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## Morgan Kousser's Noble Dream

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# MORGAN KOUSSER'S NOBLE DREAM\*

Heather K. Gerken\*\*

COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION. By *J. Morgan Kousser*. Chapel Hill: University of North Carolina Press. 1999. Pp. x, 590. \$29.95.

J. Morgan Kousser, professor of history and social science at the California Institute of Technology, is an unusual academic. He enjoys the respect of two quite different groups — historians and civil rights litigators. As a historian, Kousser has written a number of important works on the American South in the tradition of his mentor, C. Vann Woodward,<sup>1</sup> including a foundational book on southern political history, *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880-1910*. Many of his writings have become seminal texts among election law scholars.<sup>2</sup> Kousser has also used his historical skills to provide crucial assistance to civil rights plaintiffs in numerous voting cases, including *Mobile v. Bolden*, *Shaw v. Hunt*, and *Bush v. Vera*.<sup>3</sup>

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\* This title is taken from Peter Novick's famous book on the debate about objectivity among American historians. See PETER NOVICK, *THAT NOBLE DREAM: THE "OBJECTIVITY QUESTION" AND THE AMERICAN HISTORICAL PROFESSION* (1988). Novick himself borrowed the phrase from Theodore Clarke Smith. *Id.* at vii. Novick has a special gift for coining a title, as his rebuttal to critics of *That Noble Dream* demonstrates. See Peter Novick, *My Correct Views on Everything*, 96 AM. HIST. REV. 699 (1991).

\*\* Assistant Professor, Harvard Law School. B.A. 1991, Princeton; J.D. 1994, University of Michigan. — Ed. This Review has benefited from close reads by David Barron, Christine Desan, Lani Guinier, Morton Horwitz, Richard Parker, Richard Pildes, David Simon, and William Stuntz, as well as from discussions with Pamela Karlan, Duncan Kennedy, Samuel Issacharoff, and Kenneth Mack. Thanks also to Morgan Kousser for his gracious response to this Review. Alison Caplis and Michael Gottlieb provided very helpful research assistance. All mistakes are, of course, my own.

1. P. 11; see also *infra* notes 39, 93 (identifying connections between Kousser's scholarship and the writings of C. Vann Woodward).

2. For example, virtually every relevant chapter of one of the two main election law texts contains extensive references to Kousser's writings. See SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY* 78 (ch. 2), 465 (ch. 7), 475 (ch. 7), 602 n.52 (ch. 8) (1998).

3. See, e.g., *Shaw v. Hunt*, 517 U.S. 899, 910 (1996); *Underwood v. Hunter*, 730 F.2d 614, 619 (11th Cir. 1984), *aff'd*, 471 U.S. 222 (1985); *Vera v. Richards*, 861 F. Supp. 1304, 1329 (S.D. Tex. 1994), *aff'd sub nom.*, *Bush v. Vera*, 517 U.S. 952 (1996); *DeBaca v. San Diego*, 794 F. Supp. 990, 997 (S.D. Ca. 1992), *aff'd per curiam*, No. 92-55661, 1993 WL 379838 (4th Cir. Sept. 27, 1993); *Garza v. County of Los Angeles*, 756 F. Supp. 1298, 1309 (C.D. Cal. 1990); *Harry v. Bladen County*, 1989 WL 253428, at \*2 (E.D.N.C. Dec. 11, 1989); *Brown v. Bd. of Comm'rs*, 722 F. Supp. 380, 391 (E.D. Tenn. 1989); *United States v. Dallas County Comm'n*, 548 F. Supp. 875, 886 (S.D. Ala. 1982), *modified*, 739 F.2d 1529 (11th Cir. 1984);

Like the work of C. Vann Woodward, Kousser's is the scholarship of the path not taken. He seeks to show that the political and racial climate at various points in our history was more fluid than we imagine in order to persuade us that the path we eventually took was not foreordained, and that changes in institutional structures or legal rules might have led to dramatically different results. His historical scholarship is thus forward-looking — the past provides a means to chart our course for the future.

*Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction* is Kousser's most recent effort to pursue his noble dream: "tell[ing] the truth and do[ing] good at the same time."<sup>4</sup> Its self-proclaimed goal is to employ rigorous historical analysis to uncover what Kousser believes to be the partisanship, racism, and hypocrisy underlying the Supreme Court's racial gerrymandering decisions — *Shaw v. Reno* and its progeny.<sup>5</sup> Throughout the book, Kousser insists that scholars abandon their isolationist impulses and join him in fighting the good fight to eliminate *Shaw*. One can only admire the passion and intellectual firepower Kousser brings to his role as academic warrior, his choice of interdisciplinary scholarship as a weapon, and the battles he has chosen to wage.

Kousser's attack on *Shaw* has two prongs. In the first part of the book, he marshals powerful historical research to show why *Shaw* fails to take into account past and present realities. The second half of the book contains Kousser's direct attack upon *Shaw*. It consists of a wide-ranging series of challenges to the Supreme Court's equal protection decisions, all of which are designed to show us that *Shaw* reflects a racist, pro-Republican agenda.

Ironically, the first half of *Colorblind Injustice*, which largely involves an indirect challenge to *Shaw*, is far more successful than the direct attack contained in the second half. As Part I of this Review explains, the first section of the book offers a good example of the political use to which history can be put. The first six chapters demonstrate the intricate ways in which race is refracted and reflected in American politics and the powerful effect legal rules and political institutions

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Taylor v. Haywood County, Tenn., 544 F. Supp. 1122, 1125 (W.D. Tenn. 1982); QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT 1965-1990, 401 n.52 (Chandler Davidson & Bernard Grofman eds., 1994). Indeed, five of the book's chapters in *Colorblind Injustice* stem directly from the expert witness testimony Kousser provided. P. 2.

4. J. Morgan Kousser, *Are Expert Witnesses Whores? Reflections on Objectivity in Scholarship and Expert Witnessing*, 6 PUB. HISTORIAN, Winter 1984, at 5, 7.

5. The Supreme Court's racial gerrymander cases began with *Shaw v. Reno*, 509 U.S. 360 (1993), in which the Supreme Court first announced that certain majority-minority districts could be challenged under the Equal Protection Clause, depending on how they were drawn. Since 1993, the Supreme Court has struck down a number of majority-minority districts throughout the country. See, e.g., *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995).

have upon race relations. By revealing the many complexities the *Shaw* decisions elide, Kousser's historical research provides a weighty challenge to the formalist reasoning offered by *Shaw* and its progeny.

Part II argues that Kousser's direct challenge to *Shaw* in the second half of *Colorblind Injustice* fails in large part because he does not adequately articulate or defend the normative theory undergirding his challenge. The omission is a deliberate one, as Kousser believes that it is "facts, not theories, that really matter" (p. 504 n.33). As Section II.A explains, however, the attack Kousser levies is necessarily a normative one. Because he fails to defend his normative premises, however, they are difficult to discern, obvious criticisms of those assumptions go unanswered, and he never engages directly with the difficult normative questions *Shaw* raises. Section II.B argues that even if Kousser is merely trying to downplay, rather than eliminate, normative argument in equal protection, that undertaking is misguided. Indeed, decision-making that is not anchored to a clear normative principle lends itself to a different variant of the formalism Kousser decries.

Finally, Part III briefly reflects upon the language Kousser uses to advocate his cause. It criticizes Kousser's fiery rhetoric on purely instrumental grounds. While there is certainly much to be said for introducing righteous indignation into this debate, Kousser is unlikely to achieve his political aims with the language he has chosen. This Review concludes by noting that this book undoubtedly should be read by anyone interested in the ongoing debate about *Shaw v. Reno* and its progeny, but it is unlikely to change anyone's mind.

## I. THE STRUGGLE OF MEMORY AGAINST FORGETTING

The first half of *Colorblind Injustice* provides a fine example of the use of history to pursue political aims. Its goal is to show why the Supreme Court should abandon the *Shaw* doctrine, which allows majority-minority districts to be invalidated under the Equal Protection Clause, depending on how they are drawn.<sup>6</sup> By ignoring the significant role race plays in our present and recent past, Kousser argues, the *Shaw* doctrine threatens the fragile gains made by racial minorities during the Civil Rights Movement.<sup>7</sup> Unless the Court "get[s] the history right," Kousser writes, it "cannot get the equal protection clause right" (p. 456).

*Colorblind Injustice* thus takes its place within an important scholarly tradition: "the struggle of memory against forgetting," to borrow

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6. Pp. 6-7; see *supra* note 5.

7. Pp. 6, 465-67. Kousser terms this historical period "the Second Reconstruction." As Kousser explains, his use of the term is more than a "rhetorical flourish"; it highlights his efforts to conduct a "systematic comparison" between these two key periods in United States history. P. 2.

Milan Kundera's lovely phrase.<sup>8</sup> Those who subscribe to this tradition do so for forward-looking reasons; they seek "to make connections with the past in order to illuminate the problems of the present and the potential of the future."<sup>9</sup> History is worth fighting over because the past is "used to sanction or sanctify authority"<sup>10</sup> and provides the means by which we define ourselves and our community.<sup>11</sup> Thus, history "doesn't just reflect; it provides a forum for readjudicating power and interests."<sup>12</sup>

Like Kousser, legal scholars in this tradition fear the Rehnquist Court's resort to abstract principles in equal protection cases because it allows the Court to ignore how these principles are refracted and distorted when applied in the real world.<sup>13</sup> Recognizing that it is especially "[i]n the freighted area of race and public policy" that "abstract

8. MILAN KUNDERA, *THE BOOK OF LAUGHTER AND FORGETTING* 3 (1986). Kundera describes this task as the "struggle of man against power" and warns that "the first step in liquidating a people . . . is to erase its memory" so that the nation "will forget what it is and what it was." *Id.* at 159. For a recent example of this type of effort in voting rights scholarship, see Richard H. Pildes, *Democracy, Anti-democracy, and the Canon*, 17 CONST. COMMENT. 295, 297 (2000) (seeking renewed discussion of *Giles v. Harris*, 189 U.S. 475 (1903), which has "been airbrushed out of the constitutional canon").

Although Kundera was most familiar with the deliberate erasure of the past by Communist dictatorships in Eastern Europe, many have remarked upon a similar, far less systematic tendency in the United States. See C. VANN WOODWARD, *THE FUTURE OF THE PAST* 18-19 (1989) [hereinafter WOODWARD, *FUTURE OF THE PAST*] (discussing Thomas Jefferson and Alexis de Tocqueville's views on the tendency of Americans to break with the past); C. Vann Woodward, *Thinking Back: The Perils of Writing History* 3 (1986) [hereinafter Woodward, *Thinking Back*] (citing an Ibsen quote favored by Holmes to a similar effect). Others have written about the American propensity to erase the past in more positive terms. See PHILIP FISHER, *STILL THE NEW WORLD* (1999) (describing this tendency as a never-ending process of reinvention). For an effort to compare attitudes about the past in the United States and Eastern Europe, see Kim Lane Scheppele, *When the Law Doesn't Count: The 2000 Election and the Failure of the Rule of Law*, 149 U. PA L. REV. 1363 (forthcoming May 2001) (arguing that constitutional interpretation reflects the efforts of what she terms "post-horror countries" — those countries that have recently experienced mass abuse of their own citizens — to avoid the erasure of their own histories).

9. JOYCE APPLEBY ET AL., *TELLING THE TRUTH ABOUT HISTORY* 10 (1994); see also Joyce Appleby, *The Power of History*, 102 AM. HIST. REV. 1, 1 (1998).

10. Morton J. Horwitz, *History and Theory*, 96 YALE L.J. 1825, 1825 (1987) [hereinafter Horwitz, *History and Theory*]; C. Vann Woodward, *The Future of the Past*, 75 AM. HIST. REV. 711, 724 (1970); see also APPLEBY ET AL., *supra* note 9, at 308; Appleby, *supra* note 9, at 1; Morton J. Horwitz, *The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 40 (1992) [hereinafter Horwitz, *Constitution of Change*].

11. Appleby, *supra* note 9, at 10; WOODWARD, *FUTURE OF THE PAST*, *supra* note 8, at viii. For examples of how these observations play out in practice, see C. VANN WOODWARD, *AMERICAN COUNTERPOINT: SLAVERY AND RACISM IN THE NORTH-SOUTH DIALOGUE* 5-9 (1971); Pildes, *supra* note 8, at 295, 319 n.11.

