Vanderbilt Law Review

Volume 50
Issue 2 *Issue 2 - Symposium: Defining Democracy for the Next Century*

Article 7

3-1997

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Jane Schacter has made a critical contribution by elaborating the meaning and potential consequences of the Court's holding in *Romer v. Evans*.[1] At the center of her account is the thought-provoking suggestion that the Court's opinion enables a visibility or "presence" for gays and lesbians in the extended realm of the "political."[2] While I salute her illumination, I am less certain about whether to share her optimism. In this Comment, I will explore the latter question by looking beyond the decision in *Romer* to other cases involving group-based civil rights. I will probe the effects of Supreme Court decisionmaking on the "politics of presence," which I define as a society-wide conversation about the political consequences of conceiving people as members of groups rather than as unmarked individuals.[3] I will argue, in particular, that the Court's decision in *Shaw v. Reno*[4] (and its progeny) has strong negative consequences for the visibility of minority political interests, and for the development of a

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* Professor of Law, Northwestern University Law School. The research that contributed to this comment was supported by the Benjamin Mazur Summer Research Fund of the Northwestern University School of Law.

1. 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996).

2. Jane S. Schacter, Remer v. Evans *and Democracy's Domain*, 50 Vand. L. Rev. 361, 403-05 (1997).

3. Anne Phillips uses this term in the title of her recent book, *The Politics of Presence* (Oxford U., 1995), to describe a politics that focuses on identity group diversity and representation. Although there are differences in our understandings, my definition above shares much in common with Phillips's effort, in an earlier work, to describe how "democracies deliver on equality while accommodating and indeed welcoming difference": "The questions then turn on the kind of politics that can recognize and legitimate group difference while resisting fragmentation into discrete and local identities, and the kind of solidarity that becomes possible if we give up on the presumption of an undifferentiated humanity." Anne Phillips, *Democracy and Difference* 2 (Pennsylvania State U., 1993).

4. 509 U.S. 630 (1993). In *Shaw*, the Court held that "majority-minority" districts created to provide racial or language minorities with equal electoral opportunity may be challenged under the Equal Protection Clause. Id. at 649. The theory of the decision is that race-conscious districting—that is, districting in which race is the basis for or predominant factor in drawing district lines—violates the right of citizens to participate in a "color-blind electoral process." Id. at 641-42 (internal quotation marks omitted). In *Shaw* and the cases that follow, see notes 17-19, such districting is subject to strict scrutiny. 509 U.S. at 642-43.

politics of presence that comprehends issues of race. I will conclude by considering how this interpretation might be reconciled with the view Professor Schacter takes of *Romer*.

Professor Schacter argues that "legally and socially coerced . . . invisibility" is a central feature of gay and lesbian existence, and an important cause of gay inequality.[5] By striking down Amendment 2, a measure that exacerbated coerced invisibility, the Court in *Romer* enabled gays and lesbians to appear to a greater extent in the extended political domain. This appearance itself is salient, because of its potential to ameliorate political inequality and raise public consciousness; it is also the first step toward engendering a broader debate about the consequences of this group's, and other groups', "presence" in politics. I agree with Professor Schacter's account of coerced invisibility as constituting a unique feature of gay and lesbian existence; but for the purposes of this Comment I am going to give a different reading to this group's dilemma about visibility in politics, what Eve Sedgwick has called a "universalizing" rather than a "minoritizing" construction.[6] In the ongoing conversations, negotiations, and entanglements that constitute the extended sphere of politics, most socially marginalized groups struggle with questions of visibility and presence:[7] How visible is our group? What acts affect the extent to which we are seen, and the images according to which we are understood? What are the personal costs associated with efforts to attain greater visibility? In answering these questions, many groups confront a fact faced early and often by gays and lesbians: group members are not the only ones who control the way, or the extent to which, the group is seen in the extended world of the political. A range of social and institutional forces shape questions of group visibility and image; these forces affect the ability of group members both to make claims for themselves and to explore a politics that gives a more central place to group membership. Among these characterizing forces, and central to our discussion here, is the Supreme Court.

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5. Schacter, 50 Vand. L. Rev. at 369 (cited in note 2).

6. See Eve Kosofsky Sedgwick, *Epistemology of the Closet* 1 (U. of California, 1990). Sedgwick describes a "minoritizing view" as "seeing homo/heterosexual definition . . . as an issue of active importance primarily for a small, distinct, relatively fixed homosexual minority," and a "universalizing view" as "seeing it . . . as an issue of continuing, determinative importance in the lives of people across the spectrum of sexualities." Id.

