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**J. Morgan Kousser.** *Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction.* Chapel Hill: University of North Carolina Press, 1999. 608 pp. $40.00 (paper), ISBN 978-0-8078-4738-1; $65.00 (cloth), ISBN 978-0-8078-2431-3.

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Over the past decade the United States Supreme Court seems to have reversed its previous record of sympathy towards efforts to remedy this nation's history of racial injustice. The leading cases of *City of Richmond v. Croson* and *Adarand Constructors, Inc. v. Pena* have set the tone, severely limiting the circumstances in which government entities can take affirmative action to increase the number of members of minority groups who secure various government benefits. Because it classifies by race, affirmative action must meet the same strict scrutiny as legislation that discriminated against African Americans and other minority groups, the majority of justices say.

In 1993 the Supreme Court applied this doctrine to the redistricting of electoral units. As amended in 1982 and interpreted by the Civil Rights Division of the Justice Department, the Voting Rights Act (VRA) put state authorities under strong pressure to maximize the number of voting districts in which minority groups made up a majority of voters (called "minority-majority" districts in the legal literature), to the point that they would reflect the proportion of minority voters in the state. Under section 5 of the law, states that once disfranchised African-Americans had to get preclearance from the Justice Department for redistricting, and the Department refused to give it unless they maximized the number of minority-majority districts. In the 1990 round of congressional redistricting many states had drawn lines to comply, sometimes creating bizarrely shaped districts. In *Shaw v. Reno* a five-justice majority of the Court ruled that a tortuously shaped North Carolina congressional district could be challenged as a violation of the Constitution and strongly indicated that the district would not pass constitutional muster if it should come before the justices on the merits.

Later cases confirmed the prediction and expanded the reasoning, suggesting that it was the racial classification itself, not the shape of the districts or any specific racial discrimination, that offended. Indeed, as Kousser makes clear, the white plaintiffs could not show that they had been discriminated against individually, unless being placed in a majority African-American district was itself discriminatory, an untenable proposition. Nor could they show that the redistricting discriminated against whites as a whole, since the number of districts with minority-group majorities did not reduce the number of white-majority districts below the proportion of the white population of the state. What the court has held, therefore, is not that race-conscious districting discriminated against whites but that every person has the fundamental right to vote in election districts created in a color-blind manner. Apparently any race-conscious districting must meet the nearly insuperable test of strict scrutiny – it must be "narrowly tailored" to serve a compelling state interest. Meeting Department of Justice guidelines under the Voting Rights Act is not such an interest, most of the conservative justices have said, because the Act does not require maximization of districts in which minorities makeup a majority of voters. As long as states do not reduce minority voting below what it is presently, the Department of Justice has no right to refuse preclearance.

In *Colorblind Injustice*, J. Morgan Kousser, professor of history and social science at the California Institute of Technology, attacks the majority's reasoning and motives. The Court's pretended commitment to a race-neutral Constitution is mere subterfuge, he argues – as much a "thin disguise" to cover a racial and politi-

cal agenda as was the infamous segregation case of *Plessy v. Ferguson* one hundred years earlier. Kousser sets very ambitious goals for this work. He wants at the same time to write a history of race and election districting since the Civil War, to make a legal argument against the Court's recent decisions, and to rebut postmodernist denials of the possibility of accuracy in history. Thus, *Colorblind Injustice* lies at the intersection of Kousser's interests. He began his career with a highly regarded study of disfranchisement in the South at the turn of the twentieth century. As Harmsworth Professor at Oxford, he delivered an important revisionist lecture on the law of school integration in the same era. Furthermore, Kousser has been a leading defender of social-science approaches to history, resisting mightily the turn towards narrative and the influence of postmodernism in the profession.

