

EDITED COMMENTS ON POLITICAL PARTICIPATION

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I'd like to start this discussion by trying to move beyond the standard definitions of political participation. I'm going to come back and talk a little bit about some of the traditional constitutional and legal questions at the end of my talk, but I want to begin by asking where this question begins. I want to contest two aspects of the question that have been posed.

First, I think that by focusing only on narrow notions of political participation, we leave out whole areas of concern about how people participate in the law and in our society in general. Second, I want to contend that *Shaw v. Reno*¹ is not about affirmative action at all. I want to claim that there is, in essence, no affirmative action at all in allowing black communities like the community I live in—the second district in North Carolina—to participate effectively in the political process. If we win, as we did win, in the process of redistricting, to get districts that blacks can win in but so can whites, that's not affirmative action. It's simply the normal political process.

Now, starting with the notion of participation, it is a very, very narrow view of participation to focus only on voting in partisan or nonpartisan elections by citizens. And I want to say that it becomes a particular problem when we are dealing with questions about race and ethnicity in a society where lots of people aren't citizens or are too young to vote. There are a number of questions that come up about those issues with respect to a number of ethnic groups. I just want to use two examples.

One example is tagging. Tagging is an activity undertaken by a number of groups in California, but significantly by Mexican-American groups, to put their logo on mainly public but some private property in various neighborhoods. It's a way of claiming space in neighborhoods. My question about political participation is, in a world in which all of our political participation is limited to citizens, and in a world where all our political participation is limited to voting, what is the alternative for Mexican-American youths, many of

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1. 509 U.S. 630 (1993).

whom aren't citizens and most of whom are too young to participate? How do we as a society encourage people to participate?

Now, the traditional answer is to say they will eventually grow, can become naturalized if they are not citizens, and participate. But I don't think most of those young people see that as a real alternative for participation in our society. It is very important for us to figure out how to provide some space for their participation in the political and economic process.

The second example happens very frequently across the river in Newark. Joyriding. I think that lots of African-American youth in Newark who see no real opportunity for political and economic participation in our society, but want to have some access to some of the fruits of society, engage in joyriding. We often conflate joyriding with both car theft and carjacking, neither of which is exactly the same as joyriding. I want to suggest to you that the activity that these African-American youths are engaging in is a form of political participation. It's not necessarily a useful form of political participation. Tagging is not necessarily useful. But we must understand that by not providing means for actually participating in the process, we are going to produce results like this, and we are going to miss the point of political participation.

Part of our problem in thinking about participation, it seems to me, is that we can't deal with those non-participants, the people I've talked about so far, the people who are outside for either economic, political, or social reasons. We also can't admit to ourselves that we are trying to impose what I would say are white standards on some of the political questions that we are dealing with. I want to suggest a couple of examples that are not traditional political participation questions.

Let's look, for example, at the reaction to the O.J. Simpson jury and compare it to the reaction to the jury in the first case involving the police officers who beat Rodney King. That jury had no African-Americans, three non-white participants. I believe that if that jury had had two African-Americans on it, people would have suggested that there was effective participation by African-Americans in the jury process. But having only two white Americans on the Simpson jury was still felt unfair by a significant number of white Americans. I think it goes to some notion that white America has the right to control the political process. And I think that notion is central to the Court's decision in *Shaw*.

I live in a state, the state of North Carolina, which had not elected an African-American congressperson in close to one hundred years. The state is one-third African-American. And the inter-

ests of African-Americans were not significantly represented inside the political process. Now it is true that the Voting Rights Act,² which is race conscious, allowed some questions about race to be used. But the decision to create the two districts that elected African-Americans was part of a political process in which many things were given up. In fact, it was very clear that fewer Democrats would eventually be elected in North Carolina. The African-American communities decided that that was what they wanted. They won inside the political process.

In essence, what we are saying is that it is not appropriate for them to win. These districts were not unconstitutional if race was not involved. The shapes of the districts were not unconstitutionally odd for any other reason. Why were they unconstitutionally odd for the purpose of *Shaw*? The district court opinion that followed the Supreme Court ruling looked at whether in fact these districts could pass muster.³ [The district court found that the redistricting plan was indeed a "racial gerrymander subject to strict scrutiny under *Shaw*."⁴ Applying that standard, the district court nevertheless upheld the plan as "narrowly tailored to further the state's compelling interest in complying with the Voting Rights Act."⁵] If you look at the district court opinion, it is very hard to find a clear rationale for opposition to these districts besides some argument that there was some nascent penalty to being associated with a black district.

The plaintiffs in *Shaw* are almost all associated with the Duke University School of Law. Two of them are my colleagues, one of them is the son of my colleague, and the fourth is the secretary of my colleague. These plaintiffs in various ways say being associated with this black district is wrong. It seems to me again it is an argument that insists upon white control. I want to say to people who object to these districts, especially the second district, run for office.

That's what people always said to African-Americans when they were troubled: "Go out and compete." These districts are not so African-American that a white person could not win them. They are about 56 percent African-American. That is not a district that a white person cannot win. The truth is that we have a very difficult time figuring out how to deal with the notion of real participation by racial minorities.

2. 42 U.S.C. § 1973 (1988).

3. *Shaw v. Hunt*, 861 F. Supp. 408, 417 (E.D. N.C. 1994) (three-judge panel), *probable jurisdiction noted*, 115 S. Ct. 2639 (1995).

4. *Id.*

5. *Id.*