12. APPLEBY ET AL., *supra* note 9, at 289.

13. See Horwitz, *Constitution of Change*, *supra* note 10, at 98-109; Morton J. Horwitz, *The Warren Court: Rediscovering the Link Between Law and Culture*, 55 U. CHI. L. REV. 450, 456 (1988) [hereinafter Horwitz, *The Warren Court*]; Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 550 (1995).

principles [can] founder on uncomfortable facts,"<sup>14</sup> many of these scholars praise the Warren Court for its "rediscovery of the inseparable connection between political culture and political equality."<sup>15</sup>

#### A. *The Role of Bright-Line Rules in the Courts' Voting Jurisprudence*

Concerns about acontextual decisionmaking are especially apt in the voting rights context. A rigid adherence to bright-line rules seems to be the usual reaction of courts to the difficulties involved in conceptualizing how to allocate political power fairly among voters, the tensions between traditional tenets of liberalism and the aggregative aspects of voting, and the types of judgments necessary to guarantee racial minorities a full opportunity to participate in the political process.<sup>16</sup> Courts shy away from nuanced, contextual analysis and qualitative evaluation, preferring instead formulaic approaches that require only quantitative judgments. Whether one thinks the courts' resort to formalism stems from a healthy fear of traveling farther into the political thicket or is simply an ineffective attempt to dodge these questions, it is hard to deny its presence in voting rights jurisprudence.<sup>17</sup>

Bright-line rules can, of course, provide sensible proxies for achieving broader substantive aims. The problem in voting rights jurisprudence, however, is that too often courts have stopped treating these bright-line rules as means to an end; the rules have become ends unto themselves. A resort to this variant of "formalism" inevitably results in the mindless application of these rules to historical and normative contexts where they do not fit. The average judge prefers such a formal approach to probing the rule's normative underpinnings or factual assumptions and evaluating whether they still hold in the case before her.

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14. Richard H. Pildes, *The Politics of Race*, 108 HARV. L. REV. 1359, 1391 (1995); see also Horwitz, *The Warren Court*, *supra* note 13, at 456.

15. Horwitz, *The Warren Court*, *supra* note 13, at 456.

16. See Heather K. Gerken, *The Supreme Court's New Equal Protection Jurisprudence: A Comment on the Contributions of Richard Hasen and Richard Briffault to FSU's Bush v. Gore Symposium*, 29 FLA. ST. U. L. REV. (forthcoming 2001); Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1731-32 (2001) [hereinafter Gerken, *Undiluted Vote*]; Pamela S. Karlan, *Some Pessimism About Formalism*, 71 TEXAS L. REV. 1705 (1993). I disagree with Kousser to the extent that he views the Rehnquist Court's jurisprudence as a sharp break with the past. Whereas I believe that a formalist streak can be identified in virtually every generation of voting rights cases, see *infra* Part II.B, Kousser identifies what he calls a "pragmatic tradition" in voting rights law prior to the Rehnquist Court. See J. Morgan Kousser, *Beyond Gingles: Influence Districts and the Pragmatic Tradition in Voting Rights Law*, 27 U.S.F. L. REV. 551, 554 (1993).

17. See, e.g., *Holder v. Hall*, 512 U.S. 874 (1994); *Presley v. Etowah County Comm'n*, 502 U.S. 491 (1992); *Karcher v. Daggett*, 462 U.S. 725 (1983). I do not mean to suggest that formalism is always present in voting rights jurisprudence. To the contrary, the courts can and do engage in contextual analysis in deciding equal protection claims. See, e.g., *White v. Regester*, 412 U.S. 755 (1973); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

One example of this trend outside of the *Shaw* line of cases is the courts' section 2 jurisprudence. Section 2 of the Voting Rights Act prohibits racial vote dilution.<sup>18</sup> In the early stages of the doctrine's development, courts assessed whether racial minorities had a fair opportunity to participate in the political process by examining a wide range of historical and qualitative concerns. These came to be known as the "Senate factors" after they were endorsed in a Senate report accompanying the 1982 amendments to section 2.<sup>19</sup>

Over the years, however, courts resolving section 2 claims have largely abandoned the qualitative analysis required by the Senate factors. Indeed, in 1986, the Supreme Court effectively instructed lower courts to disregard those qualitative measures and focus instead on the three *Gingles* preconditions,<sup>20</sup> mechanical proxies for assessing whether racial minorities' potential voting strength has been undermined. Thus, even without some qualitative proof of dilution, plaintiffs were very likely to persuade a court to invalidate a redistricting scheme as long as they succeeded in satisfying the *Gingles* preconditions.<sup>21</sup>

While the Supreme Court's decision in *Johnson v. DeGrandy*<sup>22</sup> seemed to breathe new life into the Senate factors, it failed to deter the courts' marked proclivity for mechanical, quantitative rules. Although the Court specifically reminded courts to pay attention to the

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18. Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 (1994 & Supp. II 1996), prevents states from taking advantage of racially polarized voting among whites and racial minorities to undermine the voting strength of minority group members. For a detailed analysis of the right to an undiluted vote, see Gerken, *Undiluted Vote*, *supra* note 16.

19. See S. REP. NO. 97-417, at 23 (1982), reprinted in 1982 U.S.C.A.A.N. 177, 200-01. The Senate factors were pulled from a variety of dilution cases arising prior to 1982. See, e.g., *White v. Regester*, 412 U.S. 755 (1973); *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1979), *aff'd per curiam sub nom.*, *E. Carroll Parish Sch. v. Marshall*, 424 U.S. 636 (1976). They include:

[T]he history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political subdivision is racially polarized; the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting; the exclusion of members of the minority group from candidate slating processes; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction.

*Thornburg v. Gingles*, 478 U.S. 30, 44-45 (1986).

20. According to *Thornburg v. Gingles*, plaintiffs must prove that (1) the state could have drawn an additional, compact majority-minority district but failed to do so; (2) the minority group is politically "cohesive" — that is, its members vote in a similar fashion; and (3) the white electorate votes as a bloc, thus enabling whites usually to defeat the minority group's preferred candidates at the polls. 478 U.S. at 50-51.

21. See *Jenkins v. Red Clay Bd. of Educ.*, 4 F.3d 1103, 1135 (3rd Cir. 1993).

22. 512 U.S. 997 (1994).

Senate factors,<sup>23</sup> it offered a new standard for evaluating dilution — proportionality — that was equally amenable to mechanical implementation. Proportionality is an easily applied mathematical standard that requires a court to count the number of districts group members are capable of controlling on election day<sup>24</sup> rather than examine the quality of representation they ultimately receive. Unsurprisingly, despite the Supreme Court's insistence that proportionality is not a "safe harbor" for defendants,<sup>25</sup> courts have begun to grant "extremely heavy weight" to proportionality in assessing dilution claims.<sup>26</sup>

A particularly striking example of this new approach is *Barnett v. City of Chicago*.<sup>27</sup> There, the Seventh Circuit ignored virtually all of the qualitative measures of representation, including the nine Senate factors that were once the touchstone of any dilution claim. It based a finding of section 2 liability entirely upon the State's failure to provide an exact proportional share of districts to African-American voters. It is not surprising that courts like the Seventh Circuit have moved toward a mechanical approach to section 2 claims. The Senate Factors require courts to make judgments about the continuing effects of past discrimination, the quality of representation received by racial minorities, the substantive content of their policy preferences, the constitutive aspects of participation, and the dynamics of the legislative process. All of these issues, in turn, require contextualized judgments about race relations, the preferences of members of different racial groups, and the allocation of political power — assessments judges are often reluctant to make.

There are costs, however, to adopting the more mechanical, formal approach to voting claims that we see in recent section 2 cases. First, proportionality becomes an end unto itself rather than a means to an end (here, a well-functioning democracy). Courts may thus neglect other essential aspects of the democratic process. For example, under the current approach to section 2, courts tend to "see a single event [the election] as the culmination of political participation and the focus of voting rights efforts."<sup>28</sup> Second, rigid adherence to a formal ap-

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23. *Id.* at 1011-12.

24. *See id.* (announcing the proportionality standard).

25. *Id.* at 1017.

26. *See, e.g.,* African Am. Voting Rights Legal Def. Fund, Inc. v. Villa, 54 F.3d 1345, 1356 (8th Cir. 1995); Rural W. Tenn. African-Am. Affairs Council, Inc. v. McWherter, 877 F. Supp. 1096, 1100-03 (W.D. Tenn. 1995), *aff'd mem. sub nom.*, 516 U.S. 801 (1995).

27. 141 F.3d 699 (7th Cir. 1998).

28. Kathryn Abrams, *Relationships or Representation in Voting Rights Act Jurisprudence*, 71 TEX. L. REV. 1409, 1415 (1993); *see also* Judith Reed, *Sense and Nonsense: Standing in Racial Districting Cases as a Window on the Supreme Court's View of the Right to Vote*, 4 MICH. J. RACE & L. 389, 441, 450 (1999). Kathryn Abrams and Pam Karlan have used the Senate factors as a counterpoint to their criticisms of the formulaic approach of current dilution doctrine, which they argue focuses too heavily on electoral outcomes at the expense of

proach tends to foreclose certain types of equal protection claims simply because the discrimination is not the type of harm the bright-line rule was designed to address.<sup>29</sup> In the long run, voting rights jurisprudence may be so distanced from voting realities that equal protection loses its power to effect meaningful change and may work in counter-productive ways when applied.

### B. *What History Tells Us About Shaw*

All of these concerns animate Kousser's challenge to the formalism readily identifiable in the Supreme Court's *Shaw* decisions. *Shaw* is mistaken, Kousser argues, because it substitutes empty rhetoric and rigid rules for nuanced, contextual analysis (p. 7). In this sense, *Shaw* is part of the trend toward formalism we see in other voting rights cases. Kousser's main focus is what he sees as the Court's rigid adherence to the rule of colorblindness. And despite his apparent acceptance of *Miller's* predominant factor standard,<sup>30</sup> his historical analysis provides an equally powerful case against the application of conventional motive-based equal protection analysis to redistricting. In both instances, the Court has taken bright-line rules that are best understood as means to an end (a healthy multiracial society) and treated them as ends unto themselves. In clinging to these two rules, the Court has blinded itself to political and racial complexities that such rules are not robust enough to address.

For Kousser, a full understanding of historical context requires us to focus upon institutions. We should worry about the Supreme Court's *Shaw* jurisprudence precisely because "institutions and institutional rules — not customs, ideas, attitudes, culture, or private behavior — have primarily shaped race relations in America" (p. 1). As those first few lines of the book make clear, Kousser is an academic maverick. In emphasizing the importance of law and formal institutions, Kousser is fighting a marked shift toward cultural and social analysis in history departments and law schools throughout the country.<sup>31</sup> And, as with everything else in the book, Kousser never does anything by halves. Rather than suggesting that those moving toward cultural analysis have struck the wrong balance and placed too little

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other aspects of political participation and representation. See Kathryn Abrams, *Raising Politics Up: Minority Politics and Section 2 of the Voting Rights Act*, 63 N.Y.U. L. REV. 448, 455-56 (1988); Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 186-87, 198 (1989).

29. See, e.g., *Presley v. Etowah County Comm'n*, 502 U.S. 491 (1992).

30. Compare pp. 317-65, 494 n.2, with Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505, 2507-08, 2537-44 (1987).

31. See Rosemary J. Coombe, *Critical Cultural Legal Studies*, 10 YALE J. L. & HUMAN. 475-76 (1998); Christine A. Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV. L. REV. 1381, 1387-88 (1998).

emphasis upon formal institutions and politics,<sup>32</sup> he refuses to accept that cultural and societal forces have any explanatory weight.

Kousser's emphasis on traditional institutional analysis leads him into strikingly new terrain. The first chapter, for example, argues that the conventional story about the failure of Reconstruction is incorrect (pp. 40-49). Political battles in Washington — not racial ideology or Southern cultural practices — were the reason Reconstruction failed. Specifically, Kousser claims that efforts to protect the political power of African Americans after the Civil War failed not because of social forces that led to violence and fraud in the South, but because nineteenth-century congressional representatives enjoyed slim electoral margins in their districts. The absence of safe seats led to significant turnover in Congress. As a result, the inexperienced legislators who were elected hewed closely to the party line rather than reaching the type of bipartisan compromises on racial issues made possible in the 1950s and 1960s by safe seats and minimal political competition (pp. 40-49, 53). Kousser's argument — that the "First Reconstruction died from too much democracy" (p. 49) and that the Second thrived precisely because congressional representatives enjoyed safe seats — not only provides a counterintuitive response to the conventional wisdom that competitive districts are an unalloyed good,<sup>33</sup> but it also offers a weighty challenge to the story we now tell about Reconstruction.

