Introduction

The Long Night of Déjà Vu

Election night, Tuesday, November 8, 2016, seemed interminable for many Americans. It certainly was for me. I was scheduled to teach an election law class the following day, during which my students and I would discuss the legal implications of the presidential and congressional elections. But before that, I had to fulfill a commitment to speak to a high school audience about the election. I was to address students at Chicago’s Legal Prep Charter Academy first thing Wednesday morning—a daunting task because I had been up all night puzzling over election returns that had elevated a reality television show host, Donald Trump, to the most powerful position in the world.

In the wee hours of the morning on election night, when it became clear that Trump would clinch a victory in the Electoral College, I penned an op-ed for the Huffington Post titled “Will White Voters Never Learn?” White voters had delivered mightily for Trump, who bested Hillary Clinton by a 21-point margin among this demographic. Black voters had hewed to their overwhelmingly Democratic bent: Clinton beat Trump 10 to 1 among them. Surprisingly, although Latinos preferred Clinton by better than 2 to 1, they nonetheless gave Trump nearly 30 percent of their vote, a curious tally for an ethnic group that had borne the brunt of Trump’s racial ridicule. Still, white Americans constituted 71 percent of the electorate, and they delivered the White House to Trump, particularly in three key states: Michigan, Pennsylvania, and Wisconsin. Why?

In my Huffington Post opinion piece, I argued that white voters had yet again succumbed to a classic American con job. A candidate pitched himself as an elixir to the nation’s supposed equalitarian excesses, and white voters—eager to assert control over “their” nation—drank it readily, oblivious to the tonic that would follow. Richard Nixon campaigned in 1968 on “law and order,” only to be driven from the White House by the lawlessness of Watergate. Ronald Reagan’s crusades against “welfare queens” and “reverse discrimination” against whites did nothing to halt globalization’s...
Technology’s indiscriminate appetite for the jobs of the working- and middle-class whites who propelled Reagan to victory in 1980. George H. W. Bush’s 1988 campaign used the racial boogeyman of convicted felon Willie Horton to notch a victory over Massachusetts governor Michael Dukakis, only to be booted out of office after one term in the throes of a recession. George W. Bush was effectively installed to the presidency by Reagan’s and the elder Bush’s conservative Supreme Court majority in Bush v. Gore. Two wars and a Great Recession later, the world was still paying the price when Trump came along.

As an objective historical matter, when white voters have moved right in the post-Civil Rights era, the shifts have usually been accompanied by race as a national issue or divide, and the outcomes have come at a handsome cost to white voters and the nation generally. What made white voters think 2016 would be different? More to the point of this book, what made white voters think they were at liberty to keep making the same calculation, prodded at least in part by their disapproval of racial liberality, whether defined by their perception of a welfare state that had become too generous, a government that protected minorities at their expense, or an out-of-control immigration policy? Voting, after all, is not some impressionistic exercise unbounded by norms. It is, instead, an occasion when citizens directly assume the levers of democratic government in order to select their representatives. If we do not allow the government to discriminate based on race, we cannot allow voters to do so in choosing the government’s elected personnel.

The hard part about this proposition, of course, is proving that a voter or a group of voters has voted with discriminatory animus toward another group. At the Legal Prep Charter Academy where I spoke the morning after the election, Trump’s racial animus was taken as a given among the overwhelmingly black student body, as it had been among many black voters. One student blurted, “He hates us.” As a law professor, I would never allow such a raw, unsubstantiated statement to stand in one of my classes, so I tried to engage the students about the bases for their suspicions that Trump would be the president only of white America. Their data points were at least as good as those of many of the talking heads I heard on television throughout the campaign and on election night.

