The Duties of Historians

Beneath its calm tone, Prof. Benedict's long, thoughtful, and at times quite sympathetic review of my book challenges assumptions about the purposes of history and the duties of historians that lie at the book's (and other books') foundations. Thus, Benedict questions, among other things, the propriety of choosing and exploring historical topics in part out of a desire to contribute to current policy debates; the utility of combining historical, social scientific, and legal approaches; the desirability of openly declaring one's convictions and contending with opposing viewpoints; the likelihood that clear statements and explicit tests of hypotheses and open consideration of all major pieces of evidence will allow conclusions to be and to be seen as objective; and the possibility of assigning motives to historical actors. Do historians necessarily betray their profession and their objectivity by focusing on topics relevant to contemporary policies? Must they appear dispassionate, their histories, bloodless? Can historians assess human motives, or are people's capacities for rationalization so overwhelming and the probability of unintended consequences of their actions so high that any search for motives is fruitless? Putting the skeptical views of historians' objectivity and their subjects' subjectivity together, is historical knowledge even possible? It is worth taking a bit of space to respond to such questions.

A restatement of some of my general arguments may cast the book in a somewhat different light than Prof. Benedict's review did, and it may help to clarify my response. What holds the book together is an institutional theory, not referred to by Benedict, of the history of race relations in America. "Institutions and institutional rules – not customs, ideas, attitudes,

culture, or private behavior – have primarily shaped race relations in America," reads the book's first sentence. Thus, in explaining why the Second Reconstruction was so much more successful than the First in preserving and enhancing African-American political power, I point to four crucial roles that institutions and rules played: Blacks lost political power in the late nineteenth century, I demonstrate, not in a flash of Reconstruction-ending violence and fraud, but in a series of stages that ended only with turn-of-the-century state constitutional amendments that restricted the suffrage and discouraged opposing political parties – my first example of the importance of institutional rules. That process could have been short-circuited by congressional action at a variety of points, but while congressional Republicans (contrary to Benedict's assertions) remained almost completely united in desiring to protect black suffrage through the early 1890s, no 19th century congressional Democrat ever voted for a single civil rights law after 1865. Why was there such a stark partisan split on the issue in Congress? I suggest that the key is that 19th century congressional district margins were razor-thin, compared to those in the 20th century. While safe seats allowed and long tenure encouraged bipartisan cooperation in congresses from the 1950s through the 1980s, rapid turnover and inexperienced legislators who could do little but follow their party leaders' cues bred rabid partisanship, especially on such core issues as African-American voting, in the 19th. It was not the degree of consensus of <u>voters</u> in the two Reconstructions that was crucial, but the willingness or unwillingness of <u>members of Congress</u> to work together on voting rights policy. As a result of the differences in the two centuries' ways of drawing congressional districts (the second instance of institutional rules), members of the late 20th century congresses were able to agree on elaborating an ever-stronger Voting Rights Act (a third institutional rule), amending and extending it in 1970, 1975, and 1982. In contrast to the

19th century sequence of violence, fraud, dilution, and disfranchisement, the VRA promoted a positive cycle for blacks and Latinos of voting, eliminating discriminatory electoral structures, and sharing power. And until 1993, the Supreme Court, the fourth and most important institutional example I consider, played a very different role in the Second than in the First Reconstruction, enhancing minority voting power, rather than, as in the 19th century, first handcuffing Congress's attempts to protect blacks and then cynically refusing to enforce the Fifteenth Amendment when southern states blatantly and openly nullified it.

The observation that once established, institutions typically change slowly suggested a second general hypothesis, also unmentioned by Benedict, although it, too, appears on the book's first page: Incremental institutional changes have been much more important in the development of the history of American race relations than historians have generally believed. The only way to demonstrate whether this notion is even plausible enough to pursue is to study instances of small change intensively and to see how much difference they made. This theme runs not only through the comparison of minority voting rights in the First and Second Reconstructions, one of the two chapters that Benedict spotlights, but also through the five case studies, three of which consider redistricting and two of which (contrary to Benedict's description) treat other sorts of electoral rules. The theme also pervades two long chapters on Supreme Court decisions, which show how seemingly minor changes in doctrines and approaches have had major consequences for political equality.

If incremental changes in institutions and their rules are crucial, then it becomes especially important to highlight the nature of those changes and to explain the motives of those responsible for making them. Thus, the third theme of the book (which Benedict alludes to

briefly) is motivation: What moved legislators, county supervisors, citizen activists, as well as judges, to take the actions they did on the subject of minority voting rights? Did racial, partisan, or other motives predominate in each instance? Is it possible to lay out a systematic scheme for determining such motives, a scheme that historians might, with suitable alterations, apply to their studies of motives in other situations? Do lawyers and judges examining the intentions of historical or contemporary actors who framed the laws or practices at issue in particular litigation have anything to learn from historians? And can and should the tables be turned: can historians apply their techniques for determining motives to judges and their decisions?