Chapters Two through Six offer more recent analyses of the relationship between race and politics. These chapters — five case studies that trace redistricting and electoral controversies in Los Angeles, Memphis, Georgia, North Carolina, and Texas during the last fifty years — are filled with intimate, ugly details about electoral politics and read, as one commentator has noted, like a "political whodunit[]." <sup>34</sup>

Each of these chapters also furthers Kousser's underlying agenda — showing how *Shaw's* formalism ignores important historical realities. For example, while *Shaw* rests on the assumption that a districting body's racial motivations can readily be separated from its political aims,<sup>35</sup> Kousser shows that race and politics are inextricably intertwined. By documenting the self-interested efforts of politicians to

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32. For an example of this type of move, see Desan, *supra* note 31, at 1387-89.

33. See *Roberts v. Wamser*, 883 F.2d 617, 622 (8th Cir. 1989); BRUCE E. CAIN, *THE REAPPORTIONMENT PUZZLE 2* (1984); Bruce E. Cain, *Perspectives on Davis v. Bandemer: Views of the Practitioner, Theorist, and Reformer*, in *POLITICAL GERRYMANDERING AND THE COURTS* 117, 128 (Bernard Grofman ed., 1990).

34. David Lublin, *Race and Redistricting in the 1990s*, *AM. POL. SCI. REV.* (forthcoming 2001) (reviewing *Colorblind Injustice* and MARK RUSH, ED., *VOTING RIGHTS AND REDISTRICTING IN THE UNITED STATES*).

35. See, e.g., *Shaw v. Hunt*, 599 U.S. 817, 905-07 (1996).

take advantage of racial cleavages, he provides significant evidence that “matters of racial power” as much as “unthinking racial animosity” have undermined minority voting rights in the recent past.<sup>36</sup>

In the chapter on Los Angeles (Chapter Two), for instance, Kousser offers a fact-intensive, well-documented tale about rank hypocrisy and the cynical manipulation of race. We see that although white politicians consistently ignored the needs of the Latino community, they never hesitated to invoke these concerns to justify their actions or to manipulate Latino interests to further their own political aims (p. 120-34). Kousser thus complicates the Supreme Court's conventional model of racial motive, which is largely preoccupied with manifestations of outright racial hostility and premised on the assumption that race can be separated from politics.

Kousser's chapters on the redistricting battles that took place in Texas and North Carolina during the 1990s (Chapters Five & Six) similarly document the tangled relationship between race and politics and cast doubt upon the simplistic approach of the *Shaw* cases. While the Supreme Court confidently identified a “predominantly racial motive” from the shape of the districts and scattered pieces of evidence from the record,<sup>37</sup> Kousser describes the astounding complexity of the racial and political tradeoffs made to create those challenged districts. His adept use of historical narrative provides a far richer account of these cases than the Court's decisions and, once again, muddies the motive-based distinction the Supreme Court has tried to draw. Ironically, while Kousser seems to accept the Supreme Court's premise that *Miller's* predominant factor standard serves a meaningful analytical role in the context of redistricting,<sup>38</sup> his detailed analysis provides as compelling a refutation of that premise as one could hope to craft.

These chapters also highlight the significant role that institutions and legal rules play in shaping race relations, another concern Kousser raises about *Shaw*. Kousser does not simply depict racial minorities as the passive victims of private white oppression. He shows that racial minorities could and did resist disenfranchisement, and that whites often had to modify institutional structures to achieve their aims.<sup>39</sup> In his chapter on Georgia, for example, Kousser describes the emergence of fairly powerful groups of African Americans in Macon during the first half of the twentieth century; these organizations were able to attract

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36. P. 67; *see also* p. 9.

37. *Id.* at 905-07; *Bush v. Vera*, 517 U.S. 952, 955-72 (1996).

38. *See supra* note 30.

39. Kousser's efforts thus fit neatly within the scholarly tradition of C. Vann Woodward, who warned against depicting the African American as “a passive element, the man to whom things happens . . . the object rather than the subject of history.” WOODWARD, *FUTURE OF THE PAST*, *supra* note 8, at 18-19. For more recent efforts in this vein, *see, for example*, GLENDA F. GILMORE, *GENDER AND JIM CROW* (1996).

the support of white politicians and “sen[d] comparatively moderate whites to the legislature” (p. 214). The success of these “black slatemakers” eventually proved to be their undoing, for their effectiveness provided the impetus behind the state’s majority-vote law (p. 214-42). Manipulation of legal rules was the only way for whites to preserve their power.

In sum, the first half of *Colorblind Injustice* confirms why we should be concerned about history in the context of voting. Voting rights suits largely concern the distribution of political power, and Kousser’s book makes clear that power relations are far too complex to be captured by *Shaw*’s narrow conception of racial motive. Colorblindness seems impossible in a world where race and politics are inseparable. And the Court errs in trying to fit redistricting decisions into the formal motive-based categories employed in other areas of equal protection. Whatever the validity of those categories elsewhere, they do not come close to capturing the complexities of decisions made in the redistricting context.<sup>40</sup> Instead, as *Colorblind Injustice* demonstrates, the lens of conventional equal protection doctrine necessarily distorts the realities of districting and blinds the Court to its political and racial intricacies.

## II. THE ROLE OF NORMATIVE ARGUMENT IN EQUAL PROTECTION LAW

The second half of *Colorblind Injustice* contains Kousser’s *direct* attack on the Rehnquist Court. It offers a series of critiques of the Supreme Court’s equal protection jurisprudence, all with a view to showing that the *Shaw* decisions were rendered in bad faith. Kousser effectively documents the significant discrepancies between *Shaw* and prior equal protection doctrine (pp. 371-79, 383-99, 445-50), the internal inconsistencies within the *Shaw* decisions (pp. 387-88, 390-91), and the divisions among the members of the *Shaw* majority (pp. 399-409, 413, 448). He skillfully traces the Supreme Court’s uneven course between the twin shoals of intent and effect (ch. 7) and incorporates the work of voting rights scholars into his analysis.<sup>41</sup> One can only admire the lawyerly manner in which Kousser demolishes many of the claims

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40. P. 391; *see also* Pildes, *supra* note 30, at 2537-43.

41. One noteworthy omission in the book, however, is Kousser’s failure to cite Samuel Issacharoff’s or Lani Guinier’s work on *Shaw* and the role of groups in the democratic process. *See, e.g.*, Lani Guinier, (*E*)rasing Democracy: The Voting Rights Cases, 108 HARV. L. REV. 109 (1994); Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor’s Clothes*, 71 TEXAS L. REV. 1589, 1591 (1993); Samuel Issacharoff, *Groups and the Right to Vote*, 44 EMORY L.J. 869, 883-84 (1995); Samuel Issacharoff, *Supreme Court Destabilization of Single-Member Districts*, 1995 U. CHI. LEGAL F. 205, 210 (1995). The omission may be a deliberate one, as these articles involve precisely the type of normative analysis Kousser wishes to eschew. *See infra* text accompanying notes 42-43.

made by advocates of *Shaw*. He is the kind of expert witness (or lawyer) one would hate to see on the other side of the courtroom.

Nonetheless, as welcome a contribution as *Colorblind Injustice* is to the *Shaw* debate, the second half of the book is less persuasive than the more subtle challenge that the first half's historical scholarship provides. This is primarily because Kousser fails to articulate or defend the normative premises of his critiques.

Kousser's strategy appears to be a deliberate one. He believes that historical facts, not normative principles, should decide equal protection cases (pp. 328-31). "For the Equal Protection Clause," he writes, "history, and only history, matters" (p. 456). Kousser defends his choice by flipping the claim made during the debates about the role of social science in equal protection cases that took place in the wake of *Brown v. Board of Education*.<sup>42</sup> Some opposed the Court's use of social science to evaluate segregation's constitutionality (*Brown's* famous footnote 11) out of concern that such reliance would leave equal protection claims vulnerable to inconsistent results and subjective judgments.<sup>43</sup> Kousser makes precisely the opposite argument. He claims that if civil rights claims rest on normative principles, then equal protection will hinge upon a judge's intuitive view of what is "right" rather than upon historical and empirical analysis that can be evaluated objectively (pp. 328-31). In Kousser's words, "to reimagine *Brown* as resting on an unstated principle was to throw its meaning open to a variety of contradictory claims" (p. 329), perhaps even to allow equal protection principles to depend on "personal preferences" (p. 331).

There are two problems with Kousser's strategy. First, as Section II.A explains, Kousser's challenge to *Shaw* is necessarily replete with

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42. 347 U.S. 483 (1954). For other contributors to this debate, see ROSEMARY J. ERICKSON, *SOCIAL SCIENCE AND THE LAW: HOW THE SUPREME COURT HAS USED SOCIAL SCIENCE IN DECIDING THE IMPORTANT WOMEN'S ISSUES OF ABORTION AND SEX DISCRIMINATION* (1994); I. A. NEWBY, *CHALLENGE TO THE COURT: SOCIAL SCIENTISTS AND THE DEFENSE OF SEGREGATION, 1954-1966* (1967); Charles L. Black, Jr., *The Lawfulness of the Segregation Decision*, 69 *YALE L. J.* 421 (1960); Edmond Cahn, *Jurisprudence*, 30 *N.Y.U. L. REV.* 150 (1955); Kenneth Clark, *The Desegregation Cases: Criticism of the Social Scientist's Role*, 5 *VILL. L. REV.* 224 (1960); John Coons, *Recent Trends in Science Fiction: Serrano Among the People of Number*, 6 *J.L. & EDUC.* 23 (1977); William E. Doyle, *Can Social Science Data Be Used in Judicial Decisionmaking?* 6 *J.L. & EDUC.* 13 (1977); Ronald Dworkin, *Social Sciences and Constitutional Rights — the Consequences of Uncertainty*, 6 *J.L. & EDUC.* 3 (1977); Sheri L. Gronhvd, *Social Science Statistics in the Courtroom: The Debate Resurfaces in McClesky v. Kemp*, 62 *NOTRE DAME L. REV.* 688 (1987); Will Maslow, *How Social Scientists Can Shape Legal Processes*, 5 *VILL. L. REV.* 241 (1960); Frank McGurk, *The Law, Social Science and Academic Freedom — A Psychologist's View*, 5 *VILL. L. REV.* 247 (1960); Ray Rist and Ronald Anson, *Social Science and the Judicial Process in Education Cases*, 6 *J.L. & EDUC.* 1 (1977); Ernest van den Haag, *Social Science Testimony in the Desegregation Cases — A Reply to Professor Kenneth Clark*, 6 *VILL. L. REV.* 69 (1961).

43. Cahn, *supra* note 42, 167-68; see also Black, *supra* note 42.

normative assumptions.<sup>44</sup> But those assumptions are not fully articulated, let alone defended. And because Kousser never directly addresses the difficult normative questions underlying *Shaw*, one leaves the book feeling that some of the strongest arguments for *Shaw* have been left unanswered.

If Kousser merely seeks to downplay, but not eliminate, normative debate in the equal protection context, there is a second reason to critique *Colorblind Injustice*. As Section II.B argues, equal protection doctrine unmoored from an explicit normative theory leads to a different variant of the rule-bound formalism Kousser decries. Moreover, Kousser never fully explains why a robust normative debate is less likely to lead to “truth” — or at least that norms are less likely to constrain judicial discretion — than the empirical battles he prefers.

### A. *The Role of Normative Debate in Shaw*

The main problem with Kousser’s decision to eschew normative debate in challenging *Shaw* is that we need a normative theory to make the jump from “is” to “ought” — to decide what Kousser’s description of the past tells us about the Supreme Court’s current equal protection jurisprudence. For example, much of *Colorblind Injustice* is devoted to questions about racial intent and effect. Kousser asserts that these “are essentially empirical rather than legal questions” (pp. 5, 318); “delineations of intent” are meant “to be factual inquiries, not roundabout ways of weighing competing interests” (p. 494 n.4). That assumption is difficult to sustain.<sup>45</sup> Even setting aside the problem of reconstructing another actor’s motive, any definition of cause and effect will be fraught with normative questions and the “weighing [of] competing interests,” and those normative concerns will inevitably affect how we filter and translate historical fact into legal judgments.

Consider the differences in approach under a highly stylized taxonomy of three basic theories of equal protection jurisprudence: (1) the antidiscrimination principle,<sup>46</sup> (2) a subordination theory,<sup>47</sup> and (3)

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44. Horwitz, *History and Theory*, *supra* note 10, at 1835 (“Every system of legal architecture incorporates deep into that structure a set of normative premises about the proper way to talk about law.”).

45. See, e.g., Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller’s “Consideration and Form,”* 100 COLUM. L. REV. 94, 94-95 (2000). For concrete examples of this type of analysis in constitutional law, see Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 428 (1997) (arguing that Supreme Court’s current approach to equal protection reflects a cost-benefit analysis); Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 PA. L. REV. 247 (1996) (making similar argument in First Amendment context).

