek to convince their audience by exhibiting a few pictures of irregular boundaries, calling them "political pornography" and demanding that such districts be banned, at least if they contain majorities of minority ethnic populations. This and similar practices avoid all of the difficult and interesting questions.

And there are a lot of interesting questions, events, and personalities in this

book—from Ron Smith, the California political consultant and self-described racial egalitarian, whose specialty in campaigns and redistricting plans was pitting one Democratic ethnic group against another; to Russell Sugarmon, the African-American Harvard Law School graduate who seemed to pose such a threat to white supremacy in Memphis in 1959; to Denmark Groover Jr., the legislative wizard and staunch segregationist who framed the Georgia majority-vote law; to L. H. Fountain, the plantation-style congressman whose insistence on an antiblack gerrymander of his congressional seat stalled the North Carolina legislature for six months in 1981; to William Clements, the Texas Republican governor who posed as a friend of Dallas African-Americans in a transparent attempt to win more congressional seats for his party; to Justices Sandra Day O'Connor and Clarence Thomas, one a "moderate" partisan and the other a bitter critic of every achievement of the civil rights movement, especially of *Brown* and the VRA. Such people bring statistics and dry judicial doctrine alive because they insert politics into the analysis and because their struggles show how much the story really matters. Because the cast of characters is large, those mentioned on more than one page (with the exception of authors) are briefly identified in the index entries.

ALTHOUGH *Colorblind Injustice* spans the disciplines of law, political science, and history, it is primarily a history book. And it is not only a work *of* history, but also a work *about* history—about the importance of careful and systematic methods to the understanding of history and, in turn, about the importance of a proper understanding of history to the development of good public policy. Too much public policy is justified on the basis of casual analogies, crude caricatures of facts and trends, and ignorance, willful or otherwise, of even the immediate past. At the same time, too many of today's historians have lost their nerve, doubting not only that one can ever attain truth but also that anyone can determine whether one account of events is superior to another and whether it is ever possible to uncover the causes and motives of action. The postmodern, linguistic turn that dissolves history into a ceaseless, pointless play of "signifiers" (words that stand for actual things, or perhaps only for other words) cedes control over the interpretation of the past to others who are less professional but more self-assured and even more self-interested (Appleby, Hunt, and Jacob 1994, 198–270). It is time that we historians reclaimed our calling. The history of policy is too important to leave to lawyers, judges, and social commentators.

Colorblind Injustice is part of a larger study—a life work, it seems, on race relations in America—and a sketch of the larger themes of that work may alert the reader to otherwise imperceptible overtones in this book. I am neither a pessimist nor an optimist about race relations in this country. Thus, on the one hand, I do not find racism or evil motives everywhere and, on the other, I do not expect any permanent transformation to a new era in which race does not matter. Historians and social scientists, as well as my own research, have taught me better. Although I have learned from many people, my principal working hypotheses are due to two men: my graduate adviser, C. Vann Woodward, who stressed the importance of institutions and institutional rules in shaping race relations (Woodward 1974), and the social psychologist Thomas Pettigrew, who emphasized how variable American race relations have been (Pettigrew 1975, 1979, 1980, 1985, 1989). Racial behavior patterns, I have come to believe, are complex, multidimensional, and variable, subject to change over time and to variation across areas and between people; they are often "thin," that is, not deeply felt or unchangeable; and they are often determined by other, essentially nonracial values or interests, not by racial ideologies or attitudes alone. Institutions and institutional rules bring uniformity to this disorder—sometimes for good, sometimes for ill. Thus, in *The Shaping of Southern Politics* (Kousser 1974), I showed how variable post-Reconstruction politics was from election to election and state to state. African-American and low-status white voters posed a dangerous threat to the dominant Democrats until disfranchisement laws, motivated by a desire to assure that white Democratic supremacy would be unchallengeable, created a new southern order. In my ongoing study of nineteenth-century court cases and legislative actions on racial discrimination in schools (Kousser, 1980a, 1980b, 1986, 1988b, 1991a), I have shown how difficult the struggle for integration often was even in the North but also, in many instances, how easily that policy was accepted once it was authoritatively ordered; how integration policies, as well as segregation policies, could be reversed, casting doubt on the belief that racial change in America is invariably progressive, or as nineteenth-century racial liberals put it, that "revolutions never go backwards"; and how intertwined racial policies were with partisan politics, in courts as well as in legislatures and school boards. Then as now, the best predictor of whether lawyers, judges, or legislators would favor African-Americans or their opponents was each person's political party affiliation. In *Colorblind Injustice*, I investigate changes in electoral structures and rules in a wide array of places, over a considerable portion of time, demonstrating the connection between politicians' self-interest, the structures they wrote into law, and the electoral outcomes that occurred in those jurisdictions. I also show how changing judicial interpretations shaped and continue to shape electoral regulations, which have a crucial impact on racial democracy in America. The history of race relations in America has too often been treated as static, invariant, and isolated from other trends and interests in society. I view it as relatively fluid and heteroge-

