

## **Injustice and Scholarship**

Since *Colorblind Injustice* largely derives from my work as an expert witness in federal voting rights cases, a couple of vignettes from one particularly important case, *Garza v. Los Angeles County Board of Supervisors* (1990), and a relatively brief summary may give those who have not yet read the book both a feel for its scope and a sense of how the issues it deals with impact real people.

At an international historical conference in the mid-1980s, I met a young Russian historian, Sergei Stankevich, who specialized in America and who had read and liked some of my work. In the last few years of the Soviet Union, Sergei's political career took off, and his fluent English and keen insights into both the U.S. and the U.S.S.R. won him the attention of American, as well as of Soviet media. In late 1989, when Sergei was brought to Los Angeles for the first showing of an American television documentary that prominently featured him, he called me from a Beverly Hills hotel and invited me for a drink the next day. But because I was working on the *Garza* case and had an all-day appointment scheduled for that day to give a deposition before a lawyer in Century City (which is where people work who can afford to live in Beverly Hills), I regretfully declined, saying "I'm sorry, Sergei, but I'm being deposed tomorrow." There was a long pause on the other end of the line. I suddenly recalled that while Sergei's English was technically correct, it was not perfectly idiomatic. Unable to think of a synonym that would convey this nuance of a complicated legal system to someone from a country that barely had a legal system, I stammered out that I was "working against injustice." Sergei was very understanding about the inadequacies of my language ability, but he, too, had appointments, and I never got the drink.

The case against the largest local government in America, however, came out well, as the nearly 100-page paper I wrote on the anti-Latino intent of the redistricting of county supervisorial districts served as the foundation of a large part of a favorable federal district judge's opinion and as the principal basis for a unanimous decision of the U.S. Court of Appeals. As a result of these decisions, Los Angeles elected its first Latino county supervisor since 1874. One of Supervisor Gloria Molina's first acts was to help to settle a case on "general relief," the welfare program of last resort for the homeless. For a couple of years, until California's severe recession caused state government to gut the program, several tens of thousands of homeless people in Los Angeles county could afford food and shelter nearly every week because of Molina's election. Some injustice, at least, had been overcome.

But of course, not all. Favorable federal laws and Supreme Court decisions had led those who drew the boundaries of elective offices throughout the country in 1991-92 to make it possible for the first time in American history for African-Americans and Latinos to have reasonable opportunities to elect candidates of their choice. This was too much for the "conservative" majority of the U.S. Supreme Court, which in a series of decisions beginning with *Shaw v. Reno* (1993) attempted to unravel the gains that minorities had made in voting rights during the Second Reconstruction. *Colorblind Injustice* is an examination of the causes, nature, and significance of those decisions. Because the basis for the decisions, the Fourteenth Amendment, is defined by the history of race relations in this country, any full evaluation of the "racial gerrymandering" cases contains an implicit or explicit view of that history. In particular, it invites a comparison of America's two Reconstructions.

How and why have the courses of the two U.S. Reconstructions (after the Civil and

Second World Wars, respectively) differed? To make the problem tractable, I consider not all aspects of American society, but only the core of equal rights in a democracy, voting and political power. The First Reconstruction did not end in a blaze of gunfire and a blizzard of fraudulent ballots in the mid-1870s, as some historians have asserted, but wound down incrementally during the succeeding generation. Violence in the South furthered fraud, which enabled changes in electoral structures (such as anti-black gerrymandering), which in turn allowed for the passage of discriminatory franchise laws (such as poll taxes and secret ballot literacy tests), which often eventually led to the enactment of more permanent state constitutional restrictions on the suffrage. Nationally, the stark partisan split on the issue of black voting rights and the fluctuations of congressional seats from party to party prevented further safeguards of black voting rights from being enacted after the early 1870s, and the hostility of the Supreme Court to such rights, especially around the turn of the century, sapped the foundations of the Fourteenth and Fifteenth Amendments. In contrast, during the Second Reconstruction, up to the Supreme Court's 5-4 decision in *Shaw v. Reno*, African-American political power gradually expanded through incrementally improved national laws and, with some exceptions, strongly protective decisions by the Court. Members of Congress from both parties became increasingly favorable to black and Latino voting rights, even as the laws became stronger and stronger. Why the contrast?