7. It is surely worth noting, however, that not all groups struggle with questions of literal visibility. Although visible difference often functions as the paradigm in this society (perhaps because of the paradigmatic character of racial difference in American legal thinking about difference), it is not the only form of difference, or even the most salient from a constitutional standpoint. For a further elaboration on this point see note 13 and accompanying text.

How does the Court influence group-based appearance and visibility? Sometimes it does so simply by projecting an image of a particular group. When the Court in *Harris v. Forklift Systems, Inc.*[8] rejected the serious psychological injury requirement in sexual harassment cases,[9] it projected an image of women as impeded, but not wholly compromised, by sexualized treatment. In such cases, the Court's opinion helps to create an epistemological backdrop, contributing to what Professor Schacter calls "the ongoing normative enterprise that is a central part of our collective life."[10] Such decisions make it easier for people to see certain images of women and more difficult for them to see others.

Other cases affect not the particular way that group members are seen, but whether they are seen as group members at all. Within this category is *Romer*, in which the Court's decision affected the ability of gays and lesbians to appear in the social realm, and, ultimately, to define their political interests. But also within this category is *Shaw v. Reno*, a case with a potentially devastating impact on the visibility of racial minority groups. To help think about the effects of *Shaw*, I will distinguish several different types of visibility that operate in the lives of politically marginalized groups. These categories are not mutually exclusive, nor are they intended to be. As I note below,[11] the connections between them may help to expand the doctrinal impact of cases such as *Romer*.

The first type of visibility I have in mind might be referred to as "literal" visibility. This type of visibility is achieved when observers become aware that a person is a member of particular group. For members of many groups, such as women or racial minorities, this type of visibility follows inevitably from one's physical appearance: for better or for worse, when one is physically present, others are aware of one's group membership.[12] For members of other groups, including gays and lesbians, religious groups, and persons with disabilities such as deafness or dyslexia, the attributes that mark one as a member of a particular group are not physically apparent. For people in this category, group membership must be made obvious by

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8. 510 U.S. 17 (1993).
9. Id. at 22-23.
10. Schacter, 50 Vand. L. Rev. at 405 (cited in note 2).
11. See text accompanying notes 25-27.
12. There are, however, exceptions even within these categories. For a compelling discussion of the experience of "being black and looking white in a society which does not handle anomalies very well," see Judy Scales-Trent, *Commonalities: On Being Black and White, Different, and the Same*, 2 Yale J. L. & Feminism 305, 305 (1990).

verbal communication or some other aspect of self-presentation (for example, crossing oneself, using sign language, or expressing physical affection for one's same sex partner).[13] With respect to this second category of groups, willingness to publicly identify oneself as a group member—to make one's difference obvious, though not literally visible, to observers—may be affected by social prejudice or hostility toward the group-based characteristic. This is the phenomenon of "coerced invisibility" to which Professor Schacter refers.[14] Gays face particular challenges in making their difference apparent because of the extent—and in many contexts, the social legitimacy—of antigay prejudice. Members of all such groups, when deciding whether to make their differences known, may struggle more or less depending on the degree of stigmatization they are likely to confront in so doing.

The second type of visibility, which I will call "political visibility," arises when a person claims group membership as a central and constitutive feature of her identity. For members of many marginalized groups, political visibility does not follow automatically from literal visibility. One woman might view gender as a central influence on who she is, while another defines herself as a person who happens to be female. The connection is not automatic for gays and lesbians, but under circumstances of coerced invisibility, there is considerable overlap between literal and political visibility: the difficult decision to make group membership visible is usually a reflection of its centrality to the identity of the actor.

The third form of visibility, which I will call "programmatic visibility," arises from group members' efforts to connect their group-based identities with a particular political interest or program. The more central a group-based characteristic is in the life of a group

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13. This feature of non-visible difference has led some to argue that prejudice against such groups is a less profound problem, either because group members will not suffer it all the time or because they can avoid suffering it, by declining to verbalize or otherwise disclose their difference. See, for example, *Equality Foundation of Greater Cincinnati v. City of Cincinnati*, 54 F.3d 261, 267 (6th Cir. 1995) ("Because homosexuals are generally not identifiable 'on sight' unless they elect to be so identifiable by conduct, . . . they cannot constitute a suspect class or a quasi-suspect class because they do not [necessarily] exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group." (internal quotation marks and citations omitted)), vacated and remanded, 116 S. Ct. 2519, 135 L. Ed. 2d 1044 (1996). This argument neglects the painful burden of making constant, ongoing decisions about whether to reveal one's difference in the face of prejudice. However, confronting this argument has helped me to see the ways in which notions of difference in this society are built upon the assumption of visible, physical characteristics, and to extend my notion of "literal visibility" to comprehend groups whose members must make their differences visible, as well as those whose physical appearance automatically does this work. I am grateful to Judge Martha Craig Daughtrey for bringing this argument to my attention and encouraging me to think about its consequences.

