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Remembrance, One Person, One Vote: The Enduring Legacy of Joaquin Avila

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Remembrance

One Person, One Vote: The Enduring Legacy of Joaquin Avila

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As is often the case, when we recall someone, living or dead, we tend to remember only snippets of our encounters with them. When people come together to share their own snippets, their fragments, they form a collage, and if you step back, you can get a sense of the person. When people gathered on March 1, 2019, for the Joaquin Avila Memorial Symposium and shared their stories about Joaquin, those in attendance were likely left in awe of what Joaquin had fought for and accomplished. Over the course of his decades-long career, he sought to make real that simple but elegant phrase that is the premise and promise of our democracy: "one person, one vote."

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There were times when I did not understand, fully, his vision. I asked him, "Why do you care so much about what happens in a school board election in a small or mid-size municipality?" He responded, "So, you think all that matters is the presidential election, or the election of federal officials? Or maybe you include state officials, governor? Attorney general? State senators? State representatives?" I said, "Sure, that's where the real power is." He would shake his head slowly and say, "Bob, Bob, Bob." And then he patiently explained to me that those representatives and senators in state legislatures, those representatives and senators in the federal legislature, those governors, those presidents don't just appear as Athena did from the

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head of Zeus, full-grown and dressed for battle. He broke it down for me. Somebody like Obama – he didn't just appear magically. He started somewhere. He started at the local level. He succeeded. He failed. He worked to overcome failure. He succeeded again. Joaquin explained to me that a person's involvement in politics often begins early—someone who participated in school government in middle or high school, who continues in college and after. They get experience, they get a taste for the political process, they get a taste for the difference that they can make, and they persist. But it starts somewhere.

He then drew for me a pyramid, or at least a rough approximation of one.

You sometimes get an Obama if you have a broad and diverse base for the pyramid. Or mixing metaphors—you need a deep bench if you hope to have someone like Obama be President. But he said the real strength of the pyramid is the base—the electorate. The strength of a democracy is one where each person counts, where each person believes they count. He explained to me that disenfranchisement could be achieved both formally and informally. He told me that as important as it is to address formal disenfranchisement, the larger, longer-lasting harm comes when people lose faith in the democratic process and stop voting. He told me to read his 2005 article, and then we could resume our conversation.

So I did. I read his article, *The Washington 2004 Gubernatorial Election Crisis: The Necessity of Restoring Public Confidence in the Electoral Process*.[1] We then resumed our conversation. I said, "I see that an overarching strategy has been to shrink the electorate, to keep women and minorities from voting. You describe the formal ways to disenfranchise, literacy and other tests, poll taxes, as well as the informal ways, actual violence, and the threat of violence to intimidate people from voting." Joaquin added, "Don't forget the added dimension that after a while, people

[1] Joaquin G. Avila, *The Washington 2004 Gubernatorial Election Crisis: The Necessity of Restoring Public Confidence in the Electoral Process*, 29 SEATTLE U. L. REV. 313 (2005).

begin feeling that their votes don't matter, and people will 'choose' not to vote. People will 'choose' not to vote because they become disheartened, because they feel that their rights are not respected, that their efforts to participate in the political process will be thwarted, as they have been over and over, with the courts standing by, letting it happen and making excuses for why they do not step in."

I told Joaquin that I was struck by a long footnote discussion that surveyed some of the positive Supreme Court decisions that advanced black voting rights by curbing the power of whites in power to disenfranchise blacks, tempered, though, by the negative.[2] One step forward, two steps back. Though certainly the more egregious and obvious methods used to disenfranchise Blacks were found to be impermissible,[3] much was left unredressed, or deemed to be unredressable. The footnote ended with a discussion of the 1903 case of *Giles v. Harris*.[4] The case involved a challenge described by Justice Oliver Wendell Holmes as "a bill in equity brought by a colored man, on behalf of himself 'and on behalf of more than five thousand negroes, citizens of the county of Montgomery, Alabama.'"[5] The lawsuit by Mr. Jackson W. Giles challenged the denial of his registration to vote, alleging that he was a qualified black voter and that he was denied

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[2] *Id.* at 321, n. 38.