46. See Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1975); Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 CHI. L. REV. 235, 241, 263-313 (1971) (describing and critiquing this approach); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 109, 128-77 (1976) [hereinafter Fiss,

an expressive harms approach.<sup>48</sup> Assuming that we could agree upon the “facts,” we might reach different conclusions about intent and effect depending on which theory we chose. Those who subscribe to the antidiscrimination principle are likely to define intent as the subjective “intent to harm” someone on account of race.<sup>49</sup> Those who adhere to the subordination theory, in contrast, seek to prevent action that has the effect (intentional or not) of further disadvantaging a group that has traditionally been relegated to an inferior position in society.<sup>50</sup> And those who subscribe to an expressive harm theory of constitutional wrongs will conceive of illicit intent as the social meaning conveyed by a decision, whether or not subjectively intended. Further, the “effect” with which they are concerned involves the social values the state expresses when it adopts a classification.<sup>51</sup> For all of these reasons, a reasonable person might reach different conclusions about the same set of historical facts depending on which theory of intent and effect she employed.

We should not be surprised, then, that Kousser himself makes normative judgments in discussing questions of intent. For instance, he claims that “[a]ny reasonable intent standard . . . must . . . reject a requirement of proof of hostility” (p. 346). And, as noted above, much of his book is devoted to explaining how equal protection jurisprudence should take into account the fact that “matters of racial power” as much as “unthinking racial animosity” have harmed racial minorities (p. 67). Thus, while Kousser seems to stop short of endorsing the alternative rejected in *Feeney*<sup>52</sup> — that intent can be established when

Groups] (same); Peter Rubin, *Equal Rights, Special Rights, and the Nature of Antidiscrimination Law*, 97 MICH. L. REV. 564, 568 (1998) (same).

47. See Fiss, *Groups*, *supra* note 46 (offering an early articulation of this theory); see also Ruth Colker, *Anti-subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1007 (1986) (same); Kenneth L. Karst, *The Supreme Court, 1976 Term — Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977) (developing and further refining the theory); David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935 (1989) (same); Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2411-12 (1994) (same).

48. See Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000); Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 13-14, 34-35 (2000) (discussing effect and intent in the context of expressive harms); Richard H. Pildes & Richard G. Niemi, *Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483 (1993); Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL. STUD. 725 (1998); Todd Rakoff, *Washington v. Davis and the Objective Theory of Contracts*, 29 HARV. C.R.-C.L. L. REV. 63, 76-99 (1994) (arguing that intent in equal protection cases should be modeled on the concept of objective intent employed in contract law).

49. See Fiss, *Groups*, *supra* note 46, 109-28.

50. See Colker, *supra* note 47, at 1007; Strauss, *supra* note 47.

51. See Hellman, *supra* note 48, at 13-14, 34-35.

52. *Personnel Adm'r v. Feeney*, 442 U.S. 256 (1979).

decisionmakers act “in spite of” the impact of their actions on a protected group — his view of intent is clearly more expansive than the Supreme Court’s view.

Such an approach, of course, itself suggests a particular normative theory of equality. Kousser’s theory retains the notion of intentionality but expands intent beyond the narrow confines of animus. Self-interested decisions to harm racial minorities are thus censured in the same way as those based on racial hostility — an interesting take on the nature of partisanship. But the baseline for measuring equality is not a results-based standard. Instead, Kousser seems to retain the notion of “innocence” — that the law should not censure decisionmakers who inadvertently harm racial minorities, even if their power is exercised in, and possibly derived from, a social context permeated by racial hierarchies. That view itself reflects heavily freighted assumptions about the role of race in our society.

Kousser’s broader theory for critiquing *Shaw* is similarly normative. His criticisms of *Shaw* suggest that he subscribes to *Katzenbach*’s one-way ratchet approach<sup>53</sup> — if a policy promotes the interests of racial minorities, we should adopt it. *Shaw* is wrong, in Kousser’s view, because it harms the interests of racial minorities and consistently reaches results that undermine their political power.<sup>54</sup>

One could certainly develop a coherent defense of this normative approach by drawing upon the history Kousser documents in the first chapters of the book.<sup>55</sup> One could also defend this approach against countervailing normative concerns.<sup>56</sup> Unfortunately, Kousser does neither.

For example, Kousser never specifies how we should define the “interests” of racial minorities. The definition of minority interests, however, is fraught with complex normative judgments. For instance, in attacking *Shaw* for having an adverse effect on racial minorities, Kousser makes interesting pronouncements about what types of dis-

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53. The one-way ratchet theory of congressional power under the Fourteenth Amendment was first articulated in *Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966).

54. *E.g.*, pp. 366-467.

55. In addition to providing ample evidence to suggest that remedial efforts to aid racial minorities are still necessary, Kousser has shown that race and politics are so intertwined as to be inseparable. This evidence could justify what amounts to a *res ipsa loquitur* approach to voting rights: because racial animus is so deeply embedded in political decisions, in the absence of evidence to the contrary, we can assume that any decision that harms racial minorities was undertaken for an invidious purpose. See Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229, 2255 (1996) (sketching out this theory in the employment discrimination context and, ultimately, rejecting it).

56. For example, Kousser might concede the problem of essentialism but maintain that its costs are outweighed by the harms that would result in the absence of race-conscious remedies. See Frank I. Michelman, *Superliberal Romance, Community, and Tradition in William J. Brennan Jr.’s Constitutional Thought*, 77 VA. L. REV. 1261, 1290-1326 (1991) (offering this type of defense in the context of affirmative action).

tricts provide the best alternative for racial minorities (pp. 432-34, 462 & n.3) — that is, how we should resolve the well-known trade-off between “descriptive representation” (the number of candidates elected to office who are racial minorities) and “substantive representation” (the likelihood that policies favored by the minority community will be passed, even if they are passed by whites that minority voters have helped elect).<sup>57</sup> Kousser does not offer a normative explanation as to why we should prefer one approach over the other. Instead, he asserts that “[q]uestions about who best represents minorities and whether they are better off with concentrated or dispersed influence are empirical, not . . . theoretical” (p. 462). He thus fails to respond to some of the normative questions that come to mind when considering this trade-off: Who should decide this question? Judges? The affected community? The legislature? Even if courts must answer the question, what theory of representation should guide that choice? How should courts assess where the process of democratic compromise will take place — at the district level, when voters elect their representatives, or at the legislative level, among representatives? Is the notion of descriptive representation reconcilable with traditional liberal practices that we think are worth maintaining?<sup>58</sup>

A second, related problem with Kousser’s unwillingness to engage in normative debate is that he and the *Shaw* Court end up talking past one another. Kousser spends a great deal of time attacking the theory of colorblindness on the ground that its implementation will harm the interests of racial minorities. Nonetheless, although he criticizes a doctrine plainly grounded in fears of essentialism, Kousser never convincingly addresses this normative concern. Instead, he asserts that empirical facts tell us everything we need to know. He writes that the Supreme Court should not worry about the use of “race as a proxy” in redistricting because race works as a proxy only if “political behavior [is] truly strongly correlated with race,” and “not if it were an irrational or demeaning stereotype.”<sup>59</sup> But one might well be concerned about the use of racial or gender classifications on normative grounds even when they provide a fairly good proxy for the characteristics or behavior of group members.<sup>60</sup>

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57. See Karlan, *supra* note 28, at 213-14; Pildes, *supra* note 30, at 2530-31 & n.99, 2544 n.133. Kousser himself has wrestled with this question and concluded that influence districts represent a viable means of minority representation. See Kousser, *supra* note 16, at 551.

58. See MELISSA WILLIAMS, VOICE, TRUST, AND MEMORY (1998) (exploring some of these normative questions); James U. Blacksher, *American Political Identity and History*, 95 NW. U. L. REV. 715, 717 (2001) (raising some of these questions in reviewing ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* (2000)).

59. P. 416; *see also* p. 489 n.18.

60. *See, e.g.*, Rubin, *supra* note 46, at 573; David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99, 112-14 (1986); *see also* J.E.B. v. Alabama, 511 U.S. 127, 139 n.11

Moreover, a sustained normative discussion of equal protection would reveal that colorblindness is too easy a target. One can surely dismiss the notion that colorblindness should be our legal ideal and *still* be worried about race-conscious redistricting. The difficulty for *Shaw* opponents is not persuading those in the middle of this debate that race-conscious districting is sometimes an acceptable means of enforcing the Equal Protection Clause. Rather, the hard part is articulating the limits to that principle. How far should we go to augment minority electoral strength? Should we abandon territorially based districting for those groups unable to aggregate their votes effectively? Is our goal integrationist — fostering interracial coalitions — or empowerment and independence for minority communities? Is race-conscious districting consistent with the tenets of liberalism, or does it lead us to the problem of essentialism by requiring us to make assumptions about individuals based on their group membership? And if we think race-conscious districting inevitably leads to essentialization, how do we evaluate the costs and benefits of such actions?

I should note that my call for a normative defense does not stem from a dislike of Kousser's policy recommendations. Like Kousser, I am not ready to abandon territorial-based districting entirely. But I suspect we get there in quite different ways. To put it in extraordinarily abbreviated terms, in my view the debate over territorial-based districting involves a choice about where we want the bulk of democratic compromise to take place: at the ballot box or on the legislative floor. In many situations, compromise is likely to be easier at the legislative level, and in some instances that in itself may favor — even mandate — adoption of a non-geographic/interest-based form of allocating political power, such as cumulative voting. But, speaking in unforgivably broad generalities, the risk involved in a cumulative voting scheme is that too much of the democratic compromise necessary to pass legislation will take place solely at the legislative level. A cumulative voting scheme allows voters to disperse into small, interest-based groups and elect candidates that closely mirror their own preferences. The result tends to be a more diverse set of legislators. At some point, however, a move to the middle will be necessary to pass legislation — preferences must be ranked, compromises made, trade-offs accepted. Under a cumulative voting scheme, many of the judgments involved in this move to the middle will be made directly by the legislators themselves, not the voters.<sup>61</sup>

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(1994); *Craig v. Boren*, 429 U.S. 190, 201 (1976). Indeed, Mary Anne Case has identified imperfect proxies as the essence of the Court's current equal protection jurisprudence. See Mary Anne Case, "The Very Stereotype the Law Condemns": *Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447 (2000).

61. This concern would be far weaker, however, if we could develop a more dynamic relationship between representative and constituent. Concerns about voters' passivity and lack of involvement in legislative compromise might not be relevant if legislators and their

In a territorial-based scheme, by contrast, voters are usually clumped together with people who do not share their interests. They cannot align along a narrowly defined set of interests but must instead find a candidate who can reach out to many different groups and interests. In effect, voters themselves must make at least an initial step toward the middle if they hope to have any effect on legislative outcomes. And if one believes, as I do, that voting involves constitutive and expressive elements,<sup>62</sup> there is certainly something to be said for allowing “the people” to be directly involved in this type of democratic compromise. Indeed, presumably the reason that most of us find consociational democracy so unpalatable is that sometimes we would rather force people with different interests to find a consensus candidate and platform rather than allow them to stand on the sidelines as their chosen representatives forge those compromises. In short, the compromise that takes place on election day in a territorial-based scheme ensures that voters make at least some of the judgments involved in the inevitable move to the middle.

Because territorial-based districting takes place in such varied contexts, it also offers us a laboratory to engage in democratic experimentation. It provides an opportunity to discover which districting schemes best facilitate compromises on all sides, particularly by those who have traditionally enjoyed a disproportionate share of political power. Indeed, at least one recent empirical study suggests that the creation of majority-minority districts has led to new interracial coalitions and a decrease in racially polarized voting in the South.<sup>63</sup>

Where voting is racially polarized, however, drawing districts that foster democratic compromise among different racial groups requires a firm understanding of the context in which those compromises take place. For example, the supposed trade-off between “independence” and “integration” — between political control and political influence<sup>64</sup>

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constituents were true democratic partners. For an effort to achieve this goal, see LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY* (forthcoming 2002).

62. See Ellen Katz, *Race and The Right to Vote After Rice v. Cayetano*, 99 MICH. L. REV. 491, 512-14 (2000); Frank Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 FLA. L. REV. 443, 478-79 (1989).

63. See generally DAVID T. CANON, *RACE, REDISTRICTING, AND REPRESENTATION* (1999). I do not mean to suggest here that cumulative voting schemes always prevent this type of healthy democratic activities. To the contrary, one of the strongest reasons to consider a cumulative voting system is early evidence that such systems similarly foster cross-racial coalitions. See Richard H. Pildes and Kristen A. Donahue, *Cumulative Voting in the United States*, 1995 U. CHI. LEGAL F. 241 (1995).

64. In the political science literature, this debate is cast in terms of descriptive and substantive representation. Political scientists debate whether racial minorities benefit more from majority-minority districts, where they can elect candidates of their own race if they choose to do so, or from “influence districts,” which allow them to elect a larger number of white legislators who will promote their substantive preferences. See *supra* text accompanying note 57.