neous, unless regulated by law, and in any event as integrally connected with other facets of society. And that understanding of history, the lessons that I will draw and test in detail in this work, can help to lead us to a more egalitarian society, one where discrimination against members of minority groups is less oppressive than at present.

A WORD about the title: "Colorblind" is the buzzword of opponents of governmental actions to diminish current racial inequality, inequality that results from past and continuing governmental and nongovernmental discrimination against ethnic minorities. As I argue in the body of this book, governmental "neutrality" in this instance is unjust in intent as well as effect. Not only do such policies in fact perpetuate injustice; they are meant to perpetuate injustice. Far from "colorblind," they are deeply color-conscious. To call readers' attention to my skepticism about the "colorblind" slogan, I originally enclosed the word in quotation marks in the title.

I HAVE been at this book for a long time, and I have many friends to thank for inspiration and assistance. The voting rights bar and the community of scholars who work in this field have taught me, provided materials to me, and given me needed criticism, and although I can never adequately repay them, I can at least name them: Jim Blacksher, Neil Bradley, Bruce Cain, Tony Chavez, Dayna Cunningham, Chandler Davidson, Armand Derfner, Richard Fajardo, Luis Fraga, Hugh Davis Graham, Bernie Grofman, Jerry Hebert, Chris Herren, Sam Hirsch, Anita Hodgkiss, Gaye Hume, Bob Kengle, Allan Lichtman, Peyton McCrary, Laughlin McDonald, Rob McDuff, Larry Menefee, the late Frank Parker, Mark Rosenbaum, Steve Rosenbaum, Ed Still, and Rick Valelly. Other friends who have sent materials and/or commented most helpfully include Dale Baum, David Bositis, Canter Brown Jr., Tom Dillard, Ariella Gross, Elsie Hall, Peggy Hargis, Bill Hixson, Sam Hirsch, Greg Keating, Tom Kraemer, David Mayhew, Jack Reynolds, Bryant Simon, and Joe Stewart. I received no grants or fellowships and had no other research assistance for this project. My graduate student Micah Altman and I bounced ideas off of each other on these topics for two years. The comments of Dan Lowenstein and Rick Pildes on earlier versions of Chapters 7–9 were especially extensive and helpful. My friends Vernon Burton and Pam Karlan deserve special attention for encouraging me and giving the entire manuscript close readings. My editor at the University of North Carolina Press, Lewis Bateman, had to wait longer and for a longer manuscript than he wished, but he bore both travails with his usual equanimity. Kathy Malin of the Press pursues the underappreciated profession of copyediting with care, grace, and above all, tact. She saved this book from numerous errors, ambiguities, and infelicities. As always, C. Vann Woodward provided sage advice. His example, as one who has never forgotten that the most important parts of history are the struggles of real people over power and rights, continues to inspire me. It is of more than symbolic importance that the first and last references in this book are to Woodward's work. The book is dedicated to my children Rachel and Thad, who harassed me to finish it, to my wife Sally, who put up with my distraction about it for years, and to the memory of my mother, Alice, who somehow surmounted her small-town southern upbringing to become the most tolerant and thoroughly good person I will ever know.