

Chapter 1. Unprincipled Limitations on
Gerrymandering: The Supreme Court's Tempestuous
Use of Traditional Districting Principles

Full fathom five thy father lies;
Of his bones are coral made;
Those are pearls that were his eyes:
Nothing of him that doth fade
But doth suffer a sea-change
Into something rich and strange.
Sea-nymphs hourly ring his knell

-- The Tempest, Act I, Sc. II

1.1. *The Consequences of Judicial Fantasy: A Tempest*

Theories created in the absence of fact are fantasies, and decisions made in the absence of theory are impulses. In its latest opinions on redistricting, the Supreme Court produces both. It is a truism that judicial principles emerge from the consideration of individual cases, and we do not expect theories of representation to spring from the Court like Athena from the head of Zeus, fully-formed. After more than three decades of redistricting cases, however, the Court should be able to give a consistent answer to redistricting's central legal question: What harm does gerrymandering cause to constitutional rights or fundamental representational values, and why?

During the three-and-a-half decade plunge into the "political thicket" of districting, different Courts have attempted to shape different answers to these questions using

empirical observations of politics, the history of representation in the U.S, and implicit and explicit theories of representation. The current Court, disliking previous Courts' conclusions, has instead constructed a judicial fantasy based upon so-called "traditional districting principles" that have little to do with the realities of politics, history or representation. In this chapter, I evaluate the Court's use of traditional districting principles (t.d.p.'s) in the light of reality.

For most of its history, the Court considered redistricting a thicket too political to enter. Three decades ago the courts finally entered the political thicket, ruling in *Baker v. Carr* (1962) that redistricting was justiciable. A decade ago, the Court showed signs that it wanted to chop the thicket down, ruling in *Davis v. Bandemer* (1986) that partisan gerrymander's were actionable. Little action followed this potentially momentous decision. Just five years ago, however, the Court took its axe to the thicket in earnest: In a line of cases starting with *Shaw v. Reno* in 1993, and continuing through year in *Abrams v. Johnson* (1997), the Court has made a strong bid to outlaw what it terms "racial gerrymandering." In this attempt to eliminate gerrymandering, the Court has placed an extreme emphasis on what they term "traditional districting principles" — primarily mathematically measurable criteria such as population equality, and compactness.

This extreme emphasis threatens to change radically the redistricting process in the United States. Justice Souter, in a dissent in *Vera* in which Justices Ginsburg and Breyer joined, argued that the logic of the *Shaw* line of cases can lead only to one of two outcomes: Either "the Court could give primacy to the principle of compactness," or

radically change traditional districting practice — eliminating it or “replacing it with districting on some principle of randomness...” (*Vera* at 2009-2010).

The Court’s discovery and elevation of “traditional districting principles” raises many empirical and positive questions: Which districting principles really are “traditional”? How do we measure them? Who would benefit if traditional districting principles (t.d.p.’s) dominated the redistricting process? In the following sections, I examine the history of t.d.p.’s, their political effects, and their normative value. I then propose some ways in which the Court can extend its treatment of districting principles in order to make it more consonant with political history, science, and philosophy.

1.2. *The Historical and Judicial Basis of Traditional Districting Principles – Suffering a Sea Change*

One of the few things that is clear about the current set of redistricting decisions is that “traditional districting principles” are important — all of the recent redistricting cases agree on this point, at least. But, what are traditional districting principles? How do we know one when we see it? Why are they important? The Court’s opinions are imprecise and contradictory on such details.

1.2.1. *Out of Nowhere – Traditional Districting Principles in Shaw and its Successors*

Within the context of judicial opinions, “traditional districting principles” come from nowhere.¹ “Traditional districting principles,” as such, first appeared in the Supreme Court’s decision *Shaw v. Reno* (*Shaw I*, henceforth), and the phrase has multiplied through subsequent decisions. Symbiotically, the principles that the Supreme Court deems “traditional” have multiplied along with the phrase that refers to them.

The Court’s first mention of “traditional districting principles” appears in connection with Judge Voorhees’s lower Court dissent. In this debut, the Court attributed these principles to *UJO v. Carey*: “Chief Judge Voorhees agreed that race-conscious redistricting is not *per se* unconstitutional but dissented from *the* rest of the majority’s equal protection analysis. He read Justice White’s opinion in *UJO* to authorize race-based reapportionment only when the State employs traditional districting principles such as compactness and contiguity”(*Shaw I*).

How does the Court know that compactness and contiguity are traditional districting principles? The *UJO* opinion, in fact, did not refer to “traditional” districting principles

¹ Both a close reading of the major redistricting and malapportionment cases and a full-text search of all modern and major historical Supreme Court decisions (Infosynthesis 1998) fail to reveal any use of the phrases “traditional districting principles” or “traditional districting criteria.”

at all, but to “sound” (430 U.S. at 168) redistricting principles.² Moreover, the *UJO* court neither suggests that traditional and sound principles are the same, nor mentions contiguity as an example of either type.

Besides their brief reference to *UJO*, the Court gives no hint as to the origin of these traditional principles. They cite neither law nor history. If “traditional” principles do not come from *UJO*, as the Court implies, do they come from other precedents, from the Constitution, or from other historical sources? O’Connor, delivering the judgment in *Vera*, explicitly denies that the Constitution guarantees traditional districting principles, but neither *Vera* nor its predecessors refer to other sources. Are traditional districting criteria those that were used around the development of the Constitution, at the time of the 14th amendment, or after? Are traditional criteria those that were followed by all states, by a majority of states, or by the particular state in question? Are traditional criteria those that were historically mandated or those actually used? When traditions conflict, which should we choose? Are any traditions invalid, *a priori*? New York, for example, has traditions of malapportionment, gerrymandering, ill-compactness, and non-contiguity, stretching back from before the Constitution. Are these to be honored as “traditional districting criteria”? Our strong impulse is to answer: “surely not,” but the

² *UJO* is by no means the first case in which *sound* or *rational* districting principles are recognized. See the discussion of *Gaffney* below, and the opinion in *Gaffney* itself at 749, for a discussion of earlier cases.

Court's failure to explain where traditional districting principles come from leaves us without a legal basis for this denial.

1.2.2. *Destination Unknown – The Multiplication of Principles and their Definitions*

Although no general rule for identifying traditional districting criteria emerges from the Court's decisions, examples of individual criteria multiply throughout these cases. In *Shaw I*, the Court first identifies compactness and contiguity as traditional districting principles, then further in the opinion identifies "respect for political subdivisions" as also belonging to this august class. In *Miller*, "respect for... communities defined by actual shared interests" (excluding race) makes its debut as a traditional districting criterion, without further commentary. In *Vera*, O'Connor refers to "natural geographic boundaries" and "regularity" for the first time as distinct traditional districting criteria.³

³ The Court in *Shaw* (and repeated in *Miller*) cited *Gomillion* on the subject of the irregularity of a district plan: "In some exceptional cases, a reapportionment plan may be so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to –segregat(e)... voters- on the basis of race." Several other times in these opinions, the Court uses these terms interchangeably. In *Vera*, O'Connor appears to have discovered a distinction between "regularity" and "compactness" and treats them as separate, although related, criteria: "appellants do not deny that District 30 shows substantial disregard for the *traditional principles of compactness and regularity*" and

In *Abrams v. Johnson* (1997), the Court reveals that traditional districting principles included maintaining “district cores,” precinct boundaries, “corner districts,” and even “an urban black majority district” – at least in Georgia.

