The trial of Socrates contains a mother lode of insights about the meaning of subversive speech in our political culture. Stephen Morris’ erudite article1 employs an imaginative thought-experiment to explore analogies between the threat to the Athenian political order posed by Socrates’ expansion of the public forum and the modern threat created by our own government’s willing abdication of the potential public forum made possible by communication technologies to privatized markets. I tend to focus on a different aspect of the subversive speech issue, however, because my attention has been dominated not by the important challenges of new technology but by old, abiding questions concerning the legacy of African slavery in American national identity. Specifically, in recent years most of my voting rights practice has involved defending majority-black districts approved by earlier court orders against challenges based on the new “colorblind” jurisprudence of Shaw v. Reno, 509 U.S. 630 (1993), and its progeny.2 The five-member Shaw majority tells us that its constitutional project is, “[t]o play an important role in defining the political identity of the American voter.”3 The danger these Justices perceive is that “[s]ignificant 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.”4 Reading The Apology of Socrates and Morris’ thoughtful essay, it occurred to

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1 Stephen R. Morris, Socratic Perspectives on American Constitutionalism, 1 STAN. AGORA: J. LEGAL PERSP. 1 (2000).

2 Miller v. Johnson, 515 U.S. 900 (1995) (holding that redistricting plans are presumptively unconstitutional if race is the “predominant factor” determining the shape of the districts); Shaw v. Hunt, 517 U.S. 899 (1996) (“Shaw II”) (finding standing to bring suit for those who lived in the allegedly gerrymandered district but not to those who lived elsewhere unless they provided evidence that they were assigned to their district on the basis of race); Bush v. Vera, 517 U.S. 952 (1996) (finding unconstitutional three irregularly shaped Texas districts deemed to have been drawn on the basis of race); Abrams v. Johnson, 521 U.S. 74 (1997) (finding a federal district court’s remedial redistricting plan, which included only one majority-black district, constitutional because earlier plans including two majority-black districts were not based on “traditional and neutral districting principles”); Hunt v. Cormartie, 526 U.S. 541 (1999) (holding that summary judgment in favor of a redistricting plan is inappropriate even when the plan is passed by a state legislature following a district court order).


4 Id. at 980.
me that the four Shaw dissenters and those like me who question both the normative content of the Shaw majority’s project and its underlying justiciability have overlooked the potential relevance of the First Amendment jurisprudence dealing with subversive speech.

For the purposes of his thought-experiment, Morris postulates that Socrates’ conviction would be upheld under the currently prevailing standard of Brandenburg v. Ohio: “the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” That is, Morris supposes that an appellate court would uphold the finding of fact by the Athenian jurors that Socrates’ advocacy was intended to produce imminent action by rebellious oligarchs “to overthrow the democracy.” The facts thus conceded, Morris can proceed to his main point of interest, whether Socrates’ peripatetic discourses with ordinary citizens were carried on in the public forum, even though the Athenian tradition limited public fora to the Assembly and the law courts.

First Amendment case law supports the proposition that, at least in some circumstances, even advocacy that provokes imminent lawless conduct by either supporters or opponents of the speaker is protected if it takes place in a public forum. This provides Morris an interesting opening to criticize the commercialization of television broadcast media and the Internet and the resulting loss of a valuable public forum. My interest lies more with what makes the content of political speech subversive and why the Supreme Court varies in its application of related standards of free speech. For example, in some contexts the court views its role as a protector of constitutional freedoms when scrutinizing the dangerous conduct being advocated, while in other, closely related contexts the Court takes the opposite tack and demands that participants in legislative forums show compelling reasons why their otherwise lawful redefinition of electoral districts should not be suppressed based solely on allegations that they convey a subversive message.

The First Amendment subversive speech and Shaw cases share two crucial characteristics:

1. In contrast to almost every other kind of judicial controversy, both sets of cases address alleged wrongs that are victimless, in the sense that the primary danger the law seeks to redress or to avert is not injury to

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5 I do not share completely the normative vision of many of my trusted colleagues (which also may be closer to the vision of the Shaw dissenters) that voting rights laws will be deemed to have succeeded when “excluded minorities become physically and politically integrated into the dominant society [and we have realized] the romantic ‘dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity’ . . . .” Pamela S. Karlan, Symposium: Reflections on City of Boerne v. Flores: Two Section Twos and Two Section Fives: Voting Rights and Remedies after Flores, 39 Wm. and Mary L. Rev. 725, 741 (1998) (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 505 (1989)).