That readers of my earlier *Shaping of Southern Politics* may find these general themes familiar demonstrates that they were not wholly a response to the 1993 "racial gerrymandering" case of *Shaw v. Reno* and its successors. To be sure, *Shaw* and the increasing partisan bitterness in Congress in the 1990s heightened the urgency of revisiting and elaborating these ideas and spelling out their application to the Second Reconstruction. But good comparative history illuminates all sides of the comparisons, and in fact, much of what I think about recent civil and voting rights issues has been shaped by what I've learned about earlier parallel events. I could be accused of being what might be called a "past-ist," as much as a presentist. For long study of the history of the suppression and resurgence of African-American political power, as well as intensive analyses of 19th and 20th century Supreme and lower-court decisions on voting rights convinced me that *Shaw* and its progeny were wrong and might have terrible consequences for the nation. It was my duty as a historian, I believed, to set the historical record straight, including the tangled record of those decisions.

Of course, revising the views of historians, Supreme Court justices, or anyone else

requires explicitly or implicitly confronting their accounts. Yet Benedict asserts that "direct engagement of one's adversaries" is "inconsistent" with good historical scholarship, and that only one concerned with "answering legal questions," rather than fulfilling "the historical purpose" would devote so much attention to, for instance, uncovering personal and partisan motives behind particular redistrictings or determining whether moderate minority candidates actually succeeded in their appeals for white votes. But is there a single "historical purpose?" Does the fact that such questions interest current policymakers delegitimize them for historians? Is challenging others' claims anti-historical? It will not surprise those familiar with many of my previous writings that I believe that one of a historian's chief purposes ought to be to examine the evidence and logic behind other historians' conclusions and when in disagreement, to set out one's reasons.[1] How else will errors be corrected and knowledge advance? Should interpretations rise or fall without being subjected to scrutiny? Surely, historians dispute each other as heatedly about interpretations of the past as they or other social scientists do about policies in the present. And with respect to motives, one of the purposes of my book is to demonstrate by example and precept (to which I devote much of a whole chapter) how historians, lawyers, and judges should go about determining which intentions of the actors predominated, which is surely not an anti-historical topic. Selectively quoting a few statements to support a predetermined conclusion, I argue strenuously, should not satisfy either profession's standards. How better to illustrate these methodological contentions than to examine all the relevant evidence and all the competing hypotheses about particular historical instances?

In fact, Prof. Benedict seems to want me to write another history, to focus on different matters, as much as he seeks to defend what he represents as unadulterated history, rather than

what he charges is my current-policy-driven history. He wants a descriptive general textbook, rather than an analytical and critical monograph. His critique is not that my explanations of the adoption and consequences of election laws or of court decisions about them are biased, but that my topics, divorced from a larger context, are illegitimate *per se*; not that my history provides the wrong answers to current policy questions, but that it seeks to draw out any answers at all; not that my arguments are incorrect, but that they are impure.

Thus, in Benedict's view, one who was "only concerned with writing history" would have said more about the 19th century political parties' overall ideologies and voter coalitions; more about 20th century southern liberalism and the effect of the New Deal and World War II on black communities and white racial attitudes; more about the general intellectual background of civil rights policies, more about the overall positions and personal histories of Supreme Court justices, and more about what he apparently thinks is the inevitable pro-Republican bias that results from drawing election districts that give minorities an opportunity to elect candidates of their choice. Benedict's ideal historian would also have mused more about whether it will be worthwhile in the future to allow minorities to be deprived of equal rights in order to seek the goal of colorblind governmental policies. This would make for a long book, indeed, much longer and much less focused than the 467 pages of text that I did write. Although I do take up some of these topics or closely allied ones, such as the history of court decisions on voting rights, most are so clearly irrelevant to a study of the causes and effects of electoral laws that more extended considerations of them would be needless distractions, bad history, or at least a different history of a different subject.

Why would Benedict's suggestions lead down the wrong road? In the late 19th century,

the Republican and Democratic parties were each internally divided on the tariff, monetary policy, internal improvements, federalism, and the desirable scope of governmental action. In the North in the 1880s and 90s, Democrats increasingly disagreed on state-level civil rights policy. What most sharply united congressmen within each party and split them from their partisan opponents was national civil rights policy, especially voting rights policy. This pattern of partisan polarization on minority voting rights cannot be explained by stances on considerably less polarized matters. In particular, the racial attitudes of Democratic voters cannot account for the actions of the members of Congress whom they elected, for the state legislators whom they also elected were not unified on integration measures. Instead, I offer a novel explanation, sketched above, that emphasizes turnover in Congress caused by redistricting conventions that drew many very marginal seats.