Rather than identifying traditional districting principles exhaustively or systematically describing the rules for deciding whether a principle is traditional, the court has chosen to reveal individual t.d.p.’s piecemeal. This approach leaves lower courts that are faced with plausible, but as yet unconsecrated, districting principles, unable to answer important questions: Which historical principles are important? How old does a principle have to be before it becomes “traditional?” How should lower courts weigh these against other goals of redistricting, traditional and otherwise?

Had the Court created an exhaustive list of all t.d.p.’s, lower courts and state governments would still be faced with the problem of how to assess whether a plan followed these rules. In Chapter 3, I show that even apparently straightforward theoretical principles, such as contiguity, preservation of county lines, and population equality, are subject to a variety of different practical interpretations and measurements.⁴

“Fifty percent of the district population is located in a *compact, albeit irregularly* shaped, core in south Dallas...” (emphasis added).

⁴ While compactness has received the most recent scholarly attention, other principles suffer from similar problems of definition: For example, what is “irregularity,” and how does it differ from compactness? O’Connor’s only reference to measuring irregularity cites

It is particularly difficult to measure meaningfully the most widely discussed principle, compactness. Geographic compactness has never been defined in a way that was both mathematically precise and politically meaningful. Precision in defining these criteria is not the Court's strong suit: For example, in *Abrams* the Court disparaged the ACLU's alternative plan for its resemblance to an iguana, without an attempt to further define compactness. Not including such Rorschach tests, there are dozens of different ways of measuring compactness. In Chapter 2 I show that these measures are not

Pildes & Niemi (1993), but Pildes & Niemi do not define a measure of “irregularity” per se, but instead use the term as a synonym for compactness, as did the Court in *Shaw*. What types of geographic boundaries and political subdivisions will the Court recognize as legitimate? The Court, in *Vera*, criticizes the Texas districts for splitting voter tabulation districts and in *Abrams* similarly criticizes the splitting of precincts — but voter tabulation districts are far from “traditional” in the normal sense of the word: they are artificial units created by the Census to approximate precincts (U.S. Dept. of Commerce 1992), the precincts themselves are often changed, they often do not coincide with more historical political boundaries such as those dividing counties and cities, and they are not designed to represent any communities of interest. In fact, precincts are often created solely for the administrative convenience in holding elections — often by the same state government that is responsible for redistricting.

consistent with each other in theory, and in Chapter 6 I show that they conflict in practice.⁵

1.2.3. *What are Historical Districting Principles?*

While “traditional” districting principles remain difficult to identify, the historical record does suggest a number of candidates, at least for congressional districting. In Chapter 3, “Traditional Districting Principles – Judicial Myths vs. Reality,” I delve into historical evidence, examining the congressional record surrounding districting legislation, and measuring compactness, contiguity, boundary-integrity, and

⁵ Richard Pildes claims that “various measures of compactness tend to converge at extreme cases” (Pildes 1997, 2513). Although Pildes’ claim is probably mathematically correct for most measures of compactness (i.e., it is possible to construct a bizarre shape such that multiple methods of measuring compactness give it a poor score), compactness measures can give inconsistent rankings over the vast majority of districts and can disagree significantly even over which districts to place in the bottom 10 percent of rankings. (See Chapter 2.)

Pildes argues that the role of compactness should be to identify some extreme threshold of bizarreness, where multiple measures of compactness would presumably agree. It has not generally been true that the districts rejected by the Court have met this standard of extreme bizarreness. (See Chapter 3.)

malapportionment for most decadal redistrictings since 1789. What follows in this section is a summary of those findings.

For most of the United State's existence, there were no laws that governed the creation of individual districts. In the early years of the nation's existence, congressional districts were not required at all – states could hold elections for congress at-large, if they wanted. As revealed in contemporary congressional debates, Congress first required districts to benefit political minorities in each state – to counteract the majoritarian bias inherent in at-large elections. This was the primary purpose for districts. Districting criteria were subordinate.

Until 1842, Congress required neither districts nor districting criteria. For most of the period from 1842 until 1919, contiguity was formally required. Before *Wesberry*, however, legal principles guiding the process of congressional redistricting drew little congressional debate,⁶ and were never successfully enforced.

Nevertheless, a number of empirical regularities are evident. Historical Congressional districts were, generally, contiguous, composed of entire counties, and

⁶ In contrast, Congress has more recently repeatedly and vociferously debated formal criteria for apportionment (Young 1988).

moderately malapportioned.⁷ By two plausible measures, historical districts were, on average, more compact than modern districts. As is usually the case in history, none of these regularities held absolutely. Even in the early Congresses it is easy to find districts that failed contiguity, split counties, and resembled shoestrings (if not iguanas). Higher levels of malapportionment, splits in county lines, and ill-compactness occurred regularly in postbellum cities, where concentrated populations made it difficult to justify the use of entire counties as building blocks, and redistricters split counties and other political subdivisions. Although some of these bizarre-looking districts corresponded to known historical gerrymanders, many others did not.⁸

The shape of districts changed dramatically following the Court's decision to require strict population equality. Following *Wesberry* and *Reynolds*, the number of districts splitting county lines skyrocketed (See Figure 1-1.), accompanied by decreases in the contiguity and compactness of districts. Minority-controlled districts have been blamed for the decrease in compactness in modern districts (Pildes 1997, 2513), but the

⁷ Both of the latter two regularities were probably at least partially a consequence of the limits of the census, which in general only made available to redistricters complete data aggregated at the county level.

⁸ This contradicts Timothy O'Rourke's contention that modern "bizarre" districts are radical departures from the past, and that bizarre appearance has historically indicated "dysfunctional" districts (O'Rourke 1995, 729, 738).

chronology of changes in district shapes in the U.S. suggests instead that the Court’s equal population requirements have been a driving force.

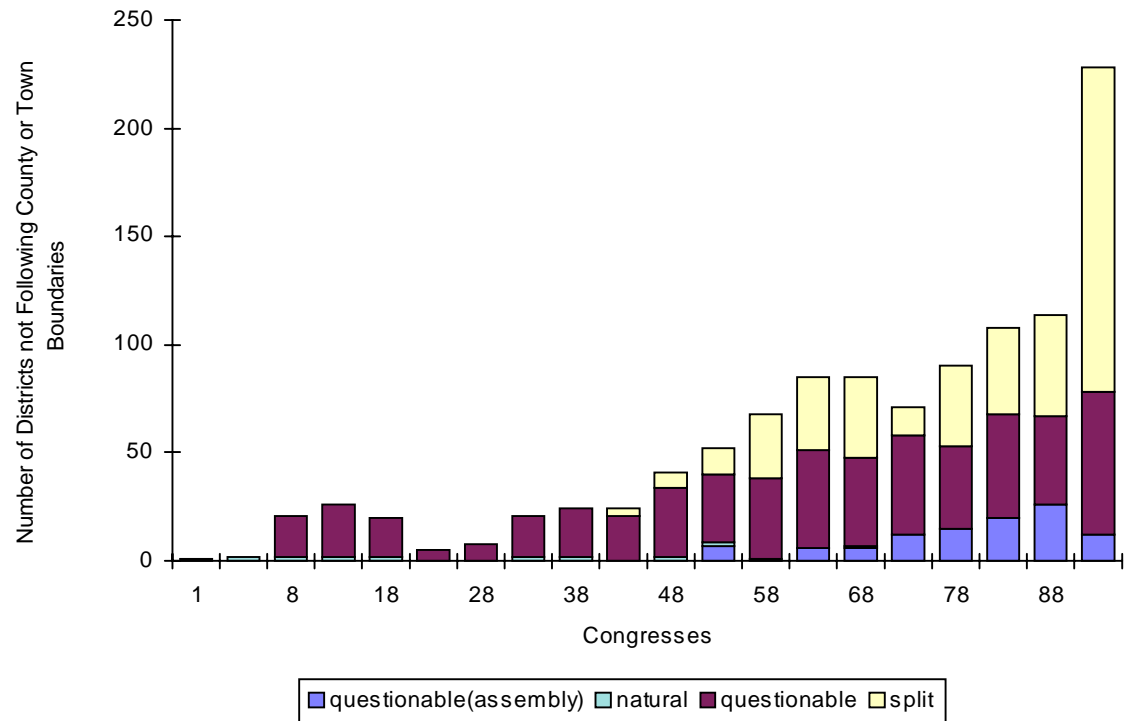


Figure 1-1. Number of districts splitting county or town boundaries by decadal redistricting. ‘Questionable’ districts split county or town lines to follow ward or assembly (“questionable assembly”) boundaries. ‘Natural’ districts split these boundaries to follow rivers or other large, permanent, natural features. The changes following *Wesberry* are shown in the final column.