Just as the crucial mechanisms for weakening and strengthening black rights were institutional rules, the crucial factors that produced the erosion of the First Reconstruction and the solidifying of the Second were also institutional, greatly magnifying the effects of relatively small shifts in popular attitudes and behavior on black voting rights in the two eras. In the 19<sup>th</sup>

century, congressional district lines were drawn so as to maximize legislative turnover, while during the 20<sup>th</sup>, they were drawn so as to minimize it. (Nobody knows why, because we have so few studies of redistricting.) Thin majorities meant that few served many terms in Congress and that they were often woefully ignorant of policy details. Consequently, they had to take their cues from party leaders in Congress, and they had little incentive to cooperate with each other in one term in hopes of obtaining reciprocal cooperation in subsequent terms. Safer majorities had opposite effects. Thus, northern Democrats in the 19<sup>th</sup> century, who had little to gain or lose directly from black suffrage because ninety percent of African-Americans lived in the South, unanimously joined southern Democrats in opposing laws to protect black voting rights, while northern Republicans in the 20<sup>th</sup> century, with equally little at stake in black rights in most of their districts, broke with their conservative coalition southern partners and overwhelmingly supported minority voting rights.

More generally, what Justice Harlan Fiske Stone in the famous footnote four of *U.S. v. Carolene Products Co.* (1938) called “discrete and insular minorities” need stable institutions, not perpetual change or frequent upheaval, to protect their rights. Incremental perfections of basically favorable institutions, not revolutions, are their best reliance because their positions in society are too fragile to withstand the whipsawing of repeated changes in policy direction. And the legislators that will best provide progressive policy incrementalism are those whose long tenures build knowledge and a desire for reciprocity and compromise with their partisan opponents, especially on issues that do not matter so much to themselves or their constituents. In the courts, where judges for life are supposed to be less responsive to outside pressures than legislators are, minorities need similar incrementalism, as well as a realization, outlined in

Stone's footnote, that small groups in a democracy need special protection because they cannot hope to prevail against antipathetic majorities. To preserve democracy for all, the ability of the majority to discriminate against permanent minorities must be circumscribed.

These general lessons of the First and Second Reconstructions suggest that to assess the state of race relations, we should focus more attention than most historians and social scientists recently have on institutional rules and especially on court decisions. Were minority political rights so widely accepted and well protected during the Second Reconstruction, and were electoral rules so fair, that all courts needed to do to fulfill the egalitarian goals of the First Reconstruction was to prevent the unprecedentedly biased affirmative action gerrymandering of the 1990s? Were racial appeals in campaigns and racial bloc voting in elections so rare that black or Latino candidates could be elected anywhere, without regard to the proportions of minority voters in a district? Were the "racial gerrymandering" decisions of the Supreme Court since 1993 so firmly reflective of the best American principles, so well grounded in facts, so clearly based on precedents, and so consistent with each other that to take exception to them is not just fruitless, but unconscionable?

My negative answers to these questions are based not only on studies of the adoption of election laws in areas across the country, but also on an intensive analysis of federal election cases, especially on the Supreme Court level. In addition to the work already discussed on Los Angeles, chapters on the passage of runoff and other laws in Memphis and the state of Georgia, and congressional redistricting in North Carolina and Texas, all of which originated as expert witness reports in federal voting rights lawsuits, make clear that election laws in a variety of places and times have been framed for the purpose of discriminating against African-Americans

and Latinos. An overview of a century of Supreme Court decisions demonstrates that the Court has repeatedly vacillated on the question of whether it is necessary to prove discriminatory intent or effect or both to sustain a contention that the Fourteenth Amendment has been violated, but that since the 1970s, blacks and Latinos have had to establish both. While courts have set high barriers to verifying such assertions, their opinions and the practice of historians show how to examine evidence of racial purposes systematically.