One commentator in particular, CNN’s Van Jones, had labored memorably to make sense of Trump’s victory on election night. Clearly shaken by the impending result, Jones opined on national television:

This was many things. This was a rebellion against the elites, true. It was a complete reinvention of politics and polls, it’s true. But it was also something else. We’ve talked about … everything but race tonight. We’ve talked
about income. We’ve talked about class. We’ve talked about region. We haven’t talked about race. This was a white-lash against a changing country. It was a white-lash against a black president, in part.3

Whitelash is a portmanteau derived from the term “white backlash.” Consciously or not, Jones had revived the term from debates during the 1960s. In 1964, after Republican presidential candidate Senator Barry Goldwater unsuccessfully opposed passage of the Civil Rights Act of 1964, Senator Allen J. Ellender, a Louisiana Democrat, predicted a “whitelash” among voters against the act’s enforcement.4 Similarly, segregationist Alabama governor George Wallace’s highly successful third-party presidential run in 1968, in which he won five southern states, was dubbed “The Wallace Whitelash.” In short, whitelash describes the reactionary impulse of many white voters toward racial equality movements and societal shifts they perceive as excessive. Of necessity, then, the phenomenon is based on the erroneous, racist view that racial inequality is a natural order and that whites should control the pace at which it is dismantled.

It is one thing to coin or revive a pithy term but quite another to supply a clear framework for its use. Claiming or even explaining whitelash is easy; proving its existence among millions of voters is the difficult task. As I later reflected on my discussion with the students at Legal Prep and continued to read the voluminous postmortems of the 2016 election, it struck me that popular discourse on the question of whether racism had driven Trump’s election was divorced from the way lawyers and legal scholars talk about whether race has influenced a decision. I’ve taught election law and employment law for a quarter-century, and I have litigated employment discrimination cases. Bringing together these two areas of focus, I realized that we could apply the frameworks of antidiscrimination law to the collective decision-making of voters to ascertain whether their support for or opposition to a candidate was based on racial animus.

I do not necessarily or even primarily mean racial animus against a specific candidate, but rather animus toward racially identifiable groups of the candidate’s supporters, who in turn engender biases against the candidate. For instance, while credible evidence suggests that misogyny hobbled Hillary Clinton’s chances in the general election,5 no one claims that her race did. Instead, her identification with racial progressivity, and Trump’s identification with the opposite, acted as racial proxies in the 2016 election, as such ideological positioning has in many elections past.

Antidiscrimination law’s frameworks for ascertaining racial bias are not superior to other ways of thinking about and discussing race and the 2016
election. They are, however, a different lens, and they are surprisingly intuitive. Indeed, because antidiscrimination law governs important facets of every American’s life—from workplace discrimination to our ability to buy and sell property as we choose—it must, at its core, be comprehensible by the public. I argue in these pages that the same legal precepts that prevent us from refusing to hire a Latino based on his national origin or prevent a legislature from passing a law that makes it more difficult for blacks to vote also prohibit voters from casting a ballot based on racial animus—even if racial animus is one motivation among several.

Moreover, the tools that courts have historically used to ascertain racist motivations on the part of decision-makers like legislators and employers can and should be applied to voters in candidate elections. Where a breach of the antidiscrimination norm is found, legal remedies exist. These remedies may not change the mind or vote of the discriminatory voter, but they can mitigate the effects of the voter’s discrimination on the body politic.

There is a certain irony, however, to advancing antidiscrimination law as a corrective to voters’ racial misconduct: under conservative jurisprudence, antidiscrimination law is just as likely to perpetuate discrimination as it is to inhibit it. This conundrum requires understanding whitelash not just as an electoral phenomenon but rather as a social one that connects the political branches of government, the judiciary, and organic reactionary movements like white nationalism. Through voter ID laws and the dismantling of voting protections for minorities, a racially regressive judiciary makes voter whitelash easier to express. Once an electoral victory is achieved, the racially regressive bent of the judiciary gets reinforced by the appointment of additional “conservative” judges—a term that, as we shall see, now correlates rather well with the denial of civil rights to minorities and women. Meanwhile, as politicians like Donald Trump shred the veneer of respectability politics, white nationalists percolate just outside mainstream conservatism—close enough to have a decided effect. The convergence of these ostensibly disparate parts is the sum of whitelash—the sustained push to retard or retreat from racial equality.