14. See Schacter, 50 Vand. L. Rev. at 369-71 (cited in note 2).

member, the more likely he or she is to connect it with a political interest or program; however, not all such members will do so, and those who do will not do so all the time. If some straight people are made uncomfortable by the "literal" visibility of gays and lesbians, it seems to be the political, and particularly the programmatic, visibility of minority groups that triggers the anxieties of many whites. Recall Professor Pamela Karlan's interesting conclusion that it was Democratic efforts to articulate a political program connected with minority political interests—rather than their use of majority-minority districts per se—that triggered white flight to the Republicans.[15]

A "politics of presence," as I will refer to it in this Comment, can be described as a politics that seeks to foster and respond to all three forms of visibility. (It is worth noting, however, that in this view, endorsing a "politics of presence" need not entail any firm conclusions about the kinds of programmatic initiatives that should be adopted.) *Shaw v. Reno*, on the other hand, impedes all three kinds of visibility on the part of minority groups. Let me say a bit about how this occurs.

Shaw affects minority visibility in two distinct contexts: the formal legislative process, and the extended political realm of discussion and norm formation to which Professor Schacter refers. As to the formal process: *Shaw* concerned the viability of a constitutional challenge to majority-minority electoral districting, a form of districting that has made possible the election of increased numbers of minority representatives.[16] The presence of minority representatives enables literal visibility at the legislative level—it prevents legislatures from being all or virtually all white—but it also enables programmatic visibility: these representatives can pursue political initiatives that serve some conception of group interest, and contribute to a social dialogue about what group membership—theirs and others'—should entail in the political process. By authorizing a constitutional challenge to majority-minority districts, and by giving it broad scope in cases like *Miller v. Johnson*,[17] *Bush v. Vera*,[18] and *Shaw v. Hunt*,[19] the

15. Pamela S. Karlan, *Loss and Redemption: Voting Rights at the Turn of a Century*, 50 Vand. L. Rev. 291, 319 (1997) (quoting a South Carolina Democratic Party Chairman who said "if we gave them what they wanted, it would be a black party").

16. 509 U.S. at 633.

17. 115 S. Ct. 2475, 2488, 132 L. Ed. 2d 762 (1995) (holding that the courts should subject to strict scrutiny any district whose contours are "predominantly motivated" by race or where traditional race-neutral districting practices are "subordinated" to racial considerations).

18. 116 S. Ct. 1941, 1958-60, 135 L. Ed. 2d 248 (1996) (holding that race-based districting schemes must serve a compelling state interest and be narrowly tailored to achieve that interest).

Court has made it less likely that minority representatives will achieve either of these forms of visibility at the legislative level.

But additionally, by virtue of the rationale it used to subject such districting to strict scrutiny, the Court crucially affected the visibility of minority groups in the more extended political realm. The Court stated that the assumption of a connection between race and political interest that underlaid the challenged districts was an insult to minority voters,[20] partook of the same stereotyped thinking that has animated the sorry history of race discrimination and has fomented racial antagonisms. Setting up a constitutional equivalence between discrimination, on the one hand, and race-based conceptions of political interest, on the other,[21] is likely to have major consequences for the ways in which minorities are able to present themselves in those myriad social interactions that inform politics. The claim that someone is engaging in stereotyped, discriminatory thinking is a potent political conversation-stopper. When constitutional law ratifies versions of this claim that are already circulating in American political culture, it may have a range of deterrent effects. It may deter ambivalent minority group members from claiming race, at least publicly, as a salient element of their identity. It may deter ambivalent minorities and whites from making connections between race and political programs, or from supporting programs associated with the interests of a particular racial group. Such ratification may also have implications for the lives of those less ambivalent about their racial identity—and I think here of participants in the black public sphere described by Professor Regina Austin.[22] Such arguments may decrease the receptivity of those outside the black public sphere to the fruits that emerge from it, because the Court's assumptions fuel skepticism about the relation between racial identity and cultural and economic products, and tar such connections with the brush of invidious stereotyping. The Court's approach could also deter minorities and whites from pursuing the kinds of reconstitutive ideas that could transform thinking about race and other kinds

19. 116 S. Ct. 1894, 1900-02, 135 L. Ed. 2d 207 (1996) (holding that districting schemes based predominantly on race must serve "a compelling state interest" and must be "narrowly tailored to acbieve [that] compelling interest").