(See Chapter 3.)

The Court’s choice to target minority-majority districts for violating “traditional districting principles,” is, in a historic context, doubly ironic. Ironically, one of the culprits responsible for the modern divergence from historical districting principles is the

Court itself -- the most precipitous deviations from historical districting principles were a result of the Court's decisions in *Reynolds* and *Wesberry*. By demanding that apportionment of population be unhistorically equal, the Court weakened the principles of county integrity, compactness, and contiguity. More ironically, the Court has reversed the historical status of representational and geographic principles: Methods of geographic districting were originally adopted so that underrepresented political minorities could have a greater political voice (See Chapter 3.) -- this was the central historical districting principle, and specific geographic principles, such as contiguity, were of lesser importance.

1.3. The Political Effects of Traditional Districting Principles – Much ado about nothing?

Past gerrymanders are the subject of history; current gerrymanders, the subject of politics. Do “traditional districting principles” lead to better electoral outcomes, in and of themselves? Do the “traditional districting principles” limit the damage done by gerrymandering? Do they act as signals warning us of harm?

In this section, I examine the harms with which this Court and past Courts have been concerned in redistricting decisions, and I evaluate the evidence that the use of traditional districting principles can prevent these harms. For more than three decades, the Courts have recognized that redistricting can be used to exclude voters from the political process, or to dilute their vote. In the recent set of redistricting cases, the Court

has discovered two additional harms associated with redistricting: expressive harm and racial classification.

1.3.1. Exclusion and Dilution – Direct Harms to Representation

In *Gomillion v. Lightfoot* (1960), the Court first acknowledged that the right to vote went beyond the right simply to cast a ballot and have it honestly counted. Black petitioners asserted that an act to redistrict the city of Tuskegee removed substantially all black resident voters and thereby eliminated any meaningful black participation in city elections, and the Court agreed.⁹ Shortly thereafter in *Baker v. Carr* (1962), *Wesberry v. Sanders* (1963), and *Reynolds v. Sims* (1964), the Court recognized that constitutional harm did not require effective exclusion, but could result from vote dilution: “And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.” (Justice Warren, writing for the majority in *Reynolds*.) In all of these cases, the Court recognized that a citizen’s right to vote went beyond the right to cast a ballot.

In these cases, the Court recognized both individual and group dimensions of vote dilution. In *Wesberry* and *Reynolds* cases, and many of the succeeding malapportionment cases, the Court treated malapportionment as a harm against the *individual’s* right to vote. Even in the early redistricting cases, however, the Court recognized that vote

⁹ Recent scholars have attempted to recast *Gomillion* as a racial-classification case. This is incorrect, as I explain below.

dilution could have a group dimension,¹⁰ as shown by Brennan’s majority opinion in *Fortson v. Dorsey* (1965): “It might well be that, intentionally or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate *to minimize or cancel out the voting strength of racial or political elements of the voting population*” (85 S.Ct. 501) (emphasis added). The recognition of a group-based dimension of voting dilution becomes clear in *White v. Regester* (1973) and in *UJO v. Carey* (1977): “But we have entertained (Constitutional) claims that multi-member districts are being used invidiously to cancel out or minimize the voting strength of *racial groups*... The plaintiffs’ burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question that its members had *less opportunity than did other residents in the district to participate in the political process and to elect legislators of their choice*” (93 S. Ct. 2339). (Justice White, writing for the majority in *White*, emphasis added.) Far from retreating from this theory of group-based vote dilution over time, the Court expanded the theory of dilution to non-racial groups in *Davis v. Bandemer* (1986).

¹⁰ Maveety (1991), provides a detailed a history of the expression of group and individual representation rights in early redistricting cases. (See, especially, Chapters 2–4.) Ryden (1997) provides another account. (See, especially Chapters 3 and 7.)

In any particular case, whether a group's vote has been diluted in or excluded from the political process is a matter for detailed empirical inquiry. The literature on statistically assessing minority vote dilution is large and well developed: Grofman, Handley and Niemi (1992) present an excellent summary that need not be repeated here. (Also see King, Bruce and Gelman (1995) for a recently developed sophisticated statistical method of evaluating dilution claims.)

No such literature exists, however, relating traditional (or historical) districting criteria to vote exclusion, vote dilution, or to their prevention. There are many claims in print that traditional districting principles provide a neutral way of limiting gerrymanders, and hence limit the dilution of targeted groups, but little evidence.

The evidence that exists to document the effects of t.d.p.'s shows that the effects of these principles are not as straightforward as such proponents suggest: Preserving county lines, requiring contiguity and requiring geographic compactness clearly can disadvantage dispersed minorities. My statistical analysis of the partisan effects of t.d.p.'s in four decades of congressional redistricting, in Chapter 6, also suggest that these principles have negligible efficacy in preventing partisan gerrymanders.

Furthermore, computer simulations, in Chapter 5, suggest that traditional districting principles, even in ideal circumstances, should not be expected to be neutral. As well as disadvantaging non-compact minorities, compactness standards can disadvantage minority parties that have a geographically concentrated base. Clearly, the Court's enthusiasm for t.d.p.'s cannot be justified by their efficacy against vote dilution.

1.3.2. *New, Improved, Theories of Harm?*

The *Shaw* line of cases, and their emphasis on t.d.p.'s, cannot be explained using the logic of traditional vote dilution and exclusion cases. To use the Court's own words: "Shaw recognized a claim -analytically distinct- from a vote dilution claim" (from the majority opinion in *Miller*).¹¹

This was not, and could not, be a vote dilution case: As in *UJO*, the white population did not suffer vote dilution because "there was no fencing out the white population from participation in the political processes of the county, and the plan did not minimize or unfairly cancel out white voting strength... even if voting in the county occurred strictly according to race, whites would not be underrepresented relative to their share of the population"¹² (97 S.Ct. 1010).

¹¹ Karlan describes the Court as abandoning representation harms, and creating a new harm of "wrongful districting" (Karlan 1996 288,290).