In contrast to cases where minorities have alleged that they were discriminated against, the majority of the Supreme Court, led by Justice Sandra Day O'Connor, has ruled that white plaintiffs in *Shaw v. Reno* and its successors must demonstrate only an intent to discriminate between people, not against themselves. No showing of an adverse effect, the Court has proclaimed, is necessary in such cases, and their opinions reveal that no stringent proof of intent is, either. In another blatant double standard, the same five-person Supreme Court majority decided in the Texas case of *Bush v. Vera* (1996) that the shape of districts where minorities have an opportunity to elect candidates of their choice have to be aesthetically appealing to judges, while those that can easily be controlled by whites can be whatever shape the legislators desire. These radical decisions, which bluntly overrule precedents and haughtily disdain the actions of Congress, the U.S. Department of Justice, and several state legislatures, are more counterrevolutionary than conservative.

Not only do they set up racial double standards, but the whole set of racial gerrymandering decisions is also shot through with contradictions: The same majority of the Supreme Court sometimes rules that the shape of minority opportunity districts matters, sometimes that it does not. It sometimes implies that any district containing any minority

proportion might be unconstitutional, and sometimes avows that its standard is much narrower. It sometimes posits societal “harms” that minority opportunity districts allegedly cause, and sometimes insists on a wholly individualized conception of equal rights. It sometimes rules that using race “as a proxy” for other characteristics, such as partisan identification, makes an action illegal (*Miller v. Johnson* (1995)), while in other cases, it suggests that using race as a proxy might save a district from being unconstitutional (*Hunt v. Cromartie* (1999)). Throughout the series of cases, the *Shaw* justices have invented what they have termed “traditional districting principles” at will, in a wholly unsystematic fashion, with no factual or logical justifications, in transparent efforts to justify outcomes that they prefer for other reasons. In the same decisions, they have twisted words, for instance terming the most integrated congressional districts in the history of North Carolina “segregated” and reminiscent of “apartheid,” and they have distorted history, confusing acts intended to harm minorities with electoral structures designed to give minorities in racially polarized polities only an equal, not a disproportionate chance to elect candidates of their choice. From decision to decision, the *Shaw* Five have adopted a set of *ad hoc* principles that have almost always carefully protected the interests of the Republican party to which they belong and undermined the Democratic party to which African-Americans and Latinos overwhelmingly adhere.

In sum, a comparison of the two Reconstructions emphasizes the importance of institutional rules and institutions, especially the Supreme Court. During the Second Reconstruction, up to 1993, federal election laws gradually evolved to promote the exercise of political power by African-Americans and Latinos by negating discrimination against them on the state or local level. But since 1993, the egalitarian constitutional amendments adopted

during the First Reconstruction have themselves been gerrymandered by the Supreme Court to deny minorities and their white partisan allies the same political opportunities as whites in general and Republicans in particular enjoy.

### **Response to Comments of Palmquist, James, and Griffin**

The often kind and always interesting comments of Professors Griffin, James, and Palmquist touch different aspects of *Colorblind Injustice*. Let me respond to them, in effect, in chronological order, according to which periods of history illuminate the comments the most.

Bradley Palmquist points out that institutions like the Supreme Court may suddenly reverse their decisions, as the Court did in the “switch in time that saved nine” after FDR had proposed to pack the body in 1937, or as it overturned *Plessy v. Ferguson* (1896) in *Brown v. Board of Education* (1954). But as the *Brown* example suggests, it often takes a long time to overturn precedents, and that is the case with minority voting rights, as well. It was twenty-five years after Richard Nixon’s “southern strategy,” twenty-four years after Earl Warren ceased to be Chief Justice, and twenty-three years after Nixon proposed to water down the Voting Rights Act before the overwhelmingly Republican Supreme Court dared to seriously undermine African-American and Latino political rights, and even then, they hesitated to attack the Voting Rights Act itself directly. Major institutions are tough in two senses: their policies often have large impacts, and the institutions, even those as tiny as the nine-member Supreme Court, are

difficult to change.