20. *Shaw*, 509 U.S. at 647-48.

21. One particularly insidious way in which the *Shaw* Court constructs this equivalence is to compare the geographically irregular districting at issue in *Shaw* with the creation in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), of an "uncouth 28-sided figure," designed to remove black voters from within the boundaries of the municipality. See *Shaw*, 509 U.S. at 644-45.

22. Regina Austin, *The Black Public Sphere and Mainstream Majoritarian Politics*, 50 Vand. L. Rev. 339 (1997).

of group membership in American politics. In *Shaw*, the Supreme Court did not *oppose* these forms of group erasure, the way Professor Schacter hypothesizes that it did in *Romer*. In *Shaw*, the Court *contributed* to erasure.

This judicially-fueled resistance to a politics of presence by minority groups, moreover, comes at a particularly volatile time. Critics sometimes characterize the politics of presence as a crude identity politics in which salient public goods are allocated on the basis of some compensatory group-derived formula. In fact, claims about the meaning and political consequences of group membership are in a phase of transition, brought about in part by intragroup challenges to the essentialism of early group-based arguments.[23] Proponents of a politics of presence are looking toward more complex, contingent notions of group membership, and more plural—though sometimes more broadly transformative—conceptions of how group membership might be recognized in politics and society. Professor Lani Guinier's advocacy of proportionate interest representation in voting might serve as an example of this new generation of definitional efforts.[24] But these questions are only beginning to be investigated, and this crucial exploration conld be harmfully curtailed if the connection of group membership and political interest that lies at its core is characterized by the Court as tantamount to invidious discrimination.

So what does this discouraging account suggest about Professor Schacter's more hopeful reading of *Romer*? One possibility, as Professor Schacter admits,[25] is that the Court did not necessarily intend the message she finds in its opinion. This message is, after all, quite contrary to the Court's apparent war on the politics of presence. But it is also possible to put our two views together in other, though perhaps no more soothing, ways. Perhaps the Court has embraced a minimalist position—it will establish the preconditions for literal visibility, but decline to support either political visibility or programmatic visibility in the political process. One might note, however, that

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23. Examples of such arguments in law include Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 Stan. L. Rev. 581 (1990) (critiquing race essentialism in work of leading feminist legal theorists); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Policies*, 1989 U. Chi. Legal Forum 139 (critiquing race essentialism of feminist advocacy and gender essentialism of antiracist advocacy).

24. Lani Guinier, *The Tyranny of the Majority: Fundamental Fairness in Representative Democracy* 94-118 (Free Press, 1994).

25. Schacter, 50 Vand. L. Rev. at 365 (cited in note 2).

it is not as easy to stop at literal visibility as the Court might think. If it facilitates literal visibility via *Romer*, many of those individuals who will shoulder even the reduced costs of coming out will be those who claim their sexual orientation as a central aspect of their identity. Thus the Court will ultimately foster political visibility as well. It is also possible that the Court has a more contingent view. Perhaps the extent to which the Court is willing to intervene in the political process varies from group to group. This would be a surprising constitutional theory (particularly from a Court that seems not to want to mention group membership at all). But this hypothesis seems almost plausible when Justice O'Connor states that positing gender-based differences of opinion may acknowledge women's distinct experiences,[26] but positing race-based differences of opinion are tantamount to discrimination.[27]

Whichever of these hypotheses about *Romer* turns out to be true, there is political, as well as intellectual, value in Professor Schacter's approach. Without arguing that she has divined the Court's intention, Professor Schacter offers a highly plausible interpretation of *Romer* that positions the Court as an aid to the visibility of gays and lesbians in the political sphere. This vision of the Court as enabling group visibility, coupled with an emphasis on the connections among different types of visibility, might be used to critique opinions like *Shaw* and redirect the Court toward a role where it facilitates, rather than thwarts, a politics of presence. This strategy might serve to educate a Court that, one can only hope, has not completely foreseen the political consequences of all of its recent decisions.

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26. *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1431-32, 128 L. Ed. 2d 89 (1994) (O'Connor, J., concurring).

27. *Shaw*, 509 U.S. at 646 (arguing that a race-based reapportionment plan "reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes").