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Maurice T. Cunningham. *Maximization, Whatever The Cost: Race, Redistricting, and the Department of Justice.* Westport and London: Praeger, 2001. xi + 178 pp. $59.95, cloth, ISBN 978-0-275-96649-2.

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Race and Misrepresentation

Although I am an historian with the Civil Rights Division of the United States Department of Justice, the following review reflects my own assessment and not necessarily that of the Department. I emphasize this point because the Department's role in enforcing the Voting Rights Act is the central issue discussed in the work under review.

In the 1990s Justice Department enforcement of the pre-clearance provisions set forth in Section 5 of the Voting Rights Act became a major subject of controversy. In large part this was because of a series of decisions by the United States Supreme Court striking down congressional redistricting plans in Southern states.[1] These opinions transformed case law in the voting rights area to a degree that can be compared only with the enunciation of the one-person, one-vote doctrine for assessing legislative apportionment in the 1960s. In a series of controversial five-to-four decisions, the Court's conservative majority enunciated a new and completely unanticipated constitutional right--the right of individual voters to be protected against what the majority chose to identify as "racial gerrymanders." The majority meant by this, plans in which majority-minority districts were drawn at the expense of traditional redistricting criteria.

Voters are now entitled to challenge redistricting plans without showing that they have experienced tangible harm--in contrast to all other voting rights claims--but merely that the legislature (or, in some cases, state or federal courts) "took race into account" in an impermissible way. In each of these cases the Court placed primary responsibility for these "racial gerrymanders" on the pressures brought to bear on state legislatures by what it saw as an inappropriate policy of "maximizing" minority representation pursued by the Civil Rights Division of the Department of Justice in enforcing Section 5 of the Act.[2]

The thesis of this revised doctoral dissertation by Maurice Cunningham, summarized in the first chapter (pp. 1-11) and repeated throughout the book, is that the Supreme Court's criticism of the Department's pre-clearance policy is correct. The book provides, with exceptions noted below, a

reasonably good summary of the Court opinions in these cases. Unfortunately, Cunningham provides little evidence beyond what is found in those decisions, except for material gathered in several interviews (most by telephone) with former officials in the Civil Rights Division. Although he is a lawyer by training, Cunningham displays little understanding of voting rights case law during the quarter century preceding the transformative decisions of the 1990s, and his mistaken notion of the constitutional standard for evaluating intent plays a critical role in his misunderstanding of the Department's pre-clearance policies. Purportedly a study of policy implementation, moreover, Cunningham does not investigate any empirical evidence concerning the implementation process within the government agency which is his subject.

The pre-clearance process on which Cunningham focuses is well understood by few historians or political scientists. Under the Act jurisdictions covered by its pre-clearance requirements--mostly Southern state and local governments with a long history of racial discrimination--must submit all changes in voting practices for approval either by a three-judge court in the District of Columbia or by the U.S. Attorney General, who delegates decision-making authority to the head of the Civil Rights Division. Submitting jurisdictions bear the burden of proving that these changes have neither the purpose nor the effect of discriminating against minority voters.

In 1976 the Supreme Court ruled, in Beer v. the United States, that the standard for measuring discriminatory effect in a pre-clearance review is whether the change would place minority voters in a worse position than under the existing practice, and the Court termed this a "retrogressive" effect.[3] In other words, a change that is ameliorative, but nevertheless still disadvantages minority voters, could not be found to have a discriminatory effect in the pre-clearance context. This was an easier standard for jurisdictions to meet than proving that the change would not violate the effect standard applied at the time in Fourteenth or Fifteenth Amendment cases or, beginning in 1982, under a revised Section 2 of the Voting Rights Act.

The Beer decision did not, however, weaken the purpose prong of Section 5 of the Act. In order to secure pre-clearance, jurisdictions would still have to demonstrate that the change did not have a discriminatory intent. After 1976 the number of objections based on intent increased steadily, until by the 1990s a majority of the Department's objections were based on its understanding of the purpose standard.[4] Although the burden of proof was on the submitting jurisdiction, the factors relevant to an intent analysis under Section 5 were the same as under the Fourteenth Amendment.[5]

The heart of Cunningham's argument is that the Department used a "new interpretation of discriminatory purpose" in the 1990s--an interpretation he sees as seriously at odds with precedent--to justify objecting to any redistricting plan that did not "maximize" minority voting strength (see esp. pp. 73-76). Cunningham faults the Department for relying in its legal analysis on a decision by the Ninth Circuit Court of Appeals in Garza v. County of Los Angeles.[6] In Garza the court ruled that the county's redistricting plan was racially discriminatory in intent because it diluted Latino voting strength for the specific purpose of protecting the reelection of incumbents.

Cunningham claims that the Garza decision "greatly distorted the meaning of discriminatory purpose" employed in earlier court opinions which, he erroneously believes, required direct proof of racial animus by the decision-makers (p. 74). He contends that the Department should have adopted "a more judicious approach" by ignoring this opinion because it was issued by the nation's "most liberal [appellate] court" at a time when the federal courts were becoming substantially more conservative (p. 59). Leaving aside the fact that

the definition of discriminatory intent on which the Department relied was the work of conservative Judge Alex Kozinski rather than one of the circuit's more liberal judges, there is no basis in law permitting the Department to ignore a federal court decision because the court is either too liberal or too conservative. The Department was also no doubt influenced by the fact that the Supreme Court, by its summary affirmance of the Ninth Circuit's decision, refused to hear the county's appeal.[7]

Nor is it true that the Garza decision was at odds with previous rulings. Among the numerous precedents was a decision striking down the 1981 redistricting plan for the Illinois General Assembly on the grounds that it violated the intent standard of the Fourteenth Amendment: "under the peculiar circumstances of this case, the requirements of incumbency are so closely intertwined with the need for racial dilution that an intent to maintain a safe, primarily white, district [for an incumbent state senator] is virtually coterminous with a purpose to practice racial discrimination."[8]