Kousser opens with a historical comparison of the two Reconstructions – the first following the Civil War and the second the result of the civil rights movement of the 1950s and 1960s. His analysis of the failure of the first Reconstruction is insightful and makes important new points that become apparent upon comparison with the second. Kousser argues that the main reason Reconstruction failed was that it never achieved a bipartisan consensus. He deploys election statistics effectively to demonstrate how much more volatile and closely contested political races were in the nineteenth century than in the mid-twentieth. Democrats and Republicans had nearly equal strength in large numbers of congressional districts, and small shifts in voter sentiment led to huge swings in Congress. With eighty percent of eligible voters casting ballots and party identification strong, each party strove to mobilize its core voters on traditional issues and neither could afford to alienate important elements of its constituency. Party unity on the issue of federal protection of black political rights was remarkably strong. Although Kousser concedes that many Republicans believed in racial justice, their support for a free ballot was reinforced by the knowledge that it would break Democrats' hold on the Solid South. Northern as well as southern Democrats resisted, Kousser argues, not so much out of racism in the case of northern Democrats as because Democratic control of the South was essential to national party success. "In the nineteenth century the parties were too competitive, too 'responsible,' too dependably committed to a program, and the voters were too civically conscious to let party elites stray from orthodoxy. Black votes counted for too much nationally," Kousser writes (p. 48).

For these reasons congressional Democrats blocked Republican attempts to protect the integrity of the ballot, and southern Democrats were able to employ "at least eleven legal devices to dilute African-American votes" (p. 25), which he lists and discusses in order before finally turning to outright disfranchisement. (Kousser tends to schematize his discussions in a way many historians will find overdone.) Using districting maps to prove it, Kousser points out that "[g]errymanders were the paradigm" of the Democratic strategy to dilute the black vote (p. 26). Although Republicans retained control of the presidency when these devices were instituted, federal court decisions discouraged them from enforcing the law. Kousser calls the Supreme Court's course "judicial perfidy" (p. 38). With public opinion so deeply and closely divided, crabbed Supreme Court interpretations of the Fourteenth and Fifteenth Amendments severely constricted the federal government's power to intervene.

Kousser makes an important contribution to our understanding of the politics of Reconstruction. His effective deployment of statistics and maps sustains his contentions that quantitative methods can be powerful tools in the historian's arsenal and that one can make historical arguments about causation that are compelling to an open-minded reader. But his legal purpose of challenging present-day Supreme Court decisions strongly influences his choice of research questions. He does not ask why, if the nineteenth-century political system encouraged such deep partisanship, the Republican commitment to federal intervention in the South eroded while the Democrats' opposition remained so firm. Indeed, while he mentions Hayes's decision to end military intervention at one point in the chapter (p. 21), at other points one would hardly imagine Republican resolve had weakened (pp. 47-48). He does not look at the role of ideology, or third parties, or Republican reformers. He is not concerned with the social, economic, ethnic, or religious makeup of the Republican and Democratic constituencies. In discussing the extreme partisanship of the nineteenth century, he does not discuss institutional factors like winner-take-all patronage. These are all questions that a historian concerned only with writing history would exhaust. But Kousser's real purpose is to demonstrate how historical context undermines present-day legal and ethical arguments against race-conscious districting, not to present a full history of the subject. He is satisfied to present a compelling picture of how election processes and structures were rigged against African Americans in the past, and he then moves on to compare the political context of the first Reconstruction to the second.

Again supporting his argument with statistics,

Kousser demonstrates that politics were more stable during the second Reconstruction. Party identification was weaker and both parties competed for a moderate middle. Success did not turn on whether African-Americans voted or not. Therefore it was possible to assemble bipartisan coalitions to secure civil and political rights legislation, including the VRA, which Kousser says was designed to overcome every procedural and structural technique by which southern whites might attempt to minimize black political influence. In this environment the judiciary was willing and able to sustain vigorous federal action to enforce the laws. Even before Congress passed the VRA the Court had ruled discriminatory redistricting unconstitutional. Kousser limns the Supreme Court's interpretation of the VRA, which indicated the circumstances in which governments could be required to establish districts containing a majority of minority-group voters. When a more conservative Court took a restrictive position – saying plaintiffs had to prove an intent to discriminate, not just a discriminatory effect when challenging voting procedures or districts – Congress repudiated the decision by amending the law.