The general development of southern liberalism or the New Deal or the national and local black communities had only the most tangential connections with the passage and potency of runoff or at-large election laws or the exact placement of legislative district lines. When self-described racial moderates like Georgia's Gov. Carl Sanders were later alleged to be key to the enactment of important election laws, I did examine their backgrounds, views, and roles in the laws' passage. But to submerge such relevant particulars in murky general discussions of "liberalism" would be, in my view, to write misleading and logically flawed history. Whatever the effect of the New Deal and World War II on southern racial attitudes, only one of 102 southern members of the House voted for the 1957 Civil Rights Bill, and it took much longer for white southerners to begin to draft state electoral laws or arrangements that benefitted blacks and Latinos. The impact of the events of the 1930s and 40s on white southern voting rights

stances, therefore, seems too obviously attenuated to merit much attention. And whether the African-American communities were comparatively rich, cosmopolitan, and well-led, as in Atlanta and Memphis, or more destitute and downtrodden, as in most southern rural areas from the 1940s through the early 1990s, their political power was shaped by the same biased election laws. Indeed, as I show in detail in the chapter about Memphis, the better organized blacks became and the more realistic their threat to claim a share of power, the more necessary it was to frame election laws to suppress them. Again, it is the specifics of the instance, not some misty general treatment, that is pertinent to explaining an event, and it is surely more true to the historian's craft to exclude the irrelevant.

Of all the topics in my book, Prof. Benedict takes issue most directly with my analysis of the recent "racial gerrymandering" cases. The opinions in these very important cases are complex, inconsistent with each other, and radical, not conservative, for they blatantly contradict a long line of equal protection opinions. Benedict begins his review with a short summary that badly distorts them. The opinions do not fit well with the Court's earlier "racial classification" cases and they do not stand for the proposition, as he claims, that "every person has the fundamental right to vote in election districts created in a color-blind manner." Although other facts could easily be cited, three simple observations make this clear enough: First, redistricting, as Justice Sandra Day O'Connor admitted in *Shaw v. Reno*, "does not classify persons at all; it classifies tracts of land, or addresses."[2] Second, as she disingenuously failed to note there, only 57% of the population and 54% of the registered voters in the North Carolina district that she condemned as an effort "to segregate voters into separate voting districts" were black – no more than in a proposed district that she casually approved, and certainly nothing like the 100%

segregated in "colored schools" in North Carolina before *Brown v. School Board* outlawed segregation as inherently harmful to African-Americans. Third, in later cases from California, Georgia, and North Carolina, the same five justices of the Supreme Court that formed the majority in all of the cases explicitly condoned taking race into account in drawing district lines, as they just as explicitly had three months before *Shaw* in a case from Ohio.[3] Rather than "colorblind," the plaintiffs and the majority of the Court in these cases have been intensely color-conscious.

Benedict can term the *Shaw* Five (Justices Kennedy, O'Connor, Scalia, Thomas, and Chief Justice Rehnquist) "conservative" because he misrepresents the pre-1993 cases on civil rights and voting rights and does not discuss those on "standing to sue." Even the most important of the "racial classification" cases, *Loving v. Virginia* (1967), in which the Warren Court struck down Virginia's law against interracial marriage, did not merely ban distinctions between citizens because of race. Instead, the Court explicitly recognized that the law had been "designed to maintain white supremacy," to discriminate *against* African-Americans, not merely to deprive black and white individuals equally of marital choice. Beginning in the 1970s, as I show in some detail in my book, minorities challenging allegedly discriminatory laws under the equal protection clause have had to demonstrate both a discriminatory intent and a discriminatory effect. By contrast, the *Shaw* Five have waived the requirement of proving a discriminatory effect when dealing with white plaintiffs in the "racial gerrymandering cases." Closely associated with this point is the fact that judges traditionally insist that in order to have standing in civil suits against governments, plaintiffs must show initially that they are injured by whatever law or regulation they are challenging. When environmentalists or blacks come into

court, the "conservative" judges have insisted that they must demonstrate a particularized "injury in fact" to themselves, not merely "a generally available grievance about government" or an "abstract stigmatic injury."[4] Perhaps the most striking innovation of *Shaw* was to disregard the normal standing inquiry. Unlike blacks and Latinos in cases before and since, the whites who challenge "racial gerrymanders" do not have to prove injury in order to bring suit. Thus, the *Shaw* Five have created a separate and unequal equal protection clause that treats whites differently and much more favorably than it treats minorities.