Palmquist also calls for clarification about the connection between political stability and policy changes affecting minority groups and more generally, about the interactions between political and policy changes. These are complicated matters, but let me add to what I said in the summary above. Large policy changes – the Thirteenth, Fourteenth, and Fifteenth Amendments, the massive expansion of the American national regulatory/welfare state during the New Deal, the assault on segregation and discrimination during the 1960s – require overwhelming partisan majorities in Congress, though not necessarily of members whose constituents elected them to impose exactly those policy mandates. A great deal of voting is retrospective and negative, a rejection, for example, of the slavocracy, the soulless engineer of the Great Depression, or the Goldwater extremists. So much is uncontroversial. What I wish to do is to emphasize the importance for discrete and insular minorities of what Thomas Kuhn called the periods of “normal science,” not of his more famous formulation of “paradigm shifts.”<sup>1</sup> It was in these non-revolutionary periods that African-Americans lost the vote and later expanded their political power. And what is necessary to preserve and enhance the gains of minorities in those critical, but often overlooked periods is slow turnover in the people who serve in those authoritative institutions and a willingness on their part to make incremental changes as they learn by doing and respond to incentives to cooperate with partisan opponents on issues inessential to their constituents. Other things equal, minority groups should prefer legislatures characterized by longevity and logrolling.

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<sup>1</sup>Kuhn, *The Structure of Scientific Revolutions* (Chicago: University of Chicago Press, 1962).

Consider two situations: In the first, the percentage of the vote for Republican congressional candidates over a thirty-six year series of elections averaged fifty-two percent, but the proportion of seats won fluctuated wildly, ranging, for instance, from a third in one election to more than nine-tenths four years later. In the second, covering the same number of elections, the Republican vote averaged fifty percent, but the range of seats won was much smaller, varying by no more than twenty percent in any four-year period. This describes elections during the First and Second Reconstructions, respectively, in the political heartland states of Illinois, Indiana, and Ohio, and my contentions are that the election outcomes were a function primarily of reapportionment, not voting behavior, and that the second, more stable set of congresses was much more favorable to progressive policy incrementalism for minority voting rights. The answer to another question Palmquist raises follows at once. Whatever the voting system adopted -- cumulative or limited voting, single transferable vote, or the system that dominates the United States, plurality-win single-member district -- systems that lead to stability in membership and partisan or coalitional control will, I contend, best protect minorities the vast majority of the time. I welcome tests of these notions on other issues in the United States or in other countries, or of course reevaluations of my arguments and evidence for the particular case.

David James's comments are both more abstract and more discordant. Following in the sociological tradition of Max Weber, James speaks of ideal types -- "the liberal democratic state," "the racist state," two and only two mutually exclusive principles of equity -- and he classifies *Shaw* and its successors as colorblind, while claiming that my antipathy to *Shaw* puts me in the same category as the authors of the infamous *Dred Scott* and *Plessy* opinions. All color-conscious policies are the same, he seems to say, and any government that adopts any of

them thereby transforms itself from a liberal democratic into a racist state. Race-conscious policies derive from and only from ideologies of fundamental differences in racial identities, and however benignly meant, only reinforce racial inequalities in the present and breed more in the future. These views, which, as I demonstrate at some length in my book, are shared by Justices Antonin Scalia and Clarence Thomas, are startling, coming as they do from a scholar whose published work so strongly and convincingly attacks racial discrimination against minorities, and whose cardinal traits are meticulous examinations of evidence and an unwillingness to accept received conceptions and categories.<sup>2</sup> But Prof. James's uncharacteristic comments apply only to some imaginary America and to some other book.