— may be a false one. Those who insist that our aspiration should be political integration may discover that granting racial minorities political independence is a necessary precondition for achieving that goal.<sup>65</sup> On this view, the interracial coalitions we see emerging in the South could not have occurred without giving African-American voters a measure of political independence. Put another way, meaningful democratic compromise may require coequals; compromise and coalitions that stem from necessity rather than choice do little to promote democratic values.

I also agree with Kousser that race-conscious districting ought to be allowed in certain circumstances. We must come to grips with the fact that territorial-based districting cannot achieve any of these democratic aspirations without race-conscious districting, thus forcing us to deal squarely with the costs of essentialization. I am ready to accept those costs when they are weighed against the benefits of majority-minority districts and the costs of the alternative, race-blinding districting. In any case, all of these questions involve difficult and compelling debates, and it would have been well worth Kousser's time to address them.

Finally, even when viewed from a purely instrumental perspective, Kousser's reluctance to engage in explicit normative debate is puzzling. Normative theory and historical context are often so intertwined as to be inseparable, especially when we are discussing race.<sup>66</sup> Because "debates cast in empirical terms often masquerade for deeper, underlying disagreements about cultural assumptions and normative ideals," I suspect that the empirical battle Kousser wishes to wage cannot be won without a normative fight.<sup>67</sup>

It is not only that normative theory is our framework for deciding what "is" — the means by which we assess the empirical facts before us. Normative theory is inherently forward-looking; it tells us which facts ought to matter going forward. An adherent to the principle of colorblindness, for example, might willingly concede the existence of racism in the past and present. But she is looking toward a future of colorblindness, and she might think that the bright promise of that future requires the law — the textual embodiment of our future aspirations — to ignore these realities. For these reasons, even if one could persuade advocates of *Shaw* that Kousser has gotten the facts "right," many would remain convinced of *Shaw*'s correctness because of the

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65. See *Bush v. Vera*, 517 U.S. 952, 1075-76 (1996) (Souter, J., dissenting) (arguing that the independence accorded to ethnic minorities was a necessary precondition to their integration into the political system).

66. See ERICKSON, *supra* note 42; Horwitz, *History and Theory*, *supra* note 10, at 1825-26.

67. Richard H. Pildes, *Democracy and Disorder*, 69 U. CHI. L. REV. 695, 704-05 (2001); see also Coons, *supra* note 42, at 25; Horwitz, *History and Theory*, *supra* note 10, at 1827.

normative principles they hold. If Kousser seeks converts to his cause, he needs a different sermon.

B. *Normative Theory Provides a Necessary Anchor for Good Judging*

If, as seems more likely, Kousser is merely trying to downplay, not eliminate, the role of normative debate in equal protection, there is another reason to criticize his approach. The failure to engage in normative debate will result in a different variant of the formalism Kousser criticizes in *Shaw*. If legal rules are not firmly anchored to a normative theory, at some point they can cease functioning as means to an end and become ends unto themselves. The normative principles embedded in those rules will thus be lost, and the rules will be applied even in contexts where those normative principles would counsel a different result. As with *Shaw*, the rule will be all that matters.

Consider the development of the one-person, one-vote cases. These cases were originally fashioned as equal protection claims based on the assumption that rural voters had different interests than urban voters.<sup>68</sup> And the Court's early articulation of the one-person, one-vote principle might have eventually developed into a sufficiently robust theory of democracy to take that truth into account.<sup>69</sup>

But that was not the path the Court took. Eventually, the Court simply stopped talking about which voters were affected by the skewed districting system or trying to develop a theory of democratic governance to explain why judicial action was required. Unsurprisingly, the injury in these cases became quite abstract and was eventually defined in highly formal terms. In the absence of a normative theory justifying the Court's intervention into the democratic process, it was difficult to identify an appropriate limiting principle. The abstract right to equality inevitably became an end unto itself, rather than a means to an end.<sup>70</sup> Thus, in the one-person, one-vote cases, precise numeric equality became the standard for equal protection with-

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68. *Baker v. Carr*, 369 U.S. 186, 273 (1962) (Frankfurter, J., dissenting) (quoting the complaint as challenging discrimination against a "geographical class of persons").

69. Compare *Wesberry v. Sanders*, 376 U.S. 1, 14 (1964) (describing one-person, one-vote principle as fostering equal representation), and *Reynolds v. Sims*, 377 U.S. 533, 563 & n.40, 565-66 (1964) (asserting that the Constitution mandated the "full and effective participation" of citizens within the democratic process, guaranteed "fair and effective representation" to them, and forbade efforts to undermine citizens' voting power "by any method or means . . . no matter what their form"), with *Karcher v. Daggett*, 462 U.S. 725 (1983) (defining one-person, one-vote principle in circular terms as implicating the right to an equally weighted vote).

70. As Morton Horwitz has pointed out, when "abstract legal concepts, instead of reality" drive a jurisprudence, "technical distinctions . . . have a logic of their own." Horwitz, *Constitution of Change*, *supra* note 10, at 109.

out any coherent theory for why a well-functioning democracy demanded such a result.

If one seeks other examples of the problems inherent in an equal protection jurisprudence that is not anchored to a normative theory, one need look no further than the Supreme Court's two most recent voting decisions: *Bush v. Gore*<sup>71</sup> and *Hunt v. Cromartie*.<sup>72</sup> *Bush v. Gore* offers a good example of the problems inherent in privileging facts over normative analysis. It was undisputed in that case that ballots were being evaluated under different standards; the Court's entire decision hinges on that fact.<sup>73</sup> But the Court never offered a normative theory explaining why this type of inequality should matter or reconciling that view with well-established equal protection norms. Should the courts continue to develop this line of decisions, one can easily imagine the *Bush v. Gore* line following the same path as the one-person, one-vote cases. In the absence of a theory for justifying or limiting judicial intervention, equality among counting mechanisms will become an end unto itself, and we will never have normative explanation for why (and when) the Fourteenth Amendment demands judicial intervention. It is hard to see why such a barren approach is superior to the formalism Kousser decries in *Shaw*.

Interestingly, the same problem afflicts the Supreme Court's most recent *Shaw* decision: *Hunt v. Cromartie*.<sup>74</sup> *Hunt* is one of the rare *Shaw* cases reaching the result Kousser seeks — it upholds the constitutionality of a majority-minority district on purely factual grounds. But both Justice Breyer's majority decision and Justice Thomas's dissent are strikingly formal and mechanical. Each takes an agreed-upon set of facts, applies the same standard, and reaches dramatically different conclusions. Even someone who approves of the result will find the decision unsatisfying. Because both opinions play down the normative underpinnings of *Shaw* in precisely the manner Kousser seems to endorse, they are bereft of any sense of the broader issues at stake. This is the jurisprudence of the technocrat: mechanical, seemingly neutral adjudication that conceals, but does not eliminate, the normative significance of the decision.

### C. *The Quest for Normative "Truths"*

A second problem with Kousser's heavy reliance on empirical facts over normative debate is that he never explains why a battle of historical experts is any more likely to lead us to "truth" than a robust

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71. 531 U.S. 98, 121 S.Ct. 525 (2000).

72. 121 S. Ct. 1452 (2001).

73. *Bush*, 121 S.Ct. at 530-31.

74. *Hunt*, 121 S. Ct. 1452.

normative debate.<sup>75</sup> Kousser's heavy emphasis on empirics seems to stem from his views on the objectivity wars that have raged in scholarly circles.<sup>76</sup> Kousser explicitly rejects the notion that "truth" cannot be discovered through rigorous analysis and debates about empirical facts (pp. 364-65). Kousser thus rejects the uneasy truce over objectivity that has been negotiated in history departments and law schools throughout the country — the widespread acceptance of certain post-modern critiques by scholars who nonetheless "stop analytically short of the radical implications of an antipositivist, postmodernist intellectual culture."<sup>77</sup>

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75. It is certainly plausible that explorations of historical fact are subject to good-faith mistakes as well as bad-faith manipulation. Morton Horwitz has described the process by which judges unintentionally "lose touch with social reality" by adopting categorizations and classifications that "either privileg[e] or screen[] out various facts." See Horwitz, *Constitution of Change*, *supra* note 10, at 92. Kousser, for example, argues that the disadvantages caused by antimiscegenation laws and Jim Crow were "too obvious to need social scientific examination." P. 331. The *Shaw* majority appears to think the same is true of its own factual intuitions about the effects of racial gerrymandering, and it has thus announced a new constitutional harm without the benefit of any empirical evidence supporting its claims. See Pamela S. Karlan & Daryl J. Levinson, *Why Voting is Different*, 84 CAL. L. REV. 1201, 1211 (1996). Nor can we simply avoid such disagreements by demanding that academics engage in research. For example, "in the early decades of the twentieth century, the most professionally accomplished work on Reconstruction — work hailed by the profession as the most objective, the most balanced, the most fair — was viciously racist." PETER NOVICK, *THAT NOBLE DREAM: THE "OBJECTIVITY QUESTION" AND THE AMERICAN HISTORICAL PROFESSION* 14 (1998); see also LEE D. BAKER, *FROM SAVAGE TO NEGRO: ANTHROPOLOGY AND THE RECONSTRUCTION OF RACE, 1896-1954*, 5 (1998) (arguing that the initial success of anthropology as a profession hinged on the fact that "early ethnologists provided scientific support for widely held ideas about the racial inferiority of people of color"). Similarly, after the Warren Court invoked social science data to support its decision in *Brown*, *supra* notes 42-43, numerous social scientists sought to prove the dangers of desegregation and the inevitability of racial inequality. See NEWBY, *supra* note 42, at 191-94.

76. P. 8. Debates about objectivity have reverberated in halls of history departments throughout the country. *E.g.*, Kousser, *supra* note 4. For description and analysis of controversies regarding objectivity among historians, see, for example, APPLEBY ET AL., *supra* note 9; NOVICK, *supra* note 75; Appleby, *supra* note 9, at 6-9. For a closely related debate about whether historians should serve as expert witnesses, including analyses of the controversy surrounding the historians' amicus brief in a Supreme Court abortion case, see NOVICK, *supra* note 75, at 469-521; Michael D. Bess, *E.P. Thompson: The Historian as Activist*, 98 AM. HIST. REV. 19 (1993); Estelle B. Freedman, *Historical Interpretation and Legal Advocacy: Rethinking the Webster Amicus Brief*, 12 PUB. HISTORIAN, Summer 1990, at 27; Thomas Haskell & Sanford Levinson, *Academic Freedom and Expert Witnessing: Historians and the Sears Case*, 66 TEXAS L. REV. 1629 (1988); Kousser, *supra* note 4; Jane E. Larson & Clyde Spillenger, "That's Not History": *The Boundaries of Advocacy and Scholarship*, 12 PUB. HISTORIAN, Summer 1990, at 33; William E. Leuchtenburg, *The Historian and the Public Realm*, 97 AM. HIST. REV. 1 (1992); Peyton McCrary & J. Gerald Hebert, *Keeping the Courts Honest: The Role of Historians as Expert Witnesses in Southern Voting Rights Cases*, 16 SOUTHERN U. L. REV. 102 (1989); James C. Mohr, *Historically Based Legal Briefs: Observations of a Participant in the Webster Process*, 12 PUB. HISTORIAN, Summer 1990, at 19; Ronald C. Tobey, *The Public Historian as Advocate: Is Special Attention to Professional Ethics Necessary?*, PUB. HISTORIAN, Winter 1986, at 21.

77. William N. Eskridge, Jr., & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707, 784-85 (1991) (describing the "New Public Law scholars"); see also APPLEBY ET AL., *supra* note 9, at 247 (describing "a different, more nuanced, less absolutist kind of realism than that championed by an older —

It is odd that Kousser takes such a strong position in favor of objectivity given that his scholarship traces the path not taken.<sup>78</sup> After all, presumably the main reason to privilege facts over normative theory is the assumption that empirical research involves a “right” answer. But Kousser’s scholarship seeks to uncover the causal chains that were broken, the opportunities that were squandered, in order to persuade us that the history we know was not foreordained. Thus, while his scholarship is rigorously empirical, it also requires the imaginative power to discern what might have been — something that does not lend itself easily to a label like “right” or “wrong.”<sup>79</sup>

It is equally odd that Kousser so easily accepts the notion that normative debate is inherently subjective while dismissing out of hand challenges to the objectivity of historical scholarship. After all, both are grounded in the same type of concerns. Assuming that it is possible to separate empirical debates from their normative underpinnings,<sup>80</sup> if Kousser is confident that historical and empirical evidence can demonstrate that the *Shaw* majority was wrong and the Warren Court was right on the facts, why can’t we be just as confident (or at least hopeful) that serious debate will help us distinguish “good” normative theories from “bad” ones?<sup>81</sup> Similarly, those who subscribe to the uneasy compromise over objectivity adopted by historians and legal scholars alike<sup>82</sup> may wonder why normative arguments cannot be subjected to “pragmatic truth-testing”<sup>83</sup> in the same way we test his-

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we would say naive — realism”); *id.* at 254 (“conced[ing] the impossibility of any research being neutral” while believing in “the viability of stable bodies of knowledge that can be communicated, built upon, and subjected to testing”); NOVICK, *supra* note 75, at 2 (noting that “there is less talk” among historians “of approaching the past ‘without preconceptions’ ” and “a tendency to think of the collective voyage toward the truth as involving tacking, rather than sailing in a straight line toward that final destination”). The compromise adopted in both disciplines resembles a metaphor Martha Minow shared with me: “none of us can precisely identify where ‘East’ is, but we all think we can move in that direction.”