Such a background, briefly sketched here, is of much more importance in expounding and explaining the tangled web that *Shaw* began than a discussion of the "heritage of the conservative justices' ideas," the "conservative position as a whole," or the bloc's positions on federalism or other issues. While it is true that "colorblind" rhetoric has been part of the civil rights arsenal since the 1840s,[5] it was always intertwined, when civil rights crusaders employed it, with charges that members of minority groups were harmed by the distinction. In *Shaw*, however, drawing district lines that were correlated with race was said to have produced only nebulous cultural damage to nobody in particular. This represented a stark reversal of the civil rights heritage that matters most for Supreme Court decisions, previous judicial opinions, and those opinions, which I examine in detail, seemed the most relevant "heritage" to discuss. Moreover, since the *Shaw* Five do not have a principled, coherent, consistent general position in the racial gerrymandering cases, it is impossible to describe one and fruitless to relate the nonexistent position to some even more general "conservative" stance. The five justices' fluctuating standards are clearly inconsistent, as well, with any single view on federalism, for in the racial gerrymandering cases, they invoke strong national judicial power equally to hamstring

the national Voting Rights Act and to overrule state actions, such those of Texas in 1991, that independently sought to guarantee African-Americans and Latinos more equal rights to elect candidates of their choice. Far from clarifying the racial gerrymandering cases, Benedict's suggested treatment of them, therefore, seems more likely to impose tenuous relationships on the basis of superficial similarities in discourse, to hide the actual opinions in a fog of disconnected ideas, to represent the *Shaw* Five's unprincipled opportunism as ideological consistency.

Far worse, however, is Benedict's insistence that one cannot explain Justice Sandra Day O'Connor's shifting course in voting rights cases because she could always rationalize her behavior. This suggestion threatens the whole enterprise of understanding human actions, because Supreme Court justices are not the only human beings capable of rationalizing. Everyone is. Ingenious observers can always frame rationalizations and project them onto their subjects. According to Benedict's casual generalization about all judges, O'Connor's motive must just be "doing even-handed justice." But in fact, there is evidence in brief after brief, dissent after dissent, law review article after law review article, and even on the face of her opinions themselves that O'Connor was aware of the partisan consequences of the cases and her actions in them, evidence that I lay out in considerable detail. No other explanation accounts nearly so well for her behavior. To apply Benedict's generalization widely would be to undermine any possibility of ever determining anyone's motives. This would be a very desiccated history, indeed.

It is peculiar that immediately after indicting my Republican partisanship thesis about O'Connor's motives, Benedict should charge me with being oblivious to the partisan consequences of race-conscious redistricting. In fact, I discuss just this issue in several chapters,

showing that the ungainly districts that Republican judges and justices threw out had been largely the result of Democratic attempts to increase the representation of their party's most loyal supporters, blacks and Latinos, while preserving the seats of white Democrats. As the *Shaw* Five's decisions in three iterations of the North Carolina congressional case and two rounds of the Ohio State House case show very clearly, the Supreme Court's standards facilitated Republican efforts to pack the largest number of the most fervent Democrats into the smallest number of districts in order to maximize the number of Republicans elected. Me overlook partisanship? Not likely.

Calls for historians to desert their monastic pursuits and engage the world have become so common that it is refreshing, in a way, to hear a challenge to such conventionalized rhetoric. But Prof. Benedict's challenge points in the wrong direction, toward a history that is diffuse, disingenuous, and ornamental, rather than pointed, candid, and useful. In their flight from politics, historians have left others free to distort or invent historical interpretations to provide window-dressing for policies they wish to pursue. It is time for more of us to return to our duties as historians to increase knowledge and understanding, and ultimately, to make a better world, rather than to reject those goals, as Benedict does, as inherently incompatible.

1. See, e.g., Kousser, "The 'New Political History': A Methodological Critique," *Reviews in American History*, 4 (1976), 1-14; Kousser, "Must Historians Regress? An Answer to Lee Benson," *Historical Methods* 19 (1986), 62-81; Shawn Kantor and Kousser, "Common Sense or Commonwealth? The Fence Laws and Institutional Change in the Postbellum South," and "Twe Visions of History," *Journal of Southern History*, 59 (1993), 201-42, 259-66.

2. *Shaw v. Reno*, 113 S.Ct. 2816, 2826.

3. See *DeWitt v. Wilson*, 856 F.Supp. 1409 (E.D. Cal. 1994), *aff'd* 115 S.Ct. 2637 (1995); *Abrams v. Johnson*, 117 S.Ct. 1925 (1997); *Hunt v. Cromartie*, 119 S.Ct. 1545 (1999); *Voinovich v. Quilter*, 113 S.Ct. 1149 (1993),

4. See *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, 2136, 2143 (1992); *Allen v. Wright*, 104 S.Ct. 3315, 3327 (1984).

5. See, e.g., Kousser, "The 'Supremacy of Equal Rights': The Struggle Against Racial Discrimination in Antebellum Massachusetts and the Foundations of the Fourteenth Amendment," *Northwestern University Law Review*, 82 (1988), 941-1010.