From James Madison's Federalist No. 10 and his Bill of Rights on, the American political tradition has been concerned with protecting citizens' fundamental rights and often with guarding the equal rights of minorities, especially propertied minorities, against blunt majoritarianism. Judges were made appointive for life, in large part, to insure that they would feel less pressure to bend to the will of transient or even long-lived majorities. In the most far-reaching amendments ever made to our constitution, the Thirteenth, Fourteenth, and Fifteenth, the Radical Republicans sought to insure that Congress and the courts would be able to shelter blacks from hostile actions not only by state and local governments, but also by private individuals, actions that the Republicans knew from their own experience were likely to persist for a long time. They were practical people, antislavery activists who had responded favorably

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<sup>2</sup>See, e.g., David R. James, "The Transformation of the Southern Racial State: Class and Race Determinants of Local-State Structures," *American Sociological Review*, 53 (1988), 191-208; and "City Limits on Racial Equality: The Effects of City-Suburb Boundaries on Public-School Desegregation, 1968-1976," *ibid.*, 54 (1989), 963-85.

to black agitation to gradually expand the opportunities of free people of color before and during the Civil War and who had almost unanimously condemned Chief Justice Roger Brooke Taney's factually incorrect and radically unprecedented opinion in *Dred Scott*. Most Republicans shared at least some of the typical prejudices, even racist ideas, of the day, but nearly all were willing to suspend them to promote equality before the law, which they knew required special protections for the freed people.

In a larger sense, American governments have never been purely anything, but a complex, *ad hoc* amalgam of national, state, and local entities, importantly including semi-public ones, of executive, legislative, and judicial branches, often in considerable tension with each other, of majoritarianism and minority rights. As I argue in *Colorblind Injustice* and elsewhere, the Supreme Court has remained truest to American tradition and most faithful to equal rights when it has stayed close to the facts, instead of mouthing lofty-sounding slogans, such as "separate but equal" or "colorblind." Because the dissenters in *Dred Scott* showed so clearly that free people of color had enjoyed many rights before and after the adoption of the Constitution, Chief Justice Taney must have known how factually outrageous his opinion was, and he must have realized how strained his interpretation of the territorial clause was, as well. In *Plessy*, Justice Henry Billings Brown must have known that separate railroad cars were never meant to be equal and that the motive for the challenged Louisiana Jim Crow law was to preserve white supremacy, because the plaintiff's brief and Justice John Marshall Harlan's dissent told him so and because Brown had witnessed similar struggles over segregation as a young man in Detroit. The briefs, oral arguments, and dissents in the racial gerrymandering cases have richly documented the facts that redistricting cannot ignore racial considerations, that

racial, partisan, incumbent, and other concerns are inextricably intertwined, and that all sorts of districts take peculiar shapes for various, often quite idiosyncratic reasons. Redistricting has never been colorblind in this country -- how could it ignore the deepest splits in the society? -- and the pretense that such practical concerns can be surmounted, as I show in *Colorblind Injustice*, is a subterfuge, hiding other motives. We will understand the process of framing electoral laws and arrangements better, make better public policy, and remain more faithful to the abolitionist intentions that produced the Reconstruction Amendments in the first place if we reject empty abstractions and return to a reliance on history and a close, honest reading of facts.

Larry Griffin doubts that the Second Reconstruction is being undone and gently chides me for asserting, but not showing it. I plead guilty to the charge, and take this opportunity to sketch ideas that I feared might detract from my focus on politics and law in *Colorblind Injustice*. Just as the ebbing of the First Reconstruction left blacks far advanced from the condition of slavery (much more mobile, better able to bargain economically, with much more secure families and considerably improved opportunities for education and the acquisition of property, and with the promise of eventually regaining political rights if voting laws could be administered fairly), so the fading of the Second Reconstruction has still not reduced African-Americans to their former legally segregated, largely disfranchised, socially outcast status. But both movements were far from fulfilling their promise, and even apart from politics, the retrogression in the Second has been palpable, especially in Supreme Court opinions. To the Shaw Five, it is unconstitutional for courts to order and probably for school boards to seek to implement policies aimed at integrating schools, and Justice Thomas has denounced as racist the social scientific finding enshrined in *Brown* that segregation harms black students. (*Missouri v.*