Using the 2016 presidential election as a focal point, this book unpacks contemporary whitelash by applying antidiscrimination law. Rather than plunge into the niceties of legal doctrine, I use a series of legal analogies to help orient the reader. Reflecting my years as an employment law scholar, my analogies often ask you to equate the voter with an employer who is making a hiring decision. At other times, you are an employee who stands to be adversely impacted by an employer’s arbitrary decision-making, in much the same way as a voter is negatively affected by a politician’s refusal to rely on facts when making decisions. Sometimes, you are placed in the shoes of a juror,
who, like a voter, must adjudicate the merits of a case that has two sides. In still other instances, you are asked to place yourself in the position of a legislator voting on a proposed statute, something that voters are asked to do in a referendum or citizens’ initiative. What is the commonality among these heuristics? In each, racial discrimination is forbidden. Why, then, should we allow it in candidate elections?

Chapters 1 through 3 set forth the architecture of what I refer to throughout this book as the “antidiscrimination norm.” Chapter 1 focuses largely on how the 2016 presidential contest violated modern understandings of this norm by reverting to primitive forms of racial appeals. Using abundant social science data, Chapter 2, “The Exoneration of White Voters,” discusses and then debunks the plausibility of white voters’ denial that race played a role in their 2016 decision. Chapter 3, “White Voters and the Law of Alternative Facts,” argues that voting, like law, requires a respect for facts, and that racial stereotypes are necessarily at odds with a fidelity to facts.

Chapters 4 and 5 place whitelash in its broader framing beyond the ballot box—a reach that nevertheless fortifies its potency at the ballot box. Chapter 4, “The Sirens of White Nationalism,” demonstrates the impact of heretofore fringe political philosophies and groups on mainstream conservatism and the electoral viability of the Republican Party. Chapter 5, “Law as Pretext,” explains how conservative jurisprudence reinforces voter whitelash and racial inequality more generally.

In everyday parlance, when someone practices one thing and does the opposite, we call it hypocrisy. In law, this type of behavior is evidence of pretext—an untruth proffered to cover up the real illicit or discriminatory reason for one’s actions. In Chapter 6, “Voting While White,” I survey the myriad contradictions that undergird white voters’ support for conservative candidates, contradictions that reveal many white voters professing a belief in small or limited government while feeding at the government’s trough. If they are not really supporting conservative candidates because of a belief in the core tenet of conservatism—limited government—why are whites supporting these candidates? In light of white voters’ racial predispositions in the 2016 election, racial animus is a distinctly credible possibility, as I argue in Chapters 1 and 2. Ironically, however, because progressives stand ready to rescue the social safety net that many white voters spurn hypocritically, voter whitelash goes unchecked.

So how should our democracy respond to whitelash if the two-party system itself encourages it? In Chapters 7 and 8, I propose legal remedies to curtail the impact of whitelash on our body politic. Constitutional guarantees of free speech and free association necessarily limit the government’s ability to
prevent citizens from casting votes based on racial animus. Still, the citizen who votes is participating in a state-sponsored exercise, the outcome of which constitutes “state action” for the purpose of determining whether, under the Constitution’s requirement of equal protection, an election’s process or result impermissibly discriminates against an identifiable group of citizens. The remedies I propose fit within established legal doctrine that I introduce to readers through the legal analogies used early on.

Viewed as a vector of white racial resentment, whitelash is not a uniquely American problem, yet America has a unique role in its spread and deterrence. A nation that boasts of its ability to encourage democracy throughout the world must be mindful of its similar ability to foster racist ideology. The conclusion of this book discusses this cautionary truth.

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I arrived at my election law class the evening after the 2016 presidential election still shocked by the results and with the words “He hates us” seared in my memory. In a democracy, no citizen, let alone a child, should sense this of the nation’s leader. Yet a July 2018 Quinnipiac University poll found that 49 percent of Americans believed President Trump was a “racist.”6 Forty-seven percent of respondents believed he was not. That a nation can hear the same words, view the same actions, and reach opposite conclusions demonstrates the need for a shared lexicon about racial discrimination. In the pages that follow, largely by analogy, I have adapted the vocabulary of our justice system—the place where every citizen can go to right a wrong, and a central feature of any democracy—to look at the 2016 election through a new lens.

The right to vote should never be used to spite one’s fellow citizens. When it has been misused in this fashion, white voters have “cut off their noses to spite their faces,” and democracy itself has repeatedly suffered. How long will we allow this recurring harm before it strikes a final, fatal blow?