My own vision is better described as a legal regime in which individuals enjoy equal protection of the law for their distinct and historically contingent cultures, even those which are defined in racial or ancestral terms, and a political regime in which less populous or powerful cultures are not systematically subordinated to the dominant society. In the terms of market liberalism, equal opportunity would mean whatever principled conditions and compromises have been provisionally negotiated within a republican demos composed of such fully contextualized and equally respectful citizens.


7 Morris, supra note 1, at 30.

8 Id. at 32–39.

9 Id. at 36 (citing Terminiello v. City of Chicago, 337 U.S. 1 (1949); Edwards v. South Carolina, 372 U.S. 229 (1963); Cox v. Louisiana, 379 U.S. 536 (1965); Gregory v. City of Chicago, 394 U.S. 111 (1969)).
any particular person but to the authority of the state itself and to the collective sense of unity which is thought necessary to legitimate that authority.

2. The predominant threat to legitimate authority in both lines of cases, in one way or another, is conflict provoked by the presence in American society of racial or ethnic communities, African Americans in particular.

Of course, in most controversies involving subversive speech the legislature has been the aggressor on behalf of the national interest. The Sedition Act of 1798, the centerpiece of free speech controversy in the Founders’ era, was designed more to defend the nation-building objectives of the Federalists against the challenge of Jefferson’s anti-Federalists than to protect the reputations of President Adams, his government or the Congress from “false, scandalous and malicious” criticism. Recent scholarship concludes that John Marshall subordinated his free speech views to his federalist vision for the new nation when he participated in drafting the Minority Report which opposed the Virginia Resolutions denouncing the Sedition Act. Before the Civil War, state legislatures in both the South and the North enacted a number of laws aimed at prohibiting abolitionist propaganda, and Congress imposed on itself a notorious ban against abolitionist petitions and debate. These attempts to suppress public attacks on the institution of slavery were justified by “perceived needs to protect public safety and preserve the Union.”

The first cracks in judicial deference to legislative suppression of subversive speech appeared when Justice Holmes alluded to a “clear and present danger” principle in Schenck v. United States, where he wrote for a unanimous Court affirming convictions under the World War I Espionage Act, and when he emphasized the need of a “present danger of immediate evil,” this time dissenting (with Justice Brandeis) from another Espionage Act conviction in Abrams v. United States. Holmes insisted, however, that his

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12 Curtis, supra note 10, at 786. The threat of disunity extended beyond the government to the Democratic Party:

These events came at a sensitive time for the then dominant national Democratic Party. Andrew Jackson’s Presidency was drawing to a close, and Martin Van Buren of New York was his hand-picked successor. The slavery issue threatened to disrupt the national Democratic coalition by driving a wedge between its Northern and Southern Wings. Martin Van Buren, the first Northern candidate of Jefferson’s party, particularly needed to reassure his Southern supporters. The Van Buren press accused Southern pro-slavery “Nullifiers” and Northern Whigs of exacerbating the issue in order to disrupt the Democratic North-South coalition and to throw the election into the House of Representatives. They also accused Southern “nullifiers” of acting in implicit concert with abolitionists to agitate the slavery issue in order to produce a united Southern party. This in turn would lead to disunion and civil war.

Id. at 801–2 (footnotes omitted).

13 Schenck v. United States, 249 U.S. 47, 52 (1919) (holding that the circumstances in which speech is uttered must be considered in determining whether its restriction is constitutionally permissible).

14 250 U.S. 616, 628 (1919) (Holmes, J., dissenting).
views in *Schenck* and *Abrams* were consistent, and he expressed no doubt that the government had the constitutional power to “punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils . . . .” Those evils included a threat of “immediate interference with the lawful and pressing purposes of the law” serious enough to warrant Congress exercising its power “to save the country.” For example, the exercise of governmental power to suppress subversive speech was more justifiable in wartime than it was in time of peace. This is because reinforcing the conception in the popular mind of the nation as a “moral unit” is especially important when the democratic republic wages war, and Holmes had no trouble upholding Congress’ power to outlaw pamphlets circulated to draftees which advocated “insubordination.”