*Jenkins* (1995)) The proportion of African-Americans attending schools with whites, as Gary Orfield and others have demonstrated, has recently fallen.<sup>3</sup> This would not have happened but for a series of Supreme Court decisions, beginning with *Milliken v. Bradley* (1974), that weighed almost any other governmental goal as more important than integration. Affirmative action policies, which have assisted blacks, Latinos, and women of all groups in breaking through barriers in schools, jobs, and contracting agencies, have been outlawed by the *Shaw* justices on the Supreme Court (*Adarand v. Peña* (1995)) and rejected by voters in California and other states and localities. Housing segregation levels are higher now than at the turn of the last century, the vast majority of whites continues to believe that only blacks' lack of ability and drive holds them back in a society of truly equal opportunities, and the legal system continues to arrest and incarcerate young black men grossly disproportionately to the rate and severity of the crimes they commit.<sup>4</sup>

Not all of these regressions have been produced by the Supreme Court, and not all of them could have been stopped by it. But the Rehnquist Court has been in the vanguard of racial reaction, as the Warren Court was in the vanguard of racial progress. And as unquestionably the most powerful institution in America during the 1990s, the Supreme Court has been the key to the Second Redemption, the reversal of the many of the gains of the Second Reconstruction. In

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<sup>3</sup>Orfield, *Dismantling Desegregation* (New York: New Press, 1996).

<sup>4</sup>Douglas S. Massey and Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* (Cambridge, Mass.: Harvard University Press, 1993), 21, 222; Howard Schuman, Charlotte Steeh, Lawrence Bobo, and Maria Krysan, *Racial Attitudes in America: Trends and Interpretations* (rev. ed., Cambridge, Mass.: Harvard University Press, 1997), 153-70; Vincent Shiraldi, "The Bias of 'Color Blind' Juvenile Justice," *Los Angeles Times*, July 27, 1999, M2.

the 1998-99 term, it decided five cases, all by the same familiar 5-4 lineup as in *Shaw*, that may serve as a summation of its recent role. In *Department of Commerce v. House of Representatives*, the Court banned the use of scientific sampling in the decennial census to apportion members of Congress between the states, a decision that, demographers widely believe, will result in a disproportionate undercount of ethnic minorities.<sup>5</sup> As vigorous *amicus curiae* briefs in the case from both major political parties indicated, Justice O'Connor's opinion will benefit the Republican party and may determine which party controls the House of Representatives in the first decade of the 21<sup>st</sup> century. In *Hunt v. Cromartie*, in effect the third iteration of the *Shaw* case from North Carolina, Justice Thomas's opinion cued Republican redistricters in 2001 on how to pack minorities into a few seats in order to minimize minority influence and maximize Republican representation. And in a set of three cases from Maine and Florida, the *Shaw* justices, over the bitter dissents of the other four justices, ruled that Congress could not authorize individuals to sue "sovereign states" in either state or federal courts. How broadly the states' rights decisions would eventually be applied, and whether they would deliver minorities once again to the tender mercies of state and local governments, without even the nominal protection of federal law, remains to be seen. But the opinions' radical break with precedents, the five justices' willingness to rest their decisions not on any provision of the Constitution, but on their extreme ideas about the nature of American federalism, and their echoes of the states' rights rhetoric of secessionists and opponents of both Reconstructions should cause more than a little unease among the friends of minority rights.

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<sup>5</sup>Margo Anderson and Stephen E. Fienberg, "To Sample or Not to Sample? The 2000 Census Controversy," *The Journal of Interdisciplinary History*, 30 (1999), 1-36.

Supreme Court decisions matter because governments have the power to make war or peace, to alleviate or exacerbate suffering, to diminish or heighten injustice. And when a majority of the Supreme Court, masquerading as earnest, nonpartisan advocates of racial fairness, in reality distort history, language, facts, and precedents in an effort to preserve the supremacy of their race and party, it becomes the duty of a scholar to subject their actions to the closest scrutiny.