Conservative critics of aggressive Justice Department-monitoring of redistricting have challenged this interpretation, which Kousser rightly says is standard among historians. They charge that a law designed to guarantee the right of individual members of minority groups to vote has been perverted into a tool to guarantee race-conscious political outcomes. Civil rights organizations and the Justice Department are using the VRA to create a group right to proportional representation among elected officials. Kousser confronts these critics – especially Abigail Thernstrom, whose book *Whose Votes Count?* has been especially influential, and Justice Clarence Thomas, who has vehemently argued from the bench that the VRA was not intended to apply to voting structures like districting at all. Kousser closes his chapter with a vigorous point-by-point rebuttal.

The comparison between the first and second Reconstructions demonstrates, in Kousser's view, that a reversal of racial gains need not be motivated by racism; it may be to a political party's advantage to tolerate racism or to oppose government efforts to combat it. Moreover, the comparison points to the key role played by the judiciary. For Kousser, the deep divisions that have developed between the parties over civil rights since the 1970s, combined with the Supreme Court's ominous shift against federal enforcement powers, presage an anti-black rights reaction parallel to that of one hundred years ago. Thernstrom and Thomas are apologists for the second Redemption.

Five succeeding chapters provide the histories of racial districting in Los Angeles, Memphis, North Carolina, Georgia, and Texas, all of which gave rise to court cases in which Kousser appeared as an expert witness on behalf of those trying to increase minority representation in political bodies. In Los Angeles and Memphis, African-Americans and their allies challenged racially discriminatory districting and election procedures. In North Carolina, Georgia, and Texas, the state legislatures, after more than one hundred years of efforts to limit minority power, maximized the number of minority-majority districts. In his final chapters Kousser both describes and criticizes the Court opinions which have overturned race-conscious redistricting.

The result is a massive tome, in many ways compelling but falling somewhat short of fully achieving its goals. As already suggested above, the problem for Kousser is that these goals and the different types of scholarship required to reach them are not fully compatible. Dispassionate objectivity – or the pretense of it, according to postmodernists – is one of the traditional conventions of scholarly historical writing, ironically adhered to even by those who deny the possibility of objectivity. It is especially expected of one who claims that it is possible to present compelling answers to historical questions – answers that are closer to the truth than alternatives. Answering legal questions, however, requires direct engagement of one's adversaries. Kousser throws the book at his adversaries, charging them with intentional distortion or willful ignorance of the historical record, partisan motivations, and an intent to dilute black political power, and he uses language that reflects his passionate disagreement. He is both historian and historical actor, a protagonist in the historical drama, hoping to affect the result and shape the denouement.

The inconsistency among Kousser's purposes affects every chapter. His chapters on race and districting in each locality are designed both to provide the history of the subject and to challenge the basis of court decisions overturning the results. His most effective discussions are those in which court decisions went his way. The Los Angeles story, he says, demonstrates that careful historical reconstruction of events and use of historical statistics can prove beyond a reasonable doubt the intentions of historical actors – in this case to minimize the voting power of Hispanic Angelenos. Kousser's work played an important role in the decision of the federal courts to mandate an equitable redistricting of Los An-

geles County. His recounting of the Memphis story is a historical chronicle of the city's history of discriminatory voting policy, the inability of black politicians to secure white votes under the structures created to frustrate them, and the successful court case that dismantled those structures. In the process, Kousser reports, black political leadership passed from black moderates who had hoped to gain power through the support of moderate whites, to more extreme elements who had no such illusions.

Kousser's legal purposes affect how he develops even these essentially historical chapters. Conservative opponents of race-conscious districting argue that it is unnecessary because black candidates can gain enough white support to win elections and unethical because they posit a nation so racially polarized that a candidate of one race cannot represent constituents of another. Kousser therefore pays special attention to the occasions in which attractive minority-group candidates were defeated by white bloc-voting. Another of Kousser's key points is that the shape of challenged districts have been distorted not solely or even primarily to secure black or Latino majorities but rather to serve the political interests of rival parties and incumbents. The fact that most African Americans and Latinos vote Democratic, not their race, is the prime consideration for the parties. Republicans want to concentrate them into single, overwhelmingly Democratic districts so they can carry the others. Incumbent white Democrats worry that minority groups will prefer a member of their own race or ethnic group. They are motivated by their own political interests, not racial animus, as they fashion districts. The legal importance of these observations leads Kousser to offer a far more detailed chronicle of partisan maneuvering than the historical purpose warrants.