78. See *supra* text accompanying notes 3-4.

79. I am indebted to Richard Parker for raising this point.

80. *But see* text accompanying notes 66-67.

81. One might argue that historical analysis is more likely to get us to “truth” because *everyone* is able to take part in the debate. Ronald Dworkin makes a version of this argument in distinguishing historical analysis from what he terms “causal social science”: historical judgments provide “refuge from the arbitrary” because “they must be framed in the critical vocabulary of the community in question.” Dworkin, *supra* note 42, at 6. Significantly, however, Dworkin argues that such “interpretive science” is little different from traditional normative debate in law, *id.*, which similarly allows all members of the community to take part.

82. *Supra* text accompanying note 77.

83. See Ronald J. Allen, *The Nature of Juridical Proof*, 13 CARDOZO L. REV. 373, 390 (1991).

torical claims."<sup>84</sup> At a minimum, as long as judges have absorbed the view that norms matter, why can't normative constraints just as effectively cabin their discretion as an attentiveness to historical facts?

### III. THE LANGUAGE OF ADVOCACY

A review of *Colorblind Injustice* would not be complete without discussing the rhetoric Kousser employs in making his case. While insisting that objectivity is possible (p. 8), Kousser abandons the formal trappings of objective scholarship — the neutral tone, the dispassionate critique, and the effort to ensure that criticism seem even-handed. For instance, Kousser describes the *Shaw* majority with language that is as vehement as that he reserves for the authors of *Dred Scott* and *Plessy* and the architects of Jim Crow, accusing them of creating “politically and racially biased exceptions” to their own doctrine (p. 7), engaged in “partisan radicalism” (p. 426), and writing “radical opinion[s]” (p. 369). He also harshly describes academics who support *Shaw*. Indeed, at one point he characterizes their arguments as:

reminiscent of the excuse offered by Los Angeles police chief Darryl Gates for the deaths of African-Americans at the hands of police officers who used choke-holds: “We may be finding that in some blacks when a [carotid restraint] is applied, the veins or arteries do not open as fast as they do in normal people.”<sup>85</sup>

Because my concern with Kousser's language is largely instrumental, let me touch upon aesthetic and aspirational concerns first. Perhaps Kousser, like a revolutionary, has “no taste for irony,”<sup>86</sup> and his earnest and straightforward prose is simply not to my taste.<sup>87</sup> Indeed, on a purely aesthetic level, Kousser's attempts at advocacy interrupt the flow of his argument and needlessly distract the reader. In his formidable chapter on electoral politics in Memphis, for example, Kousser explains how devices designed to preserve the power of the white majority also “rewarded intransigence and a concentration on rallying one's segregated tribe” and exacerbated racial divisions and stereotypes (p. 195). At the end of this compelling and well-told narrative, Kousser adds the following: “unlike the parallel assertions of

84. For much more detailed defenses of this proposition, see Frank Michelman, *Law's Republic*, 97 *YALE L.J.* 1493 (1988); Cass R. Sunstein, *Beyond the Republican Revival*, 97 *YALE L.J.* 1539 (1988).

85. P. 514 n.92 (quoting *Probe of Statements by Gates*, *LOS ANGELES TIMES*, May 11, 1982, § 1, at 1).

86. WOODWARD, *FUTURE OF THE PAST*, *supra* note 8, at 49 (quoting Joseph Conrad). Of course, according to Conrad, women and revolutionaries share similar tastes, *id.*, so it is not clear why Kousser's style fails to sway me. For a lovely defense of the role of irony in scholarly analysis, see Woodward, *Thinking Back*, *supra* note 8, at 137.

87. In this sense, I share Woodward's preference for “the Shakespearean ideal of genial adversaries.” WOODWARD, *supra* note 11, at 236.

Justice O'Connor in *Shaw v. Reno* about the deleterious consequences of race-based districting, these conclusions . . . are based on a close analysis of actual evidence" (p. 195).<sup>88</sup>

This passing swipe at Justice O'Connor and similar attacks scattered throughout the book remind one of Virginia Woolf's complaint about Charlotte Brontë's *Jane Eyre*. Woolf quotes one notable passage in the book, where the narrator describes herself sitting on the roof of Rochester's mansion and reflecting on the restlessness of talented women who are imprisoned within the narrow confines of the roles their gender has assigned to them. Brontë follows this reverie on the station of women in nineteenth-century England with a terribly awkward transition: "When thus alone I not unfrequently heard Grace Poole's laugh."<sup>89</sup> Woolf remarks that "it is upsetting to come upon Grace Poole all of a sudden"<sup>90</sup> and notes:

One might say . . . laying the book down besides *Pride and Prejudice*, that the woman who wrote those page had more genius in her than Jane Austen: but if one reads them over and marks that jerk in them, that indignation, one sees that she will never get her genius expressed whole and entire. She will write in a rage where she should write calmly. . . . She will write of herself where she should write of her characters.<sup>91</sup>

The same could be said of Kousser's prose.

One might respond in Kousser's — and Charlotte Brontë's — defense that it is their passion that makes them great. Surely one could quarrel with Woolf's efforts to force nineteenth-century women authors — who have much to be angry about — to use the neutral tone of what was, until then, a male-dominated discourse. Similarly, one could sensibly conclude that the quiet halls of the Supreme Court might benefit from a little more righteous indignation and a little less hushed, lawyerly debate.

As an aspirational matter, I am ready to concede that debate need not be carried out in a neutral, respectful way — while it is quite likely that we will generally have a better and more productive debate without people shouting at each other, shouting serves a purpose on some occasions.<sup>92</sup> And if there is any place for strong rhetoric, it is in con-

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88. Similarly, the very first footnote of the book's first chapter opens with a salvo against "the racialization of the crimes and welfare issues, the political assaults on legal and illegal immigrants, the California and congressional pushes for totally dismantling affirmative action, and the middle-brow tracts of Hernstein and Murray (1994), D'Souza (1995), and Roberts and Stratton (1995)." P. 470 n.1. Even one who believes these are all worthy targets for criticism might be a bit startled to discover this attack so early in Kousser's book.

89. VIRGINIA WOOLF. A ROOM OF ONE'S OWN 69 (1929) (quoting *Jane Eyre*).

90. *Id.*

91. *Id.*

92. See, e.g., *Cohen v. California*, 403 U.S. 15, 26 (1971) ("[W]ords are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution . . . has little or no regard for that emotive function which practically speaking, may

demning those who we believe have denied racial minorities a fair chance to participate in the political process. Moreover, I would not suggest that Kousser's efforts at advocacy undermine his scholarship.<sup>93</sup>

I also recognize that a preference for a deliberative tone necessarily implicates the debates about objectivity discussed in Part II.<sup>94</sup> Our choice of tone, like our choice of message, may reinforce false assumptions about objectivity and reify the hierarchies that undergird them.<sup>95</sup> But those costs must be balanced against the effect that a consistent use of Kousser's rhetoric may have upon judges. While the private rant is an essential part of being human, public rants convey a certain message about judges and their (in)capacity to set aside their own prejudices. The real question is, if we speak to judges as if they are their better selves, is it more likely that they will act as such? If the answer to that question is "yes," then there are long-term costs to Kousser's rhetoric. I am not ready to say we should not yell on occasion to shake judges out of their complacency.<sup>96</sup> And surely if we need to designate an occasional yeller, Kousser would be a good pick. But the unrelenting use of this type of rhetoric is a game not worth the candle.

In any case, even taking all of these concerns into account, one can still criticize Kousser on instrumental grounds. If Kousser wants to be an advocate, he should try to be an effective one. Kousser makes two mistakes in this regard. First, he ignores the cultural traditions of the audience he is trying to reach. Second, Kousser's language sometimes leads him to overstate his claims and thus, in the long run, undermines his effectiveness.

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often be the more important element of the overall message sought to be communicated."); see also JAMES CARVILLE, *WE'RE RIGHT, THEY'RE WRONG* (1996) (offering a fine example of the power of the rant).

93. To the contrary, Kousser's role as an advocate may have sparked his best, most creative scholarship. As one commentator noted of C. Vann Woodward's work, it was his "desire to provide southerners with a more hopeful, diverse, and discontinuous 'usable past' " that was "critical to opening a whole new field for study and infusing it with a startling perspective." Howard N. Rabinowitz, *More Than the Woodward Thesis: Assessing the Strange Career of Jim Crow*, 75 J. AM. HIST. 842, 849 (1988). Rabinowitz's assessment is certainly true of Woodward's most famous book, *The Strange Career of Jim Crow*, which stemmed from work he had done to support the attorneys litigating *Brown v. Board of Education*. NOVICK, *supra* note 75, at 507; Woodward, *Thinking Back*, *supra* note 8, at 94. Interestingly, Woodward himself seemed to be less sanguine about this question. While acknowledging that a "dedication to noble causes . . . inspire[s] many works of history and sometimes whole careers," he expressed concern that "the integrity of the art over which Clío presides can be threatened by the just as well as the unjust, the righteous as well as the unrighteous." C. Vann Woodward, *Strange Career Critics: Long May They Persevere*, 75 J. AM. HIST. 857, 867 (1988).

94. See *supra* text accompanying notes 75-77.

95. See Lynn M. Sanders, *Against Deliberation*, 25 POL. THEORY 347 (1997).

96. I am indebted to Carol Steiker, Elena Kagan, and Martha Field for helping me clarify my thoughts during a spirited discussion on whether the Supreme Court's decision in *Bush v. Gore* presents us with just such an occasion.

One problem with Kousser's rhetoric is that he uses the type of language one would employ at a political rally to address a contest being played out on the Supreme Court's turf. What Kousser fails to grasp is that the trick to battles waged there is to distance oneself from one's role as advocate. To the lawyers, judges, and legal academics Kousser addresses, overblown rhetoric is generally the sign of an advocate with a weak case, and interdisciplinary work like *Colorblind Injustice* is likely to be most successful when it takes into account the professional norms of the community it is addressing.

If the language of neutrality is important for lawyers, it is at least as important for academics who wish to influence public debate. From a purely instrumental point of view, if academics have what economists would call a comparative advantage, it is that people (rightly or wrongly) turn to us for neutral, dispassionate assessments.<sup>97</sup> Ironically, our apparent removal from the world gives us power in it. Whether or not Kousser is any less "objective" than other scholars, he loses the appearance of being so.<sup>98</sup> And to paraphrase an overused phrase in *Shaw*, advocacy is one area in which appearances do matter.<sup>99</sup>

Kousser's rhetoric seems especially unlikely to move his real audience — the *Shaw* majority. While few believe judges are capable of overcoming all of their biases and predispositions, most assume that they have at least absorbed the norm of neutrality and believe themselves to be capable of objective judgments.<sup>100</sup> Charges of partisan bias are unlikely to impress a judge deeply steeped in the traditions of the legal culture and firmly persuaded of her own objectivity. Again, from an instrumental perspective, a reasoned legal argument that shows that a judge is making herself *vulnerable* to such accusations by adopting seemingly inconsistent or unreasoned opinions is much more likely to give her pause.<sup>101</sup> In short, if history "must be a personal possession to do its work,"<sup>102</sup> then Kousser's rhetoric is likely self-defeating.

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97. See Mohr, *supra* note 76, at 23-25. Whether the world *should* look to academics for dispassionate opinions is another question, one that is sure to be debated in the wake of the *Bush v. Gore* controversy. See Frank I. Michelman, *Suspicion, or the New Prince*, 68 U. CHI. L. REV. 679 (2001).

98. See Larson & Spillenger, *supra* note 76, at 33, 41.

99. *Shaw v. Reno*, 509 U.S. 630, 647 (1993) ("We believe that reapportionment is one area in which appearances do matter.").