¹² Indeed, it is hard to imagine Justice O'Connor affirming an argument that white voting strength had been *diluted* in *Shaw* after she wrote, in her concurrence in *Bandemer*, arguing that the Court should not recognize vote dilution against "dominant groups." O'Connor emphasized that vote dilution should only be recognized when it affected racial minorities, and then only in the most extreme cases: "As a matter of past history and present reality, there is a direct and immediate relationship between the racial minority's

Two conflicting theories of harm permeate the Supreme Court's recent redistricting cases. In the "expressive-harm" cases, best exemplified by *Vera*, violations of t.d.p.'s are a necessary and integral part of the harm caused by racial gerrymanders. Compliance with traditional districting principles is not merely one piece in a body of circumstantial evidence, but is also a threshold requirement for strict scrutiny. We can avoid strict scrutiny altogether, even if we are motivated by race, if we pay reasonable¹³ attention to

group voting strength in a particular community and the individual rights of its members to vote and to participate in the political process...Even so, the individual's right is infringed only if the racial minority group can prove that it has essentially been shut out of the political process.'"

It is just as hard to imagine Justices Thomas and Scalia acknowledging that vote dilution had occurred in these cases, when they went so far as to deny its existence in *Holder* (See below in this section.).

¹³ The Court does not require that districts be drawn strictly to follow these criteria: "We thus reject, as impossibly stringent, the District Court's view of the narrow tailoring requirement, 'that a district must have the least possible amount of irregularity in shape, making allowances for traditional districting criteria.'" Furthermore, "A § 2 district that is reasonably compact and regular, taking into account traditional districting principles such as maintaining communities of interest and traditional boundaries, may pass strict scrutiny without having to defeat rival compact districts designed by plaintiffs' experts in endless

t.d.p.’s: “For strict scrutiny to apply, the plaintiffs must prove that other, *legitimate districting principles* were -subordinated- to race...” (emphasis added). O’Connor, delivering the judgment of the court, stresses this point repeatedly: “Under our cases, the States retain a flexibility that federal courts enforcing Section 2 lack, both insofar as they *may avoid strict scrutiny altogether* by respecting their own traditional districting principles.” Furthermore, she goes on: “We do not hold that any one of these factors is independently sufficient to require strict scrutiny. The Constitution does not mandate regularity of district shape... and *the neglect of traditional districting criteria is merely necessary, not sufficient*” (116 S. Ct. 1953, emphasis added).

For the majority in *Shaw I*, reapportionment was an area where “appearances do matter.” In the majority’s view, districts that separate people by race, while disregarding political and geographic boundaries, reinforce the perception that members of the same race necessarily share political views. These districts send the “pernicious” message to politicians that they should only represent the majority voting-group in the district. In *Shaw*, violation of “traditional districting principles” is an integral part of the harm perceived by the Court — violation of these principles *actively* causes harm by sending a pernicious message to politicians and to voters.

Although not explicitly named in *Shaw I*, in *Vera*, the court acknowledges that it is relying on a new type of harm: “we also know that the nature of the *expressive harms*

‘beauty contests.’ “

with which we are dealing.” (emphasis added)¹⁴ Pildes & Niemi outline (or define) this theory in “Expressive Harms, ‘Bizarre Districts,’ and Voting Rights: Evaluating Election-District Appearances After *Shaw*,” (Pildes and Niemi 1993). As Pildes & Niemi write in their much-cited article: “Expressive harms focus on social perceptions, public understandings, and messages; they involve the government’s symbolic endorsement of certain values in ways not obviously tied to any discrete, individualized wrongs.” In this theory, ugly districts¹⁵ send a symbolic message — without ugliness, there is no such message.

The opinions in *Miller*, *Shaw II*, and *Abrams* parallel those in *Shaw I* and *Vera* in denouncing ugly districts, but differ from them in reasoning. Unlike in *Shaw I* and *Vera*,

¹⁴ It is difficult to determine to what extent the Court formulated a theory of expressive harm in *Shaw I* and to what extent it took the theory from Pildes and Niemi’s article itself. In any case, Justice O’Connor, in *Vera*, both frequently cites Pildes and Niemi’s article on other topics and adopts their expressive harm terminology when she discusses harm; so it is clear that the theory of expressive harm has now become part of this jurisprudence.

¹⁵ Presumably, other violations of traditional districting principles send the same sort of symbolic message. Although this presumption seems unlikely that not having “corner districts” or a black majority district in Atlanta, the Court gives no separate theory of harm for t.d.p.’s other than compactness.

“traditional districting principles” are no longer an integral part of the harm caused by redistricting. Instead, violations of these principles act as circumstantial evidence of racial intent. For example, in *Shaw II*, which was delivered on the same day as *Vera*, Rehnquist disavows the role of t.d.p.’s that O’Connor affirms. Implicitly rejecting the view that traditional districting principles are relevant because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, Rehnquist states bizarre district lines “may constitute persuasive *circumstantial evidence* that race for its own sake, and not other districting principles, was the legislature’s dominant and controlling rationale in drawing its district lines.”¹⁶

In contrast to *Shaw I* and *Vera*, the operating principle in *Miller* and in *Shaw II* seems to be not expressive harm but racial classification. Two authors attempt to explain the Court’s logic: In “Affirmative Racial Gerrymandering: Fair Representation for Minorities or a Dangerous Recognition of Group Rights?” Katharine Inglis Butler (1995) argues that the court is applying a principle banning racial-classification. James Blumstein makes a similar argument in “Racial Gerrymandering and Vote Dilution:

¹⁶ Nor can adherence to these principles necessarily defeat a claim of racial gerrymandering, as the Court states that bizarreness is not necessary to raise issues of equal protection: “Our observation in *Shaw* of the consequences of racial stereotyping was not meant to suggest that a district must be bizarre on its face before there is a Constitutional violation...”

Shaw v. Reno in Doctrinal Context”¹⁷ (1995). In essence, they both argue that under the 15th amendment voters have a right not to be subjected to racial classifications. Voters in this case are not harmed by any electoral or legislative outcome, but by the government’s act of classification.

Both Blumstein and Butler view this theory of racial classification as, in Butler’s words, “established constitutional doctrine.” Each has a somewhat different story about how the doctrine was established.¹⁸ Butler claims that this principle comes originally from *Gomillion* and to some extent from *Brown v. Board of Education* (1954). Blumstein

¹⁷ These articles were written after *Shaw*, but prior to *Miller*. Following Miller, Blumstein continued to hold that: “From an analytical perspective, Shaw and Miller are not voting cases, but suspect classification cases. They are not wrongful districting cases, they are racial gerrymander cases - racial classification cases” (Blumstein 1996, 505). Butler, as well, holds to the racial classification theory in analyzing *Miller*: “Racial classification was the gravamen of the complaint, the Court said. Bizarre shape is merely one means to determine that race was the basis of the districting plan” (Butler 1996, 216).

¹⁸ Note that, although Blumstein and Butler attempt to account for the genesis of the racial classification standard the origin of the “predominant factor” requirement remains a mystery. Isacharoff (1996), Karlan (1996) and Kousser (1998, ch. 8) dissect this requirement, and so I shall not elaborate upon it here.

traces this principle from *Brown* and more recently from *Northern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville* (1993).

Under *Miller* and *Shaw II*, redistricting plans are subject to strict scrutiny when race is the predominant motive in their creation. Under *Vera*, subordination of traditional districting criteria is necessary to trigger strict scrutiny.

Under a racial-classification standard of harm, violation of “traditional districting principles” can act, at most, to overcome a defense that a plan is narrowly tailored for a compelling state interest, or as circumstantial evidence of an impermissible racial classification. (See *Butler*, section H, and *Blumstein* 4A, respectively.) But both *Shaw I* and *Vera* treat traditional districting principles as more than mere circumstantial evidence, and both refer not to the government’s act of classification, but to the message sent to voters and representatives, as shown by these passages from the majority’s opinion in *Shaw I* and judgment in *Vera* (respectively): “Significant deviations from traditional districting principles, such as the bizarre shape and noncompactness demonstrated by the districts here, cause Constitutional harm *insofar as they convey the message* that political identity is, or should be, predominantly racial” (116 S.Ct. 1962, emphasis added). “For example, the bizarre shaping of Districts 18 and 29, cutting across pre-existing precinct lines and other natural or traditional divisions, *is not merely evidentially significant; it is part of the Constitutional problem*” (116 S.Ct. 1962, emphasis added).

1.3.3. *Theories in Search of Evidence*

Is harm needed for racial classification cases? Proponents of the “racial classification” theory of harm wish to argue that no evidence of harm is needed in such cases — beyond the evidence of a classification itself. Despite this avowed preference for metaphysical harm, an examination of the precedents which are supposed to support the racial classification theory gives the lie to such arguments — these precedents are based on demonstrated actual harm, not a metaphysical classification.

Proponents of these theories of harm lay claim, of course, to legal precedent. Blumstein and Butler recast *Gomillion* as a case of racial classification. In addition, Blumstein attempts to reinterpret *Brown v. Board*.¹⁹

¹⁹ Butler also traces the lineage of *Shaw I* to *City of Jacksonville*, a case hardly older than *Shaw* itself. Even in *City of Jacksonville*, however, in this case the Court does not recognize a harm based upon pure racial classification — instead the Court recognizes a harm to an outcome, the ability to compete: “the injury in fact is the inability to compete on an equal footing.” Evaluating equal opportunity is more difficult in the political arena, because both the action and outcomes of voting have group dimensions — but the principle that each person should have an *equal opportunity* to participate in the electoral process is nonetheless central to the entire line of minority vote dilution cases. In distinguishing itself from these cases, however, *Shaw* distinguishes its theory of harm from *City of Jacksonville*.

Butler correctly stated that while the black voters removed from Tuskegee were deprived of the municipal vote, “so was every other person who resided outside the city boundaries.” She then concluded that the basis of their claim could not have been a right to vote in municipal elections. Finally, she concluded that the harm was one of classification or segregation.

This argument, however, belongs not to the majority opinion, but to Justice Whittaker’s concurrence. Unlike Butler, Justice Whittaker recognized the Courts reasoning, but disagreed with it: “It seems to me that the decision should not be rested on the Fifteenth Amendment... inasmuch as no one has the right to vote in a political division.” His conclusion is the same as hers ““fencing Negro citizens out of” Division A and into Division B is an unlawful segregation of citizens by race in violation of the Equal Protection Clause” (81 S.Ct. 131-2). The Tuskegee case, however, was not one of racial sorting, as Butler claims, but a real case of segregation, as the city was nearly all-white.

The reasoning used by Frankfurter, for the majority in 1960, bears little resemblance to the reasoning in *Miller* and other modern racial-classification cases. *Gomillion*’s operating principle was not an abstract racial classification but the denial of the effective right to vote: “such (legislative) power, extensive though it is, is met and overcome by the Fifteenth Amendment to the Constitution of the United States, which forbids a State from passing any law which *deprives a citizen of his vote* because of his race” (81 S.Ct. 129, emphasis added).

Contrary to Whittaker's and Butler's argument, the majority decision was not based on the belief that everyone in Alabama had an unconditional right to vote in Tuskegee. Instead, *Gomillion* recognized the principle that voters could be harmed, not just by removing the ballot, but by reducing its effectiveness. Furthermore, it was firmly grounded in clear and concrete evidence of just such a harm: "The essential inevitable effect of this redefinition of Tuskegee's boundaries is to remove from the city all save four or five of its 400 Negro voters while not removing a single white voter or residence."

Like *Gomillion*, *Brown* relied not on an appeal to symbolism, but was firmly rooted in evidence of psychological and educational harm.²⁰ *Brown* did not raise the symbolism of classification to a harm in itself, but instead declared that the *result* of separate schools was inequality: "Segregation of white and colored children has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law... Separate educational facilities are inherently unequal." Both the plaintiff's arguments in *Brown* and the Court's decision were based, rightly or wrongly, on the Court's view of the *impact* of segregation. In the cases leading up to *Brown*, in *Brown* itself, and in the cases immediately following, plaintiffs presented, and courts weighed, evidence that

²⁰ And as Karlan and Levinson point out, taking race into account in redistricting bears a close resemblance to the race conscious pupil assignment used by the courts to dismantle segregated schools, following *Brown* (Karlan and Levinson 1996).

segregated education was neither materially nor psychologically equal. (Lively , 1992: Ch. 4,5)

Racial classification can have enormous practical consequences, but in this current line of cases the Court has again embraced symbolism over substance. Rather than evaluating the political effects of racial classification, in reality they are expressing a distaste for politics *tainted* by race.²¹

²¹ This abhorrence for race-taint is most clear in the Court's treatment of race-as-proxy, in *Vera*, where the Court announced that strict scrutiny was to be applied to any use of racial variables in redistricting, even if these variables were used only for partisan purposes: "But to the extent that race is used as a proxy for political characteristics, a racial stereotype requiring strict scrutiny is in operation. Cf. *Powers v. Ohio*, 499 U. S. 400, 410 (1991) (-Race cannot be a proxy for determining juror bias or competence)" (116 S. Ct., 1996).

In censuring the use of race-as-a proxy in districting, the Court relied on *Powers v. Ohio* (1991), which declared that race cannot be a proxy for determining juror bias or competence. Although the principle stated is the same in both cases, the nature of the classification has changed, because the context of redistricting is fundamentally different from the context of a jury trial.

In *Powers*, the court claims that the use of race to classify to qualify or select jurors harms their dignity and the integrity of the courts. In redistricting, unlike in jury trials, the use of race as a proxy for partisan voting is distanced both from individuals and from the courts, and hence harms neither.

In jury trials, the *Powers* opinion holds, the Court forbids the use of race as a proxy to guard against discriminatory purposes, and especially to guard against subverting earlier neutral procedures in the trial: “Racial discrimination in the selection of jurors in the context of an individual trial violates these same prohibitions. A State “may not draw up its jury lists pursuant to neutral procedures but then resort to discrimination at `other stages in the selection process.’”⁴⁴ In *Vera*, the Court specifies that the use of race is forbidden only when it is predominant over other purpose, yet the use of race *as a proxy* is absolutely forbidden. If the ban against race as a proxy is meant as prophylaxis, why would it apply when the use of race is not itself forbidden?

Most important, in *Powers*, the Court’s central argument is that race cannot be used as a proxy for determining juror bias or competence because the relationship is a stereotype only; in reality race has nothing to do with juror competence or bias: “A *person’s race simply ‘is unrelated to his fitness as a juror.’*” (emphasis added). In redistricting, however, the situation is entirely opposite: race is used as a proxy for predicting partisan votes precisely where race and politics are in reality most closely

What, exactly, causes “expressive harms,” and how? Advocates of “expressive harm” argue that vote dilution is not the only meaningful harm that can follow from redistricting, and that redistricting can cause harm by altering the perceptions of voters and representatives. If redistricting does cause changes in perceptions, we should be able to find evidence of this in expressed opinions and behavior.

If district appearance sends messages to voters and representatives, how are these messages transmitted, and how can we detect their effects? How do voters receive this message, when most voters are certainly unaware of the shape of their districts? Why must voters be in bizarre-shaped districts to receive this message?²²

related. If the relationship were merely a stereotype, there would be no reason for partisan gerrymanders to use racial variables in their design.

None of the arguments that are used to ban race as a proxy from jury cases succeeds in redistricting cases. As with harms of classification, all requirements that there be likely harmful consequences are dispensed with. Gone are the severe, direct, individuated, fundamental harms that occur in jury cases. Gone are any requirement that plaintiffs show that they have been representationally injured. The only identifiable harm left is the symbolic taint of the classification itself.

²² The Court’s treatment of standing further muddies this issue. The Court has declared the *Shaw* line of cases distinct from vote dilution and exclusion cases; in line with

this distinction, the rules of standing are much simplified. As the Court declared in *Hays* and reaffirmed in *Vera*, individuals inside a racially gerrymandered, majority-minority district have the right to challenge those district lines; those outside do not: “(w)here a plaintiff resides in a racially gerrymandered district, the plaintiff has been denied equal treatment because of the legislature’s reliance on racial criteria, and therefore has standing to challenge the legislature’s actions” (115 S. Ct. 2436).

Standing and harm are supposed to be connected intimately. In *Lujan v. Defenders of Wildlife* (1992), upon which the Court relies in *Hays*, the Court lists three elements of “the irreducible constitutional minimum of standing,” the first of which is that “the plaintiff must have suffered an ‘injury in fact’ -- an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.” For an argument against the court’s current approach to standing see Sunstein (1993).

Yet the clear and simple rule of standing announced by the Court appears not at all connected with the opaque and complicated theories of harm that it uses in its decisions. On their face, expressive harms are public harms — they are messages sent by the government and perceived by the voting public. Why do only those voters in majority-minority districts have standing? If expressive harm stems from *symbolic* government action, all voters should have standing — the government symbolically represents all voters when it endorses the use of race in the political process, even if such endorsement

The Court claims that bizarre districts lead to the balkanization of the electorate — causing voters to polarize along racial lines. Where is the evidence of this? What else serves as evidence that district shape harms voters? Why would representatives have an especially strong reaction to district shape — when as professional politicians they already know the extent to which redistricting has manipulated electoral outcomes? How can we detect whether representatives have changed their behavior because of bizarre district shape? Suppose that we have evidence both that a redistricting plan causes psychological harm, and prevents the political harm of vote dilution — how do we weigh these two harms?

only results in one district where race has been predominant, or in no minority opportunity districts at all. If expressive harm stems from *actual perception* of government action, there is no justification for the assumption that voters and politicians are unable to perceive the racial motivation of a government action simply because they were not placed in a majority-minority district. Others have commented upon the abandonment of doctrines of standing in these cases: see Kousser (1995) at 640-642, Issacharoff and Goldstein (Issacharoff and Goldstein 1996), and Karlan (1994) at 278-9. Pildes & Niemi (1993) themselves recognize a fundamental tension between expressive harm and individualized theories of standing which the Court has still to confront.

Neither these authors nor the Court have formulated an explanation of individuated expressive harms. Pildes (1997, 2568) and Ely (1997, 590) take the opposite tack, and they argue that every voter in the state should have had standing in these cases.

Unlike televised flag burning, for example, redistricting is technical, low profile, and lacks drama. If expressive harms are rooted in symbolism, why is redistricting of particular symbolic importance? Does harm occur whenever voters believe a district was racially motivated -- even, as Pildes and Niemi (Pildes and Niemi 1993, 193) argue, if these beliefs are wrong? If we measure expressive harm by the offense of actual voters, we are led to the perverse conclusion that “ignorance is bliss” for all concerned.

If district shapes are harmful because they have a pernicious effect on legislators, causing them to single-mindedly represent only the majority coalition in their district - what evidence is there of this behavior? Would Justice O’Connor be surprised to learn that much work in political science has long been based on the assumption that *all* representatives act primarily with a view to pleasing the majority of their constituents, and hence getting reelected?²³ (Downs 1957; Mayhew 1971)

If some individuals have been placed in a racially gerrymandered, majority-minority district because of race, many others have been excluded from that district, and hence placed in adjoining districts for the very same reason. Theories of racial classification raise equally troubling questions. Why do majority-minority districts engender harmful “racial classification,” when adjoining white districts do not? Are the subjects of

²³ In addition, as Kousser (1995) says, the argument that irregular districts cause representatives to over-represent minority interests contradicts the argument that such interests are illusory stereotypes. The Court cannot have it both ways.

classification individuals or groups? If individuals are subject to classification, how are individuals classified when the state uses only aggregate data? If instead the harm is that a group is subjected to classification, does not this classification occur as soon as racial data is introduced into the redistricting process — whether or not that data is used to draw any minority district? Under the Court's current theory of racial classification, and until the Court requires concrete evidence of harm, there seems to be no reason to exclude anyone from having standing, when a state uses any racial data at any point in the districting process.

Why does the Court's decisions raise so many questions? Here, at least, the answer is straightforward: Lacking a consistent theoretical framework, historical precedent, and any evidence of political harm, the Court decisions are necessarily unanchored -- bound to raise more questions than they answer.

Where is the evidence of harm in these cases? Both the racial classification theory and the expressive harm theory should logically expand the types of evidence relevant to redistricting cases. Before the use of these theories, plaintiffs could not win a case without evidence of vote dilution; now, the court recognizes harms from racial classification and from pernicious messages as well. Logically, we should expect to see plaintiffs present to the court a broad variety of evidence for such harms. Instead, we see that plaintiffs have not even bothered to refute contrary evidence offered by the defendants. Is there any evidence that redistricting causes such harms?

Although the research community has only recently begun to search for connections between redistricting and harms other than vote-dilution, current research suggests that district shape does not have a large effect on the behavior of elected representatives. Both the classic research of political science (Fenno 1979; Mayhew 1971) and current research (Cameron, Epstein and O'Halloran 1996; Lublin 1997) show that the political behavior of representatives is strongly determined by the constituents of the district. This leaves comparatively little room for bizarre shape, or other factors, in general, to have an intrinsic effect on the behavior of representatives.

In these specific cases, plaintiffs provide little evidence to suggest that the redistrictings in question cause psychological damage, send pernicious messages, or have caused any measurable harm due to racial classification; nor does the Court discuss such evidence. In fact, as Kousser points out, the evidence suggests that minority opportunity districts in North Carolina and Texas reduced racial polarization in voting (Kousser 1995, 648).

In Chapter 6, "Do Traditional Districting Principles Matter," I attempt to directly measure the effects of district shape, as well as other t.d.p.'s on voting behavior. I use district shape, election, and opinion poll data for four separate elections spanning three decades. To my knowledge, this is the first study of its kind.

I find little evidence to support the theory that bizarre districts cause psychological harms: There is little evidence that the compactness of districts affects electoral

outcomes. There is no evidence that compactness affects voters' trust in government, or their opinions about their representative.

I do find evidence that compactness may affect turnout: This bears further investigation, but may be simply a result of incumbent gerrymandering. Moreover, even if ill-compactness directly causes turnout to decrease, this effect is hardly so dramatic to trump all claims of vote dilution.

I also find evidence that compactness can affect the voting behavior of the representative. The effect is weak, but is significant for Republican representatives. Some forms of ill-compactness, are, as opponents argue associated with more extreme voting behavior, but other forms of compactness have just the opposite effect. So it is imperative for the court rely on evidence and analysis of effects, rather than simple assumptions that ill-compact districts cause extreme behavior.

It is still imaginable that redistricting does result in some previously undiscovered harm, and empirical investigation into this issue continues, as it should. Unless and until we discover evidence that these harms are pervasive, the Court should, at least, demand evidence of harm from plaintiffs.

1.4. *Lessons from Political Philosophy – Nothing Comes from Nothing*

Whether we should regard the effects of redistricting as justiciable harms, or simply as the rough and tumble of politics depends, in large part, on our theories of political

representation. Similarly, in the history of redistricting cases, it has been difficult to separate explanations of why gerrymanders should be prevented from theories of political philosophy: If the 14th amendment guarantees “fair and effective” representation, how can we protect this guarantee without a theory of representation? If history informs us that districts have displayed regularity in shape and line, how are we to decide whether this regularity is incidental or integral to the purpose of redistricting? If an analysis of politics suggest that rules for redistricting help or hinder groups, how are we to decide if such effects represent illegitimate bias in the process, or simply the spoils of victory? Justice Frankfurter expressed this point eloquently, in his dissent in *Baker v. Carr* (369 U. S. 186, 300):

Talk of “debasement” or “dilution” is circular talk. One cannot speak of “debasement” or “dilution” of the value of a vote until there is first defined a standard of reference as to what a vote should be worth. What is actually asked of the Court is to choose among competing bases of representation — ultimately, really, among competing theories of political philosophy.

In *Colgrove*, preceding *Baker*, Justice Frankfurter had prescribed a cure consistent with the malady: “The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress.”

The majorities in *Shaw*, *Vera* and *Miller* are not willing to leave issues of fairness to Congress and the states, but neither are they prepared to accept what political

philosophers have had to say about representation. Instead, they invent their own theories of harm.

In their approach to political theory, Justices Thomas and Scalia are most extreme, and least consistent — denying the relevance of political theory while espousing a point of view based solely upon it. In *Holder v. Hall* (1994), declaring “Stare decisis is not an inexorable command,” they propose discarding judicial precedent and Congress’s choice of political theory, while pretending to hold no political theory at all. They urge the Court to abjure all consideration of vote dilution because, in their view, like Frankfurter’s, any decisions in this area are inherently matters of political philosophy, and thus unfit for judicial consideration:

In short, there are undoubtedly an infinite number of theories of effective suffrage, representation, and the proper apportionment of political power in a representative democracy that could be drawn upon to answer the questions posed in *Allen*. See generally, Pitkin, [*The Meaning of Representation*], supra. I do not pretend to have provided the most sophisticated account of the various possibilities; but such matters of political theory are beyond the ordinary sphere of federal judges. And that is precisely the point. The matters the Court has set out to resolve in vote dilution cases are questions of political philosophy, not questions of law. As such, they are not readily subjected to any judicially manageable standards that can guide courts in attempting to select between competing theories.

Unlike Frankfurter, who urged, consistent with his abjuration of political theory, that the Courts leave the standard of fairness up to the legislature. Thomas and Scalia urge that Congressional will, as embodied in the V.R.A.,²⁴ be overthrown, and wish to substitute for it their own theory — the theory that voting equality is necessarily defined solely by the act of casting a ballot and having it counted. (Guinier 1994)²⁵ These modern justices do not abjure theory, but abuse it in two fundamental ways. First, they mistake their own political preferences for agnosticism. Second, they conflate the absence of a single theory of representation with the presence of infinite theories of representation. While Thomas and Scalia misuse political theory, the Court in *Vera* and in *Shaw I* merely ignore it by confusing substantive political representation with symbolic, non-political representation.

Do questions of vote dilution require the Court to choose from among an “infinite” number of theories of political philosophy? Are the Court’s other decisions about voting

²⁴ Parker (1990) provides a thorough discussion of the history of the Voting Rights Act, the circumstances that led up to it and the intent of Congress in passing it and its amendments. His conclusions are quite contrary to those of Thomas and Scalia.

²⁵ Guinier argues correctly, in my view, that Thomas’s opinion in *Holder* is theory-laden. She then proceeds to argue that representation is inherently group-based. For the purposes of my argument, however, the question of whether redistricting is inherently or exclusively group-based need not be settled.

rights and redistricting free from such heady philosophical considerations? Does modern or historical political philosophy offer any guidance?

Zagarri, whose book, *The Politics of Size* (Zagarri 1987), is an in-depth analysis of the development of representation in the United States, offers insight into the theories of representation embodied in the Constitution: “The Constitution embodied the principles of both corporate and proportional apportionment, spatial and demographic theories of representation.”²⁶ (149) Although there was a tension between the Anti-Federalists, who believed in representation based on geographic communities, and the Federalists who believed in representation on the basis of population, both groups shared some ideas. Both groups rejected the British, Burkean, idea of virtual representation, the idea that representation was purely a matter of having one’s interests looked after (18).

Moreover, both groups agreed that representation required control over the composition and decisions of the legislature. According to Zagarri (39), advocates of corporate representation argued, to use John Adams’ words that the legislature should be

²⁶ Butler’s claim, however, that American states should not provide interest-group representation because states retain a geographic system (Butler 1996, 360) turns history on its head. States have a tradition of geographic *because*, historically, interest-groups were geographically based. It is the representation of interest-groups, not geography for its own sake, that is at the heart of the American tradition of geographic representation.

“a miniature and exact portrait of the people at large. It should think, feel, reason and act like them.” (Adams 1776)

Noted Federalists have also recorded their view of representation. Hamilton’s and Madison’s writings in the *Federalist Papers* demonstrate that the idea that representatives would and should be guided by their constituents’ opinions and interests was current at the time of the founding of the republic. Hamilton writes in Federalist 35:

Is it not natural that a man who is a candidate for the favor of the people, and who is dependent on the suffrages of his fellow-citizens for the continuance of his public honors, should take care to inform himself of their dispositions and inclinations, and should be willing to allow them their proper degree of influence upon his conduct? This dependence, and the necessity of being bound himself, and his posterity, by the laws to which he gives his assent, are the true, and they are the strong chords of sympathy between the representative and the constituent.

And in Federalist 78: “It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their WILL to that of their constituents.”

Historically, the Constitution does not embody one single theory of representation — but it does embody the concept that substantive representation is paramount. Voting is

not enough. Neither is having one's interests "looked out for." Representation requires that voters be able to shape the legislature and its decisions.

Political philosophy offers us guidance as well. Taking the historical strands of representation theory and weaving them together, Hannah Pitkin, upon whose work Thomas and Scalia claim to rely, demonstrates that there are many different definitions of political representation. Thomas and Scalia abuse this fact when they conclude from it that all definitions are equal, and hence none are valuable. To the contrary, Pitkin identifies and develops, a core theory of representation that encompasses its many meanings. This core is widely recognized today.

Pitkin explains that different theories of representation have different implications for the types of actions that are valuable (and conversely the types of harm that are possible), and vice-versa. Under *authorization* views of representation, like Hobbes's, representation simply means that the representative's decisions are binding upon the represented. (Pitkin 1967, Chapter 3) Under this theory, access to the ballot is irrelevant because as long as the laws that legislators make are binding upon all people, all people are represented. There can be no exclusion from the political process, because such a harm simply does not exist. Other harms to representation, such as malapportionment and minority vote dilution, are only cognizable under certain theories of representation. If, for example, we instead adopt Burke's theory of *virtual representation*, voters can be

excluded from the political process, but malapportionment is irrelevant (Pitkin, Chapter 4).²⁷

In fact, not all theories of representation deserve equal treatment — there is a range of theories that are supported by political thought at the time of the creation of the Constitution, by modern political scholarship, and by past precedent. As we have seen