This and numerous other precedents applied the guidelines for evaluating discriminatory intent set forth by the Supreme Court in 1977 in Village of Arlington Heights v. Metropolitan Housing Development Corporation.[9] Under the Arlington Heights standard courts are to rely on circumstantial evidence such as the historical background of the decision, the specific sequence of events leading to the decision, and whether the decision departed from usual procedures or norms, as well as specific statements of purpose made during the legislative history of the decision. There is no requirement that plaintiffs prove racial animus by decision-makers, nor even that racial discrimination was the sole, or even the "primary" motive underlying the decision.[10]

The Department's publicly available letters to jurisdictions explaining the reasons for denying pre-clearance to particular voting changes--which Cunningham apparently never examined--make clear that its assessment of discriminatory intent relied on the Arlington Heights standard and its application by the lower courts in numerous voting rights cases. The "racial gerrymandering" decisions on which Cunningham relies make specific findings that criticize the Department's application of the Arlington Heights standard, but reiterate the continuing validity of that standard as a basis for determining intent.

Only in January, 2000, after Cunningham's book had gone to press, did the conservative majority of five re-define the meaning of the purpose requirement under Section 5, declaring (improbably) in Reno v. Bossier Parish School Board, that the wording of the statute referred only to an "intent to retrogress."[11] Under this new standard the Department cannot object to an ameliorative plan even in the face of "smoking gun" evidence of racial animus on the part of the key decision-makers. That momentous change is, of course, beyond the scope of Cunningham's study.

Lacking specific evidence regarding the actual implementation of the pre-clearance process, other than in the few Supreme Court decisions of the 1990s, Cunningham relies on the mea culpas reportedly expressed in interviews with John Dunne, the former Assistant Attorney General for Civil Rights under the first Bush administration, and the career deputy who advised him, James P. Turner. Even if they are accurately quoted or paraphrased,[12] the views of Dunne and Turner are a pretty slim foundation for these broad charges of over-reaching in the enforcement of law. The persuasiveness of the account is not improved by frequent reliance on the published views of critics of the Voting Rights Act such as Abigail Thernstrom, Timothy O'Rourke, and Hugh Davis Graham, who also offer no empirical evidence to support their claims.[13] In fairness to Cunningham, with rare exceptions neither internal memoranda nor in-depth interviews with the staff of the Voting Section, on which such a study

would in part depend, are available to researchers. This does not stop him, however, from assuming facts not in evidence. As a result, scholars will rely on Cunningham's study only at their peril.

Notes

[1]. Shaw v. Reno, 509 U.S. 630 (1993) (Shaw I); Shaw v. Hunt, 517 U.S. 899 (1996) (Shaw II); Miller v. Johnson, 515 U.S. 900 (1995); Bush v. Vera, 517 U.S. 952 (1996).

[2]. Pamela S. Karlan, "Still Hazy After All These Years," ***Cumberland Law Review***, 26 (No. 2, 1995-96), 287-311; Laughlin McDonald, "The Counterrevolution in Minority Voting Rights," ***Mississippi Law Journal***, 65 (Winter 1995), 271-314.

[3]. Beer v. United States, 425 U.S. 130 (1976).

[4]. Mark A. Posner, "Post-1990 Redistrictings and the Preclearance Requirement of Sec 5 of the Voting Rights Act," 80-117, in Bernard Grofman (ed.), ***Race and Redistricting in the 1990s*** (New York, Agathon Press, 1998).

[5]. Hiroshi Motomura, "Preclearance Under Section Five of the Voting Rights Act," 61 ***North Carolina Law Review*** 189, 194-95 (1983), refers to the retrogression test as the "first prong of Beer," and a "second prong" focusing on the issue of discriminatory purpose, quoting the Court's observation that an ameliorative (that is, non-retrogressive) change cannot violate Section 5 unless the new voting practice "itself so discriminates on the basis of race or color as to violate the Constitution." Beer, 425 U.S. 130, 141 (1976).

[6]. 918 F.2d 763 (9th Cir. 1990), cert. denied, 498 U.S. 1028 (1991).

[7]. 498 U.S. 1028 (1991).

[8]. Rybicki v. State Board of Elections, 574 F. Supp. 1082, 1109 (N.D. Ill. 1982).

[9]. 429 U.S. 252 (1977).

[10]. 429 U.S. 252, 266 (1977).

[11]. Nos. 98-405, 98-406 (Oct. Term 1999), 2000 WL 48425 (U.S.).

[12]. Cunningham cites his interview with Turner as the basis (p. 50) for his inaccurate characterization of Gerald W. Jones -- the African American Chief of the Voting Section for two decades -- as head of its "Section Five Unit." Turner was Jones' direct supervisor, talked with him nearly every day, and of course knew that Jones was the Section Chief. Such elementary mistakes in identifying the decision-makers in the agency he is studying do not build confidence in Cunningham's use of interviews.

[13]. Abigail Thernstrom, ***Whose Votes Count: Affirmative Action and Minority Voting Rights*** (Cambridge, Ma., Harvard University Press, 1987); Timothy G. O'Rourke, "Shaw v. Reno: The Shape of Things to Come," 26 ***Rutgers Law Review***, 723 (1995); O'Rourke, "The 1982 Amendments and the Voting Rights Paradox, in Chandler Davidson and Bernard Grofman (eds.), ***Controversies in Minority Voting*** (Washington, D.C., Brookings Institution, 1992), 85-113, and Hugh Davis Graham, "Voting Rights and the American Regulatory State," ibid., 177-96.

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