100. For a summary of psychological studies documenting the ability of people to process identical information in divergent, self-interested ways, see Michael C. Dorf & Samuel Issacharoff, *Can Process Theory Constrain Courts?*, 72 U. COLO. L. REV. (forthcoming Fall 2001).

101. I am grateful to Pam Karlan for articulating this point in a recent discussion. For a similar proposal, see *id.* (concluding that "sympathetic criticism" — by which the authors mean "criticisms that takes seriously the enterprises in which the Court is engaged" — is most likely to affect judicial decisionmaking).

102. Appleby, *supra* note 9, at 1-2.

From an instrumental point of view, Kousser's rhetoric suffers from a second, more serious flaw: it leads him to overstate his case and thus undermines his credibility. Kousser uses the same type of rhetoric in describing the *Shaw* majority's venial sins as he does in cataloging its cardinal ones. And because he provides no linguistic clues to guide his reader, the arguments he makes about *Shaw*'s most serious flaws get lost in his pettifogging about the Rehnquist Court and its academic supporters.

It is difficult to convey the overall tone of *Colorblind Injustice*, so I will offer just a handful of examples. Kousser rebukes Justice Kennedy for a "misleading" citation to *Bakke* simply because Justice Kennedy does not endorse Kousser's unusual (albeit more sophisticated) view of voting claims.<sup>103</sup> The author attacks Justice O'Connor's good faith because she adheres to a more common (if more rudimentary) view of compactness than he prefers.<sup>104</sup> Kousser repeatedly censures the Rehnquist Court for failing to overturn a Burger Court decision, *Beer v. United States*,<sup>105</sup> because he is convinced that the legislative history of section 5 requires a different result (p. 444). While I think that Kousser is correct about the proper reading of section 5's legislative history, it seems unduly harsh to rebuke one Justice for relying on *Beer* as a sign of her "preference for extraneous materials rather than the text of the law" (p. 444) given the Court's strongly held internal norm of *stare decisis*.<sup>106</sup> Similarly, Kousser rebukes the Court for a decision to grant, vacate and remand ("GVR") *Quilter v. Voinovich* after

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103. Specifically, Kousser rebukes Justice Kennedy for "misleadingly" quoting "language from Justice Powell's opinion in *Bakke* in which Powell stated that 'racial and ethnic distinctions of any kind are inherently suspect.'" P. 402. Kennedy's reliance on *Bakke* is "misleading," argues Kousser, "because the *Bakke* case had involved a challenge to discrimination *against* white applicants to the University of California at Davis Medical School, not just to distinctions *between* students." *Id.* While I am sympathetic to Kousser's claim that, absent vote dilution, redistricting does not generally burden or benefit individuals in the same way that racial classifications might in the context of employment or government contracts, it is quite a stretch to assume that this theory is so well-entrenched in equal protection doctrine that any Justice who adopts a different view of *Bakke* is "misleading" us.

104. Kousser rebukes her for terming "the principal Republican alternative to the second black-majority district 'reasonably compact,' even though it was thirty miles longer and much more difficult to traverse than the district actually adopted by the North Carolina legislature." P. 385. Kousser concludes from this fact that Justice O'Connor "meant a district's ugliness to remain entirely in the eye of whatever judge beheld it." *Id.* Perhaps. But one might also conclude that Justice O'Connor made the same type of assumption that many of us who are not political scientists make about compactness — that compactness is something that can be assessed by looking at it rather than something that should be measured in functional terms. See Cain, *supra* note 33, at 77.

105. 425 U.S. 130 (1976). *Beer* announced that section 5's "effects" test prohibits only retrogression. *Id.* at 141

106. There was significant debate among the Justices in *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000), about whether *Beer* should be overturned. But even the dissenting Justices, who thought *Beer* was flatly incorrect and dissented from the Court's decision to *extend* it, were nonetheless unwilling to overturn *Beer* itself. See *id.* at 363 (Souter, J., dissenting, joined by Stevens, Breyer, and Ginsburg, JJ.).

the Court issued its opinions in *Shaw v. Hunt* and *Bush v. Vera* (pp. 370, 430, 446) even though “no fault” GVRs are reasonably common in Supreme Court practice.<sup>107</sup>

The flaw in *Colorblind Injustice* is not simply that Kousser treats petty misdemeanors by the *Shaw* majority as if they were high crimes. Kousser’s rhetoric is too strong for one of his primary arguments as well. One of his main theses is that the outcomes in the *Shaw* cases can be explained on purely partisan grounds — and by “partisan,” Kousser refers not to judicial ideology, but to a deliberate effort to favor the Republican Party over the Democratic Party.<sup>108</sup> The claim is an extraordinarily provocative one, and a long-term pattern of the type of reversals and affirmances Kousser identifies would certainly raise eyebrows if no other explanations existed for the Court’s decisions. But even in the wake of *Bush v. Gore*,<sup>109</sup> the evidence on which Kousser relies is too thin to justify such a powerful accusation.

To begin, Kousser is working with a fairly small data set — just five cases — at an early, formative stage of the *Shaw* doctrine. Even setting aside the strong possibility that this data set might be skewed toward the invalidation of plans drawn by Democrats,<sup>110</sup> it seems too early to

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107. The Supreme Court routinely grants, vacates, and remands after it issues any major decision related to the lower court opinion being reviewed. It does so to allow the lower court to apply the newly announced standard in the first instance. See *Stutson v. United States*, 516 U.S. 163, 164 (1996) (Scalia, J., dissenting); *Thomas v. Am. Home Prods.*, 519 U.S. 913, 914 (1996) (Scalia, J., concurring); *State Farm Mut. Auto. Ins. Co. v. Duel*, 324 U.S. 154, 161 (1944) (describing the GVR as “[a] customary procedure”).

108. See, e.g., pp. 438-39, 430, 437, 446.

109. 531 U.S. 98 (2000). See *Law Professors Denounce Supreme Court Ruling*, at <http://www.the-rule-of-law.com> (last visited Aug. 1, 2001) (listing 673 law professors condemning the majority of *Bush v. Gore* for acting as “political proponents of candidate Bush, not as judges”). For a response to the law professors’ statement, see Dorf & Issacharoff, *supra* note 100.

110. First, the *Shaw* litigators, not the Supreme Court, have controlled which cases have been litigated. It would not be surprising if these conservative lawyers chose to pursue their colorblindness agenda by attacking mostly plans that favor Democrats. Second, to the extent that *Shaw* hinges on the shape of a district, Democrat-drawn plans are more vulnerable to *Shaw* challenges because Democrats generally have a greater incentive to create bizarrely shaped districts than Republicans. See Pildes, *supra* note 14, at 1387-90. Districting inevitably involves balancing lots of factors — compactness; the requirements of one person, one vote; incumbency protection; partisan aims; compliance with the Voting Rights Act, etc. When section 2 was read to require maximization, something had to give. That “something” tended to be compactness when Democrats were drawing the lines, as North Carolina suggests. (In North Carolina, it was apparently possible to draw an additional majority-minority district on the southeast side of the state, but drawing the district there would have harmed the interests of Democrats and Democratic incumbents. Drawing a bizarrely shaped district in the middle of the state, District 12, achieved compliance with section 2 and promoted Democratic interests. See *Shaw v. Hunt*, 517 U.S. 899, 902 (1996).) Republicans, in contrast, did not have to face such hard choices; majority-minority districts pack Democratic voters, something that is generally in keeping with the Republican’s partisan strategy. It should not be surprising, then, that Democrat-drawn districting plans were more vulnerable to invalidation under *Shaw*. Indeed, a number of the least compact majority-minority districts in the country were in North Carolina and Texas — two of the three states whose plans were challenged in the cases Kousser offers to show an anti-Democrat bias. And none of the majority-minority

claim partisanship with such confidence. Such claims now seem especially unwarranted given that more recent empirical evidence suggests that if *Shaw* favors either party, it probably favors the Democrats in the long term.<sup>111</sup> Kousser does not ignore this possibility, but he argues that the Supreme Court overcame this potential problem by administering *Shaw* inconsistently — that it invalidated only the districting plans that benefitted Democrats while upholding all racial gerrymanders put forward by Republicans (pp. 438-39). Kousser's theory is undermined by *Hunt v. Cromartie*,<sup>112</sup> the latest *Shaw* decision, which affirms a districting plan that favors Democrats. But even at the time Kousser was writing, there existed enough alternative explanations for the results in the only five cases he cites to counsel against such strong pronouncements.

Consider the two examples Kousser offers to establish that the Court has improperly refused to invalidate Republican-created districting plans under *Shaw*. The first, *Voinovich v. Quilter*,<sup>113</sup> provides weak support for Kousser's thesis. The only full opinion the Supreme Court delivered in that case prior to publication of Kousser's book, *Voinovich v. Quilter*, did not involve a *Shaw* challenge at all and was handed down a short time prior to *Shaw*. It would have been surprising had the Court addressed *Shaw* in that decision without the benefit of full briefing by the parties and without granting the lower court an

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districts included in that list was found in Ohio or California, the states whose plans were affirmed by the Court in Kousser's only two examples of a pro-Republican bias. See Pildes & Niemi, *supra* note 48, at 565.

111. *Shaw* puts at risk majority-minority districts that pack a large number of racial minorities. If existing voting patterns prevail, that packing leads to the concentration of a large number of Democrats into a district. Packing racial minorities is a well-known technique of partisan gerrymanders, particular those done by Republicans. See CAIN, *supra* note 33, at 170-71. And it is not a coincidence that the bulk of the country's majority-minority districts were drawn at the behest of the Republican Department of Justice. For recent articles debating this question, see Charles Cameron et. al., *Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?*, 90 AM. POL. SCI. REV. 794 (1996); Bernard Grofman & Lisa Handley, *Estimating the Impact of Voting-Rights-Related Districting on Democratic Strength in the U.S. House of Representatives*, in RACE AND REDISTRICTING IN THE 1990S, at 60-61 (Bernard Grofman ed., 1998); Lisa Handley et. al., *Electing Minority-Preferred Candidates to Legislative Office: The Relationship Between Minority Percentages in Districts and the Election of Minority-Preferred Candidates*, in RACE AND REDISTRICTING IN THE 1990S (Bernard Grofman ed., 1998); Kevin Hill, *Does the Creation of Majority Black Districts Aid Republicans? An Analysis of the 1992 Congressional Elections in Eight Southern States*, 57 J. POL. 384 (1995); David Lublin, *Racial Redistricting and African-American Representation: A Critique of "Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?"*, 93 AM. POL. SCI. REV. 183, 185-86 (1999).

To be fair to Kousser, it is not clear that these data were available at the time he wrote *Colorblind Injustice*. Indeed, while Kousser acknowledges that the Republicans thought that the creation of a large number of majority-minority districts would benefit their party, p. 439, he also notes a study suggesting that "compact districts tend to minimize the number of seats Democrats win." P. 501 n.17.

112. 121 S. Ct. 1452 (2001).

113. 507 U.S. 146 (1993).

opportunity to address the question first.<sup>114</sup> Moreover, the decision was unanimous, a fact that is at odds with Kousser's theory of partisanship.

The only other case Kousser offers to demonstrate a pattern of affirming Republican-drawn plans is the Court's summary affirmance of California's districting plan in *DeWitt v. Wilson*.<sup>115</sup> Even setting aside the fact that at least one prominent voting rights scholar has termed the districts affirmed in *DeWitt* "relatively compact,"<sup>116</sup> something that would justify distinguishing *DeWitt* from most of the districts invalidated by the Court, there are a number of other explanations for this summary affirmance. First, California's districting plan was drawn by a nominally bipartisan redistricting commission rather than a self-interested state legislature.<sup>117</sup> Second, the commission in California drew lines with large building blocks — census tracts — rather than the much smaller census blocks used in almost all of the other districting plans struck down by the Court.<sup>118</sup> Third, the timing of the de-

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114. See *supra* text accompanying note 107. Further, the only *Shaw*-related ruling in *Voinovich* that Kousser mentions was the Court's decision to grant, vacate, and remand a subsequent iteration of that case after the Court rendered its decisions in *Shaw II* and *Bush v. Vera*. See, e.g., pp. 370, 430, 446. As noted above, a GVR is quite different from a decision to affirm a challenged districting plan. *Supra* text accompanying note 107.

To be fair to Kousser, it is worth noting that when the lower court eventually rejected the Democrats' *Shaw* claim under the standards articulated in *Bush* and *Shaw II*, the Supreme Court summarily affirmed. See *Quilter v. Voinovich*, 523 U.S. 1043 (1998), *aff'g mem.*, 981 F.Supp. 1032 (N.D. Ohio 1998). But the only Justice to disagree with this decision was Justice Scalia, *id.*, hardly the Justice most likely to defend the partisan interests of Democrats.