Even *Brandenburg*, which restored and arguably strengthened the prosecution’s burden of proving that subversive speech presents imminent danger to society, struck down Ohio’s criminal syndicalism statute, not because advocacy of terrorism in the cause of political reform is always, absent actual injury to particular victims, too abstract and generalized to be actionable, but because the statute did not adequately distinguish “mere advocacy . . . from incitement to imminent lawless action.” Justice Douglas wanted a much stronger standard of protected political speech. He quoted Justice Holmes’ observation that “[e]very idea is an incitement . . . . The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker’s enthusiasm for the result.” Douglas would have done away with the clear-and-present-danger test altogether. He would have made speech immune from prosecution unless it was so “brigaded with action [that] they are indeed inseparable and a prosecution can be launched for the overt acts actually caused.” This strong version of free political speech, however, has never gained the support of anything close to a Court majority. Instead, legitimating state action outlawing incitement to imminent subversive action, the Court has left itself wiggle room sufficient to bend to strong public sentiments. Indeed, a historicist analysis of the Supreme Court’s First Amendment jurisprudence could reach “[a] cynical, though nonetheless apparently accurate,” conclusion “that political dissidents become entitled to significant constitutional protection only when they cease to pose a serious threat to the status quo—that is, communists and Ku Kluxers in the second half of the 1960s, but not, respectively, in the 1950s

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15 *Id.* at 627.
16 *Id.* at 630.
17 See *id.* at 627–28. See also *Schenck v. United States*, 249 U.S. 47, at 52 (noting that “[w]hen a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.”)
19 See *Schenck v. United States*, 249 U.S. 47, 49.
21 *Id.* at 452 (Douglas, J., concurring) (quoting *Gitlow v. People of New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting)).
22 See *id.* at 454 (Douglas, J., concurring).
23 *Id.* at 456–57 (Douglas, J., concurring) (citation omitted).
or 1920s.”

The First Amendment jurisprudence permits the government, with or without evidence that particular persons actually have been injured, to suppress incitement to imminent action deemed sufficiently threatening to political stability. Likewise, the Shaw cases have authorized individual litigants to suppress legislative redistricting the Court deems a threat to political stability, without requiring the plaintiffs to demonstrate that they have been harmed personally. The private plaintiffs need only show that district boundaries have been drawn in a way that classifies them predominantly by race. They have no burden of proving that their right to vote thereby has been denied or abridged, that their voting power has been diluted, or that they personally have been disadvantaged in any way.

The Shaw injury is said to have the nature of an “expressive harm,” which merely “threaten[s]” racial stereotyping, stigmatization, or “representational harms.” Plaintiffs are not required to demonstrate that they have actually been stigmatized, that the district’s design actually has incited racial hostility, or that the candidate elected actually provides better representation for one racial group of constituents than for another. As I have argued elsewhere:

the perceived victim of the Shaw-Miller constitutional tort is not any one or more voters but the whole American nation. The current majority is concerned that state legislatures are passing laws that will “separate,” “segregate,” and “balkanize” the American people “by carving electorates into racial blocs.” The “obligation and the aspiration” to guard against such political divisiveness, they say, is one “all members of the polity share . . . [a]s a Nation. . . .”

Districts that aggregate members of racial or ethnic communities are presented in the Shaw cases as sufficiently threatening to the legitimacy of democratic structures to justify suppression of victimless political speech in the legislature itself. Similarly, there has usually been a strong racial or ethnic component to

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26 This is essentially a standing issue, which is thoroughly explored in Pam Karlan’s and Sam Issacharoff’s rejoinder to John Hart Ely’s essay about Shaw in the Harvard Law Review. See Samuel Issacharoff & Pamela S. Karlan, Standing and Misunderstanding in Voting Rights Law, 111 HARV. L. REV. 2276 (1998), responding to John Hart Ely, Standing to Challenge Pro-Minority Gerrymanders, 111 HARV. L. REV. 576 (1997) (arguing that whites placed in a majority-minority district have standing to challenge the redistricting plan).


29 See id. at 745.


31 This is the central criticism of my Dred Scott article:

The Shaw majority is attempting to restrict the freedom of American citizens to define themselves
speech found sufficiently subversive to warrant suppression by the government. The divisive issue of slavery was not far beneath the surface of the controversy over the Sedition Act of 1798. The Republicans opposed the law on states’ rights rather than free speech grounds, and Jefferson’s narrow victory over Adams in the 1800 Presidential campaign, traditionally viewed as popular repudiation of the Federalist effort to suppress political speech, was made possible only by the Three-Fifths Clause of Article I, § 2 of the United States Constitution, which, through Article II, § 1, allocated the decisive number of electors to states where slaves did not vote. Fear of the politically destabilizing power of the slavery issue, which provoked the ante-bellum suppression of abolitionist advocacy even in Congress, proved to be fully justified, and that same fear continues to be one of slavery’s legacies in American democracy. Opposition to the American entry in World War I seemed most subversive when it was coupled with appeals to Old Country loyalties among Eastern and Southern European immigrants. The five defendants in Abrams v. United States, for example, were not just anarchists and socialists but Russian Jews who circulated articles in Yiddish targeting “[w]orkers, Russian emigrants, you who had the least belief in the honesty of our government. . . .” The wave of criminal syndicalism laws that swept through the states between the two World Wars received strongest public and judicial support when they were used to prosecute politically radical aliens and met the greatest disfavor when organizers of a more nativist-oriented labor movement were hauled into court.