²⁷ Cain (1990) extends this point, to *individualist*-formalist definitions of representation. If we adopt such definitions, voters are represented equally if and only if all voters are treated uniformly and each vote bears equal weight in determining the results of the election — under this theory malapportionment does affect equality, but minority vote dilution cannot, by definition, exist. Cain uses the term “formalistic” rather than “individualist-formalist” to refer to these types of theories. I use the latter term for two reasons. First, I use it to distinguish these theories from Pitkin’s “formalistic” theories — Cain’s “formalism” refers to the use of formal mathematics to describe representation, whereas Pitkin’s formalism refers to the substance of the relationship between representative and electorate. Second, while I agree with Cain’s point that minority vote dilution is excluded by some mathematical theories of representation, I think it is important to note group theories of representation are also quite compatible with mathematical formalism, as demonstrated by group-based formal measures of representation such as “power indices.” (See Ordeshook 1986 , Section 10.6 for an introduction.)

above, Thomas and Scalia throw up their hands at what they claim is an “infinite number” of theories of representation, citing Pitkin’s *The Concept of Representation* as evidence of the diversity of theories. In doing so, they not only ignore the particular theories of representation embodied in the Constitution, but also miss Pitkin’s central argument, which is that the fundamental principles of political representation can be identified, within bounds: (Pitkin 1967, 209)

(Political) representation here means acting in the interest of the represented, in a manner responsive to them. The representative must act independently; his action must involve discretion and judgment; he must be the one who acts. The represented must also be (conceived as) capable of independent action and judgment, not merely being taken care of. And, despite the resulting potential for conflict between representative and represented about what is to be done, that conflict must not normally take place. The representative must act in such a way that there is no conflict, or if it occurs an explanation is called for. He must not be found persistently at odds with the wishes of the represented without good reasons in terms of their interests, without a good explanation of why their wishes are not in accord with their interests.

Modern democratic theorists have come to a similar conclusion — democratic representation is not satisfied merely by voting, but requires substantive control of

leaders by voters. In the conclusion of a comprehensive survey of theories of democracy, David Held summarizes the requirements for a system to be fully democratic. In essence, democracy requires that all competent adult members be able to understand and participate in the collective decision making process, and that they be able to control both the subjects and the substantive outcome of that process. (Held 1987)

The preeminent modern democratic theorist Robert Dahl expressed the same idea succinctly, if less precisely: “democratic theory is concerned with processes by which ordinary citizens exert a relatively high degree of control over leaders;” (Dahl 1956, 3) More recently, Dahl made the point that that representative government is not merely procedural (Dahl 1989, 175), but substantive:

Nor is the right to self-government a right to a “merely formal process,” for the democratic process is neither “merely process” nor “merely formal.” The democratic process is not “merely process,” because it is also an important kind of distributive justice.

Rather than misreading Pitkin, the Court should perhaps read Dahl; in its rush to eliminate race from the *procedures* of representation, it has neglected the substance of representation.

Thomas and Scalia’s complaint of an infinite number of representational theories, is, to borrow Frankfurter’s words in *Colgrove*: “A hypothetical claim resting on abstract assumptions... made the basis for affording illusory relief for a particular evil even though it foreshadows deeper and more pervasive difficulties in consequence.” Although

writers on representation have many differences, there is a core to representation theory. First, political representation requires that constituents be able to exercise control over their representatives — the Court’s complaint that representatives might pay *too* much attention to the constituents in their district is misguided. Second, political representation is not primarily concerned with symbols, but with outcomes; in the context of modern and constitutional political theory alike, the things that matter most are who gets elected and what the legislature does.

1.5. Sound Districting Principles— History, Politics and Philosophy

The Court, in *Shaw*, starts in its ill-starred course by transmuting the “sound” principles in *UJO* to the “traditional” principles of *Shaw*. Whether the principles used by the Court are traditional is a matter of history, and whether they are sound is a matter of reason and politics. Neither history nor politics supports the Court’s current use of t.d.p.’s.

Historically, when Congress first required each state to draw district lines for the House of Representatives, its purpose was to expand representation by moderating the majoritarian bias that was a result of widespread at-large elections. (See Section 2.3, also Chapter 3.) Sound districting principles stem from the historical and theoretical purpose of redistricting — representation.

There are a large number of candidates for sound redistricting principles (See Lijphart (1989) for a survey.), although few are universally accepted. What is important is that these principles be judged against the benchmark of representational values.

Court cases before *Shaw* recognized the fundamental representational purpose of redistricting, and the role of sound principles. In contrast to the current Court's use of "traditional districting principles," sound redistricting principles were valued insofar as they contributed to political fairness. This principle of fairness is aptly summarized in *Geffen v. Cummings* (1973), where the Court allowed deviations in population that contributed to a more balanced partisan districting plan: "The very essence of districting is to produce a different —a more 'politically fair'— result than would be reached with elections at large..." (93 S. Ct. 2321 at 2329). This principle remains, even in much later cases -- in *Davis v. Bandemer* (1986), which explicitly addressed partisan gerrymandering, the Court emphasized this once again: "The very essence of districting is to produce a different — a more 'politically fair' — result than would be reached with elections at large, in which the winning party would take 100% of the legislative seats" (106 S. Ct. 2797, at 2808).

Historically, the court has recognized that legislatures are best suited to manage the political process of redistricting and its representational implications. (Kilgore 1997, 1306-7) The freedom to play political "games" is intertwined with the responsibility to manage this process. The Court's role before *Shaw* has been, and should be, to ensure that minority players are not excluded from playing, and that the athletic field is not too uneven.

In fact, remnants of the purpose of districting remain in *Vera*. In the opinion, O'Connor recognizes that states have legitimate interests in districting in order to change

partisan balance, support communities of interest, protect incumbents, create representational proportionality, and remedy discrimination:

- “We have recognized incumbency protection, at least in the limited form of avoiding contests between incumbent(s), as a legitimate state goal” (116 S. Ct. 1954).
- “For example, a finding by a district court that district lines were drawn in part on the basis of evidence (other than racial data) of where communities of interest existed might weaken a plaintiff’s claim that race predominated in the drawing of district lines Cf.post, at 6 (Souter, J., dissenting) (recognizing the legitimate role of communities of interest in our system of representative democracy)” (116 S. Ct. 1954)
- “ A State’s interest in remedying discrimination is compelling when two conditions are satisfied. First, the discrimination that the State seeks to remedy must be specific, identified discrimination; second, the State must have had a ‘strong basis in evidence’ to conclude that remedial action was necessary, ‘before it embarks’” (116 S. Ct. 1962).

Justice O’Connor states that redistricting is not simply an exercise in following mechanistic principles – it is not a “ beauty contest.”²⁸ The judgment in *Vera* explicitly states that district planners do not have to maximize compactness, even for the narrow

²⁸ This distinguishes the role of redistricting principles in *Vera* from that advocated by some proponents of these principles (Polsby and Popper 1991; Stern 1974), who have argued that districts should be created by maximizing formal criteria such as compactness, districts.

tailoring requirement of strict scrutiny — there is still room for representational purposes in creating districts: “...Rather, we adhere to our longstanding recognition of the importance in our federal system of each State's sovereign interest in implementing its redistricting plan” (116 S. Ct. 1960).

This deference to the State's sovereign rings hollow, however, when one considers that the Court has put traditional districting principles and non-representational harms above representational values. History, philosophy, and politics provide three lessons on redistricting. The lesson of history is that redistricting is *traditionally* concerned with representation; other historical features of districts were of secondary importance. The lesson of philosophy is that representation is, at heart, about the rights of constituents to choose representatives and legislative policy — within the context of redistricting, “expressive” harms and racial classifications should be important only where they intersect these rights. Finally, the lesson of politics is that, to the best of our knowledge, violations of traditional districting principles are essentially harmless.