[3] Those positive decisions are the following:
From 1876 to the 1950s there were some notable exceptions to this sordid history of minority political oppression. For example, the United States Supreme Court in *Guinn v. United States*, 238 U.S. 347 (1915), outlawed the use of grandfather clauses. In addition, the Court, in a series of cases, effectively limited the use of the white primary as a tool for disenfranchising African Americans. *See* Terry v. Adams, 345 U.S. 461 (1953) (all white private association which conducted a preprimary selection ruled unconstitutional); Grovey v. Townsend, 295 U.S. 45 (1935) (approving Democratic Party convention resolution limiting party membership to whites), *overruled by* Smith v. Allwright, 321 U.S. 649 (1944); Nixon v. Condon, 286 U.S. 73 (1932) (Court removed discretion of party executive committee to establish membership qualifications which limited membership to whites only); Nixon v. Herndon, 273 U.S. 536 (1927) (African Americans permitted to vote in Democratic Party primary).

[4] 189 U.S. 475 (1903).

[5] *Id*. at 482.

registration "arbitrarily on the ground of his color, together with large numbers of other duly qualified negroes, while all white men were registered."[6] Though Justice Holmes seemed to acknowledge that the provision in question had been intended to enfranchise white male voters through their permanent voter registration while not permitting the same privilege to otherwise qualified black male voters, he was able to avoid reaching the constitutional question on jurisdictional grounds.[7]

Jurisdiction could not be established if the relief sought by Mr. Giles was simply a declaration that the provision in the constitution violated the U.S. Constitution's 14th and 15th Amendments.[8] Instead, whether the Court had jurisdiction turned on whether the Court could grant affirmative relief in the form of requiring that Mr. Giles (and others similarly situated) be granted permanent voter registration.[9] But Justice Holmes turned Mr. Giles's arguments against him. Because Mr. Giles had argued that the constitutional provision was enacted as part of a racial conspiracy to deny him and others this right, the relief he sought (which he had to seek based on the understanding of equitable relief at the time), placement on the voter registration rolls, would have made the Court complicit in the fraudulent scheme that Mr. Giles had exposed through his case.[10] Justice Holmes could not fathom permitting the Court to be part of such a scheme.[11]

Then, in a very telling passage, Justice Holmes admitted to "the powerlessness of the federal judiciary to provide any redress to limit th[e] abuse of political power." Holmes stated:

> The bill imports that the great mass of the white population intends to keep the blacks from voting. To meet such an intent something more than ordering the plaintiff's name to be inscribed

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[6] *Id.*
[7] *Id.* at 488.
[8] *Id.* at 486.
[9] *Id.* at 487.
[10] *Id.*
[11] *Id.*

> upon the lists of 1902 will be needed. If the conspiracy and the intent exist, a name on a piece of paper will not defeat them. Unless we are prepared to supervise the voting in that state by officers of the court, it seems to us that all that the plaintiff could get from equity would be an empty form. Apart from damages to the individual, relief from a great political wrong, if done, as alleged, by the people of a state and the state itself, must be given by them or by the legislative and political department of the government of the United States.[12]

Holmes's phrase, "Unless we are prepared," is deceptive. What he should have said is that because the Court and the federal judiciary are unprepared to supervise voting in Alabama, any relief the Court granted to Mr. Giles would be an "empty form." Rather than do that, and further admit to the powerlessness of the courts, Justice Holmes ruled on jurisdictional grounds.[13] Though Justice Holmes did not say it directly, in essence what he expressed was the following: "Sorry, Mr. Giles. We cannot hear your case, regardless of its merits, regardless of how Alabama or Montgomery County is trammeling your right to vote."

As I recall my conversations with Joaquin, and as I revisit his writings, I see that his critique of the Court is spot on. If he were alive today, he likely could have written in his sleep the majority opinion in *Lamone v. Benisek* and *Rucho v. Common Cause*. He would have said that despite the connection between partisan gerrymandering and racial gerrymandering, and perhaps even because of the connection, the Court would re-affirm its powerlessness to redress what it seems to acknowledge as an abuse of political power. Further, he would have said that the Court would do this in such a way that when the more direct question of racial gerrymandering makes its way to the Court, its previous decision in these cases would likely foreclose any affirmative role for the Court. It's political, after all. And the Court is not a political institution!