The pattern of stressing parts of the historical story that are important to the legal argument is even more apparent in Kousser's discussion of race and voting in Georgia, North Carolina, and Texas, where the reader gets the political jockeying among partisans and incumbents in exquisite detail. Kousser attends less to other aspects of the story than he likely would if he were writing solely for historical purposes. He focuses narrowly on the politics of race and electoral structures in the state being discussed. There is no general discussion of southern liberalism and its limitations, of changes in the African-American community, of the effect of the New Deal and World War Two on racial attitudes and black power nationally or locally. None of these contextual matters are directly relevant to the legal issues that shaped the research questions.

Kousser follows his discussions of specific race and redistricting controversies with a history and analysis of the question of "intent" and "effect" in racial discrimination court cases. In a strong historical discussion of the cases, he points out that both issues were crucial to court decisions through the 1950s. At no point could one persuade the Supreme Court to rule a law unconstitutional simply because it classified by race. To win their cases, black plaintiffs had to work hard to prove either discriminatory intent or effect, and nowhere more so than in *Brown v. Board of Education*, where the plaintiffs famously provided sociological evidence of the harm segregated education did to black children. Not until the 1960s did a line of opinions emerge that suggested that classification per se offended the Constitution. But, Kousser points out, the Court still worked very hard to determine the kind of evidence that demonstrated either discriminatory intent or effect in applying the VRA.

Discerning intent is inherently a historical question, Kousser notes, and he closes with a discussion of what factors to look for in determining it in redistricting cases. He aims his discussion primarily at judges, but means to address historians as well. Careful, well-structured analysis of historical evidence can lead to accurate understandings of motivation and causation, he argues. Historians as much as judges are obligated to test hypotheses through the reasoned analysis of facts; they are not free to order information according to personal dispositions. They discover patterns; they do not invent plots. It is a strong performance and the place where Kousser's legal and historical purposes best mesh.

Where Kousser's legal and historical purposes come into conflict most clearly is in his analysis of the Supreme Court's recent decisions. His historical purpose is to describe those decisions and their effects. His legal purpose is to demolish their reasoning. The second clearly takes precedence over the first. Kousser presents no history of the heritage of the conservative justices' ideas. He does not consider the inherent tension between the arguments that the Constitution was colorblind, which served to break down discrimination through the mid-1960s, and the argument that the Constitution permits racial preferences, which has proven necessary to combat discrimination afterwards. He offers only slight discussion of the personal histories of those who have attacked the race-conscious alternatives and does not discuss how their views fit into their larger intellectual outlooks. He does not describe the conservative position as a whole, indicating what its proponents have in common and how they disagree. He does not relate their position

on race-conscious public policy to other legal positions – for example their positions on federalism. Nor does he dispassionately analyze the liberal position, its heritage, its commonalities, disagreements, and inconsistencies.

Instead Kousser offers a devastating analysis of the conservative legal argument as reflected in majority and concurring opinions. He hits Justices O'Connor, Kennedy, and Thomas, who have taken the conservative lead, where they are weakest – in their rote formalism, their privileging of theory over fact and experience, their obtuse ignorance of history. Kousser does not make clear enough the relationship between this analysis and the previous chapter's discussion of intent and effect. In the view of the conservative majority, any racial classification in redistricting that offends the Constitution is subject to strict scrutiny. The question is not whether there was an intent to discriminate but whether there was an intent to classify by race. They divide on whether this question must be broached only when districts are bizarrely shaped, with O'Connor especially adamant that this is what triggers suspicion. Kousser does indicate this and other differences among the conservatives, but primarily to discredit them rather than to limn the growing tensions in the conservative judicial bloc.

Kousser is absolutely persuasive in his argument that the bizarre shapes of districts result not from an intent to classify by race but from the intent to promote the partisan interests of parties and incumbents. His response to the argument that racial classification per se is unconstitutional lies in his history of the first Reconstruction, which makes clear that the Fourteenth and Fifteenth Amendments were aimed at overcoming discrimination not racial classifications. This proposition was confirmed by the traditional importance of proving discriminatory intent or effect in Fourteenth and Fifteenth Amendment court cases. The idea that the Amendments mandate colorblindness is a perversion of history, Kousser insists. But that of course requires one to agree that there are correct and incorrect interpretations of history. Hence Kousser's distaste for postmodernism in history, and his charge that the Court majority's history is postmodernist in nature.