politically in only one crucial respect: their representatives may not bargain for electoral districts which “convey the message that political identity is, or should be, predominantly racial.” As constitutional history, this definition of national identity is worse than disingenuous; as constitutional change, it serves only to perpetuate the American nation’s historical refusal to negotiate with the descendants of slaves.


32 The Republican margin of victory was only eight electoral votes, “and if the southern states had not had the representational bonus awarded by the Constitution for their slave population, the Republicans would have lost.” ROBERT A. BURT, THE CONSTITUTION IN CONFLICT 110-11 (1992); accord, Paul Finkelman, Cultural Speech and Political Speech in Historical Perspective, 79 B.U. L. REV. 717, 722–23, n.25 (1999) (reviewing DAVID M. RABAN, FREE SPEECH IN ITS FORGOTTEN YEARS (1997)) citing as a prime example of this historical misconception Akhil Reed Amar’s description: “[A] popular majority adjudicated the First Amendment question in the election of 1800 by throwing out the haughty and aristocratic rascals who tried to shield themselves from popular criticism.” Akhil Reed Amar, The Bill of Rights as a Constitution, 100 YALE L.J. 1131, 1150 (1991)).

33 See generally Curtis, supra note 10 for more information on the suppression of abolitionist advocacy.

34 Aside from broad societal issues like reparations and affirmative action, slavery is a ubiquitous threat to the legitimacy of the American constitutional regime itself and to reliance on constitutional interpretation of any sort, whether or not one is an originalist. The Constitution still contains its original four endorsements of slavery as an institution: the Three-Fifths Clause, U.S. CONST. art. I, § 2, cl. 3; protection of the slave trade before 1808, U.S. CONST. art. I, § 9; the Fugitive Slave Clause, U.S. CONST. art. IV, § 2, cl. 3; and (usually overlooked) in the Guaranty Clause a requirement that the federal government suppress slave revolts upon application by the states. See Curtis, supra note 10, at 791. An even more subversive thought that our national memory tries to suppress is the fact that the unique structure of American federalism is the product perhaps more of the Machiavellian compact between slave and free states than it is the expression of lofty republican ideals traceable to Montesquieu and Locke.


36 Klarman, supra note 24, at 35–41.
However, the most frequently recurring subject of subversive speech in the Supreme Court’s twentieth century First Amendment jurisprudence has been the federal government’s efforts to contain conflict between blacks and whites—both old stock Anglos and immigrant newcomers—and to enforce the prevailing official position about the status of descendants of slaves in American society. *Brandenburg v. Ohio* was one of several cases in which the Court assessed the temper of the times in deciding whether to protect or to uphold suppression of Ku Klux Klan activity.\(^{37}\) And the Court showed its resolve to enforce the equal rights-based dismantlement of Jim Crow during the Civil Rights Era with a series of decisions upholding the free speech and assembly rights of African-American protesters and organizations.\(^{38}\)

During its century-long reign, de jure racial segregation was never challenged in court on the ground that it threatened national unity and political stability or that it otherwise was subversive. The lonely warning of the first Justice Harlan that segregation could someday undermine the republic\(^ {39}\) was not recalled in *Brown*, which focused instead on perceived harms suffered by black school children. However, when the pursuit of equal rights by African Americans eventually produced electoral districts in which they enjoyed voter majorities, the *Shaw* Court discovered not counter-injuries suffered by white voters but dangers to national unity and democratic legitimacy. And yet, if there is something subversive about majority-black (and majority-Latino) districts, as the *Shaw* majority believes, it remains unexplored and unexplained.