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[12] *Id*. at 488.
[13] *Id*. at 488.

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I wonder, sometimes, how he persisted in the face of the hypocrisy of those who stood in judgment when he tried to protect the voting rights of his clients. I wonder how he persisted.

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His persistence, though, is what led to the passage of the California Voting Rights Act in 2001. Though he had fought successfully for the reauthorization and extension of the federal Voting Rights Act, he knew its weaknesses, and he knew the weakness of the Court, that the Court would ensure that the VRA would continue to fail minority voters. Knowing this, he formulated his vision of state voting rights acts. He started with California.[14] After its passage, he turned to other jurisdictions, including Washington, which he made his home in 2005.

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Joaquin became my colleague when I joined the faculty at Seattle University in 2008. After the Fred T. Korematsu Center for Law and Equality was launched in 2009, Joaquin's National Voting Rights Initiative operated under the center's umbrella. Joaquin would joke about how I was now his boss. The joke, of course, is that Joaquin could never be bossed. But we went along with this fiction.

Meanwhile, he would school me on my naïve understanding of power. He explained to me that my understanding of power was incomplete, that I didn't understand how much power local officials wield in the lives of people in their communities. I would learn later how important one or more votes can be on a school board, that it might be the difference between whether a school district has a Mexican American Studies Program or not.

He was right. There was much I did not understand or appreciate fully.

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[14] *See* Marguerite Mary Leoni & Chris Skinnell, *The California Voting Rights Act, in* AMERICA VOTES! A GUIDE TO MODERN ELECTION LAW AND VOTING RIGHTS 219, 221 (Benjamin E. Griffith ed., 2d ed. 2012) (crediting Joaquin Avila as the author of CVRA).

I was lucky that he was a patient teacher. I was able to call on Joaquin for advice. One of the cases in which I received this advice was one where I had the privilege of being co-counsel representing students at the Tucson Unified School District, which had challenged a law that had been used to eliminate the district's Mexican American Studies Program.[15] He would give me tips as we struggled through the slog of discovery preceding at our trial in 2017. His advice helped me to better appreciate the adversarial nature of the litigation process. He reminded me that power is never given away.

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I was in my car when I learned that my friend, teacher, and mentor Joaquin had suffered a serious stroke. It was 2011. I was driving back from Washington's state capital in Olympia after having testified before the Senate Judiciary Committee when I received a call from David Perez, who was serving then as the Korematsu Center's Assistant Director. He told me to pull over, that he had some news. I pulled over. He told me the news.

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On one of my visits to Joaquin in the hospital, he looked over at me and asked if I could get him out of there. I asked if they were taking good care of him. He said, "Sure, but the food . . . ." Then he said, "Next time, bring me a Jamba Juice." He then continued and said, "Don't bother. They'll take it away from you if you bring it." And he looked away.

The stroke, though debilitating, did not stop Joaquin. I remember being with him during a physical therapy session as he fought to regain his steps, his stride. The stroke, though debilitating, did not stop Joaquin from continuing his work to advance the principle to which he had devoted so much of his life—one person, one vote.

I remember his excitement when the Seattle Times Editorial Board gave a positive endorsement of the Washington Voting Rights Act, modeled after the California version that he had authored and shepherded through passage.

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[15] González v. Douglas, 269 F. Supp. 3d 948 (D. Ariz. 2017).

He didn't think that he would have lived to see this day. But it came to be. Because of him.

We must continue his fight so that they do not take away the foundation of our democracy. Erwin Chemerinsky, in his keynote address at the Joaquin Avila Memorial Symposium, reminded us of this when he said that though things may seem grim because of what the U.S. Supreme Court was doing to voting rights, Joaquin would tell us that we needed to continue fighting, that we needed to fight even harder.

One person. One vote.