Kousser hammers on the practical result of requiring colorblind public policy. Abstract commitment to colorblindness can only damage African Americans in light of the pervasiveness of race in the real world, Kousser insists. He never addresses the philosophical question of whether we ought to take the risk in order to maintain the ideal. Immersed in America's history of racism, he scorns the conservatives' insistence that the future is rosier. Where conservatives see the victory of minority candidates in white-majority voting districts as evidence that racism is receding in politics, Kousser stresses the continued polarization in the voting patterns. In light of its real-world consequences, the Court's rhetorical commitment to a colorblind Constitution is merely pretense.

Looking at the effects of the decisions and studying alternative explanations for them, Kousser concludes that the Court's motives, and especially Justice Sandra Day O'Connor's, are partisan (pp. 436-39) – to overturn redistricting where it benefits Democrats and sustain it where it benefits Republicans. Kousser makes a plausible if brief case, based on his pre-judicial record, that Chief Justice William H. Rehnquist is hostile to African-Americans. He claims that "[e]xcept for Souter, the Reagan-Bush appointees shared Rehnquist's racial opinions" (p. 437), based on no more than the fact that they concurred with Rehnquist's commitment to colorblindness on the redistricting cases. Nonetheless it is not their anti-African American bias that has determined their course, but their partisanship, Kousser concludes, pointing out that "[t]heir uncompromising adherence to 'colorblindness' collapsed when the interests of the Republican party were at stake" (p. 438).

The inconsistencies in the Court's redistricting opinions can be attributed primarily to the erratic course of Justice Sandra Day O'Connor, Kousser finds. Kousser argues that O'Connor's inconsistencies can be explained only by partisanship. Alternative explanations – desire to moderate between extremes, failure to foresee unintended consequences, a distaste for express acknowledgments of the role of race in American society – all fail upon analysis. Nowhere is Kousser more the legal analyst than in his failure to consider the obvious – that if ability to see logical inconsistencies in one's reasoning are the mark of a good judge, O'Connor fails the test. On the other hand, nowhere is Kousser less the legal analyst than when he suggests that O'Connor is conscious of her partisanship. Doing even-handed justice is a powerfully inculcated value among lawyers and judges, even as they recognize that a variety of intellectual and political dispositions will determine what they – or at least other lawyers and judges –think even-handed justice is. The need for judges to rationalize the way their political, class, and other commitments affect their judgment is very powerful, and a historian must take it into account, even as the legal analyst uses the inconsistencies such rationalizations foster to discredit legal judgments.

Moreover, Kousser does not discuss the implications of the fact that Republican presidential administrations and state Republican parties have been prime movers in promoting race-conscious redistricting. Concentrating black Democratic voters in particular districts makes other districts more likely to vote Republican. Kousser points out accurately that the opinions of black Americans are significantly different on many issues even from white Democrats, and that the black caucus in Congress reflects those views more closely than white Democrats do. His commitment is to the full representation of black Americans' political views and interests, no matter the consequences for the Democratic party. But it is not clear that the Supreme Court's opposition to race-conscious redistricting will benefit Republicans and hurt Democrats, no matter how much it might diminish the ability of black Americans to elect representatives who accurately reflect their views.

Professor Kousser has made himself both historian and protagonist. His accomplishment is at the same time the strength and the weakness of his book. Committed to both historical and legal conventions, he does not write with the pointed conciseness that characterizes Thernstrom's *Whose Votes Count?* Nor has he written a conventional history of race and redistricting. But he has provided a detailed historical study of the political and racial issues involved in a series of redistricting cases and a powerful critique of the recent Supreme Court cases that are severely restricting race-conscious remedies to counteract continuing prejudices. His study is a powerful argument for quantitative methods and social-science approaches to history. It should force proponents of colorblind public policy to reconsider their commitments, to recognize the dangers, to be more aware of the justifications for race-conscious remedies in response to the long and all-too-contemporary history of racial discrimination.

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