115. P. 413-14. 515 U.S. 1170 (1995).

116. Pamela S. Karlan, *Just Politics? Five Not So Easy Pieces of the 1995 Term*, 34 HOUS. L. REV. 289, 313 n.124 (1997).

117. Samuel Issacharoff, *Racial Gerrymandering in a Complex World: A Reply to Judge Sentelle*, 84 CAL. L. REV. 1201, 1267(1996). Indeed, if one is seeking a pattern in the Court's *Shaw* opinions, it is worth noting that all but one of the districting plans affirmed by the Court under *Shaw* were drawn by either a court or bipartisan commission. See Pamela S. Karlan, *The Fire Next Time: Reapportionment After the 2000 Census*, 50 STAN. L. REV. 731, 762 & n.114 (1998) (discussing districting plans upheld in California, Florida, and Illinois); Charles Ogletree et al., *Contemporary Challenges in Race Relations*, 43 N.Y.L. SCH. L. REV. 129, 142 (1999). And the one case that does not fit that model — *Hunt*, 121 S. Ct. 1452 — involved an affirmance of a plan drawn to favor Democrats.

118. As a brief filed on behalf of members of the Black Congressional Caucus has suggested, see Brief Amici Curiae of Congresswoman Corrine Brown, Congressman John Lewis, Congresswoman Cynthia Mckinney, and the Democratic Congressional Campaign Committee Supporting Appellants, *Hunt v. Cromartie*, 121 S. Ct. 1452 (2001) available at 1998 WL 789668, at 12-18, the use of census blocks in drawing district lines is important for two reasons. First, the only data generally available at the census block level is racial and population data, see *Bush*, 517 U.S. at 961-62 (availability of racial data at block level "enabled districters to make more intricate refinements on the basis of race than on the basis of other demographic information"), whereas census tracts are at least in theory built around communities of interest and geographic landmarks, and precincts follow local political boundaries. See Bureau of the Census, U.S. Department of Commerce, Guidelines for Delineating Census Tracts and Block Groups 5, 10 (June 1985); *Wilson v. Eu*, 823 P.2d 545, 552

cision may help explain this particular affirmance, coming as it did immediately after Justice O'Connor promised that *Shaw* would not lead to the invalidation of all majority-minority districts.<sup>119</sup> Fourth, the heavy-handed efforts by the Republican Department of Justice to promote its maximization policy — efforts which plainly angered the Court — may not have been present in *DeWitt*.<sup>120</sup>

Perhaps most significantly, Kousser too quickly discounts the possibility that the inconsistencies in the administration of *Shaw* may be the result of bad judging rather than bad faith.<sup>121</sup> Countless scholars

(Cal. 1992). *But see* Richard T. Ford, *Geography and Sovereignty: Jurisdictional Formation and Racial Segregation*, 49 STAN. L. REV. 1365 (1997).

Second, these units are small and manipulable, *see Wilson*, 823 P.2d at 571 (stating that California contains 400,000 census blocks but only 6,000 census tracts), thereby allowing for surgical line-drawing separating voters by race. Their use thus tends to result in extremely jagged district boundaries that correspond closely to racial populations. Use of census blocks thus dramatically increases the likelihood that a court will conclude that the lines of a district are “unexplainable on any grounds other than race.” *Shaw*, 509 U.S. at 631. Again, if one is looking for a pattern to explain the *Shaw* cases, it is worth noting that the vast majority of the districts invalidated by the Supreme Court were drawn using census blocks. *See Shaw v. Hunt*, 861 F. Supp. 408, 457 (E.D.N.C. 1994), *rev'd*, 517 U.S. 899 (1996); *Johnson v. Miller*, 864 F. Supp. 1354, 1377-78 (S.D. Ga. 1994), *aff'd*, 515 U.S. 900 (1995); *see also Silver v. Diaz*, 522 U.S. 801 (1997), *summarily aff'g* 978 F. Supp. 96, 110-11, 118 (E.D.N.Y. 1997) (three-judge court); *Meadows v. Moon*, 521 U.S. 1113 (1997), *summarily aff'g* 952 F. Supp. 1141, 1147 (E.D. Va. 1997) (three-judge court). *But see King v. Ill. Bd. of Elections*, 979 F. Supp. 581, 609 (N.D. Ill. 1996), *summarily aff'd*, 519 U.S. 978 (1997).

119. The *DeWitt* affirmance came on the heels of Justice O'Connor's pronouncement in *Miller* that the opinion she was joining would not result in the invalidation of every majority-minority district in the country. *Miller*, 515 U.S. at 928-29. The *DeWitt* affirmance may have provided some solace to a Justice known for steering a middle path, as it made her claim in *Miller* more believable. Indeed, in her special concurrence in *Bush v. Vera*, Justice O'Connor herself cited *DeWitt* as evidence that “strict scrutiny [does] not apply to” all “intentionally created majority-minority distret[s].” *Bush*, 517 U.S. at 958 (O'Connor, J., concurring).

120. *See, e.g., Shaw*, 517 U.S. at 912-13; *Miller*, 515 U.S. at 907-08, 921-23. The opinions issued in *DeWitt* do not suggest that DOJ placed the same type of pressure on California's redistricters that it placed upon states whose legislatures were dominated by Democrats. *Compare Wilson v. Eu*, 823 P.2d. 545 (Cal. 1992) (making no mention of significant DOJ pressure), *and DeWitt v. Wilson*, 856 F. Supp. 1409 (E.D. Cal. 1994) (same), *with Johnson*, 864 F. Supp. at 1362-64, 1366-67 (describing extensive DOJ pressure on the Georgia General Assembly and noting that the plan it adopted “bore all the signs of the [Justice Department's] involvement”), *and Miller*, 515 U.S. at 907-08, 921-23 (1995) (describing DOJ involvement in redistricting process with disapproval), *and Shaw*, 517 U.S. at 912-13 (same). If the Supreme Court was reacting to the interference of the Department of Justice in state redistricting efforts, the Court's decisions would reveal the type of pattern Kousser decries due to the partisan bias of the Department of Justice rather than the partisan bias of the Court's own members. I am grateful to Alison Caplis for bringing this pattern to my attention. For an argument that hostility toward the Department of Justice has also affected case outcomes in the context of Section 5, *see Ellen D. Katz, Federalism, Preclearance, and the Rehnquist Court*, 47 VILL. L. REV. (forthcoming September 2001).

121. P. 437. Kousser addresses this concern in an exchange with Michael Les Benedict. He argues that such a claim “threatens the whole enterprise of understanding human actions, because Supreme Court justices are not the only human beings capable of rationalizing. Everyone is.” Kousser Response at 24. Perhaps what is at stake here is merely disagreement on terminology. As a general matter, accusations of “partisanship” in judicial decisionmaking generally refer to deliberate bad faith, not the ability we all have to reach a result we personally favor while remaining convinced that our conclusions are objective. *See*

have tried to make sense of *Shaw* and its subsidiary holdings, but none has offered a theory that fully rationalizes and explains all of the *Shaw* cases.<sup>122</sup> Kousser's partisan-influence theory may fare as well as any other theory (even if it is undermined by the most recent *Shaw* decision, which affirms a districting plan that favors Democrats<sup>123</sup>). But no one has yet provided an explanation for *Shaw* that has both theoretical and predictive power. That suggests that *Shaw* is simply the product of a seriously divided Court engaged in ad hoc judging as it tries to feel its way to a coherent rationale and a manageable judicial standard.<sup>124</sup> Consistency may not be possible until either the four to the right of Justice O'Connor on *Shaw* or the four to her left enjoy a decisive majority. Until then, however, *Shaw* claims will depend on the vote of Justice O'Connor, who continues to steer an inevitably incoherent middle ground.<sup>125</sup> And even someone who believes that the *Shaw* line is muddled and unsupportable might well sympathize with her efforts

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Dorf & Issacharoff, *supra* note 100 (describing studies to this effect). If Kousser means to accuse Justice O'Connor and the *Shaw* majority of deliberate, self-conscious partisan decisionmaking, then the evidence he offers for this conclusion is inadequate. If Kousser means only to accuse the *Shaw* majority of acting in good faith but simply being unable to understand their own partisan motivations, then the rhetoric he employs seems unduly strong. As Kousser himself points out, "everyone" is "capable of rationalizing"; while he should of course censure the Court for its inadequacies, he surely could do so in gentler terms. See *supra* notes 103-104 and accompanying text.

122. See Samuel Issacharoff & Pamela S. Karlan, *Standing and Misunderstanding in Voting Rights Law*, 111 HARV. L. REV. 2276, 2277 (1998); Pildes, *supra* note 30, at 2506.

123. *Hunt v. Cromartie*, 121 S. Ct. 1462 (2001).

124. That is certainly a story we have seen in the context of other Supreme Court voting rights jurisprudence, including the one-person, one-vote cases and the vote-dilution cases. The early one-person, one-vote cases failed to articulate either a clear standard or a clear constitutional theory, as a quick look at the concurring Justices' opinions confirm. Compare *Reynolds v. Sims*, 377 U.S. 533 (1964), and *Baker v. Carr*, 369 U.S. 186 (1962), with *Baker v. Carr*, 369 U.S. 186 (1962) (concurring opinions of Douglas, Clark, and Stewart). Similarly, the Court's early vote-dilution claims do not leave one with a very clear sense of what dilution is and when it is prohibited. Compare *Whitcomb v. Chavis*, 403 U.S. 124 (1971), with *White v. Regester*, 412 U.S. 755 (1973).

125. Kousser's response to this argument, which he attributes to an "uncritical biographer" (p. 437), is not persuasive. First, he argues, Justice O'Connor "has been a leader, not a follower" because she has "writ[ten] the principal opinions in" a number of major equal protection cases. P. 437. That evidence, however, simply confirms Justice O'Connor's status as the swing vote; Supreme Court watchers know that the best way of guaranteeing that the swing vote sticks is to assign the opinion to that Justice. And while Kousser himself refuses to accept the characterization of Justice O'Connor as a "moderate" because her opinions "take quite radical ideological positions," "contain strong, absolutist statements of 'color-blind individualism,'" and consistently disfavor "the minority litigant," (p. 437), Kousser fails to acknowledge that "moderate" is a relative term here. In the context of *Shaw*, for example, her willingness to accept section 2 of the Voting Rights Act as a compelling state interest, *Bush*, 917 U.S. at 992 (O'Connor, J., concurring), and her insistence that race-conscious districting is at least sometimes permissible, *id.* at 958 (O'Connor, J., concurring), place her squarely in the middle of the Rehnquist Court.

to find a middle way in answering these difficult questions,<sup>126</sup> and thus will find Kousser's accusations of bad faith too harsh.

This leads me to my final criticism of Kousser's rhetoric. Both because Kousser fails to engage in an explicit normative debate about the use of race and because the language he uses to attack *Shaw* is so strong, *Colorblind Injustice* leaves one with the distinct impression that *Shaw* is an easy case, so easy that we would second-guess the motives of those who think that the questions raised by this intersection of race and politics are difficult. The book never creates enough space for someone who may ultimately agree that *Shaw* is mistaken to be concerned about the role that race plays in redistricting or to think that broader normative principles are at stake here.<sup>127</sup> And that is unfortunate, for one would hope that such a powerful challenge to *Shaw* would be capable of changing the minds of those in the middle of this debate.

### CONCLUSION

The dilemma of a reviewer is that one cannot simply praise a fine book and leave it at that. And *Colorblind Injustice* is a very fine book — engaging, provocative, and insightful. No matter what one thinks of *Shaw*, one can only admire Kousser's passion and intellect. Kousser has achieved great things as a historian and as an advocate, and, for all of its flaws, *Colorblind Injustice* should certainly count among them.

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126. For a defense of Justice O'Connor's approach, see CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999); see especially *id.* at x, xiv, 11-14, 209-27, 260-61 (defending judicial minimalism and the adoption of "incompletely theorized agreements" even though it makes the Court vulnerable to accusations of incoherence or inconsistency).

127. Even Justice Brennan wrote in his agonized concurrence to *United Jewish Organizations, Inc. v. Carey* that race-based districting "raises particularly sensitive issues of doctrine and policy." 430 U.S. 144, 171 (1977) (Brennan, J., concurring in part). Kousser dismisses one academic's reliance on these concurrences to establish that race-conscious districting may raise hard constitutional questions as "unconvincing." P. 500 n.4. Yet the only support Kousser offers for this dismissal is that the scholar "does not note the subtleties of the earlier opinions," which Kousser notably does not articulate, "or sufficiently emphasize the factual differences between *Wright* and *Shaw*," the only example of which Kousser cites is the somewhat odd distinction he believes the Constitution draws between the intentionally created, race-consciously drawn "86 percent nonwhite district in [*Wright*] versus a 57 percent black district in [*Shaw*]." P. 500 n.4.