The juridical history of subversive speech seems to offer a sensible starting point for an inquiry about the danger to the nation perceived by *Shaw*. That history starts at the beginning of the American national experience and probes deep into the psyche of the only modern democracy in the world founded on the

\(^{37}\) *See id.* at 36. Klarman notes: “[T]he Court protected the free expression rights of the Ku Klux Klan after the defeat of massive resistance to *Brown*, not before, and certainly not during the Klan’s heyday in the 1920s when the organization’s membership peaked at over four million.” *See also id.* at n.149: *Compare* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (protecting racial hate speech) and *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (protecting Klan member’s speech) *with* Beauharnais v. Illinois, 343 U.S. 250 (1952) (holding distribution of white supremacist literature unprotected) *and* New York ex rel. Bryant v. Zimmerman, 278 U.S. 63 (1928) (upholding mandatory disclosure of Klan membership lists).

\(^{38}\) *See* Klarman, *supra* note 24, at 42 (citations omitted).

\(^{39}\) It is always worth recalling at least some of what Justice Harlan said:

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty. But in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens . . . .

In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott Case. . . .

Sixty millions of whites are in no danger from the presence here of eight millions of blacks. The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens? That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana.

institution of slavery. The rationalization of slavery by the Founding generation, the fear of slave revolts or other forms of retribution by blacks, the association of black rule with anarchy in the minds of whites, the traditional unifying power of white supremacy—these are some of the obvious themes which come to mind immediately. They need to be developed with more care than this article can give them. But there is one First Amendment case, *Herndon v. Lowry*, 301 U.S. 242 (1937), which *Shaw’s* concern about subversiveness should remind us of, and which has startling parallels with the trial of Socrates.

Angelo Herndon was “a negro and a member of the Communist Party of the U.S.A.” who in 1932 was “sent from Kentucky to Atlanta, Ga., as a paid organizer for the party.”\(^40\) He was tried and convicted of violating the Georgia insurrection law, which, like the law Socrates was tried under, prescribed the death penalty for “attempt[ing] to induce others to join in combined resistance to the lawful authority of the state with intent to deny, to defeat, and to overthrow such authority by open force, violent means, and unlawful acts . . . .”\(^41\)

In a five-to-four decision, the U.S. Supreme Court reversed the denial of Herndon’s habeas petition on the ground that the Georgia statute had such a “vague and indeterminate” standard of guilt as to violate Herndon’s rights to free speech and assembly under the Due Process Clause.\(^42\) However, the Court made it clear that, had the statute been more carefully drafted, and the evidence been stronger, the Constitution would not have protected everything Herndon did in Atlanta. To survive constitutional challenge such a statute could not sweep into its “dragnet”\(^43\) mere recruitment of membership in the Communist Party, notwithstanding the Party’s well-publicized advocacy of an international revolution of the proletariat. The documents in Herndon’s possession which advocated the organization of white and black workers to demand increased social security and unemployment benefits were also insufficient evidence.\(^44\) The Georgia statutes could constitutionally outlaw advocacy of “forcible subversion of the lawful authority of Georgia,”\(^45\) especially the distribution of “a booklet entitled ‘The Communist Position on the Negro Question,’ on the cover of which appears a map of the United States having a dark belt across certain Southern states and the phrase ‘Self-Determination for the Black Belt.’”\(^46\) The booklet advocated “bring[ing] together into one governmental unit all districts of the South, where the majority of the settled population consists of negroes.”\(^47\) Land owned by white farmers would be confiscated and turned over to blacks, and a new state would be created, which would provide “complete and unlimited right of the negro majority to exercise governmental authority in the entire territory of the Black Belt, as well as to decide upon the relations


\(^{42}\) *Id.* at 263–64.

\(^{43}\) *Id.* at 263.

\(^{44}\) See *Id.* at 261.

\(^{45}\) *Id.* at 250.

\(^{46}\) *Id.* at 250–51.

\(^{47}\) *Id.* at 251.
between their territory and other nations, particularly the United States.”

The only thing that saved Herndon from going to prison for inciting insurrection to create a majority-black state was “the absence of proof that he brought the unlawful aims to [his black audience’s] notice, that he approved them, or that the fantastic program they envisaged was conceived of by anyone as more than an ultimate ideal.” This was a narrow escape; the four dissenters did not think the danger to the state posed by Angelo Herndon’s program was fantastic at all:

The purpose and probable effect of such literature, when under consideration in a prosecution like that against Herndon, are to be tested and determined with appropriate regard to the capacity and circumstances of those who are sought to be influenced. In this instance the literature is largely directed to a people whose past and present circumstances would lead them to give unusual credence to its inflaming and inciting features.

In other words, the Court was one vote shy of agreeing with Georgia that otherwise protected Communist agitation crossed the line when it urged African Americans to repudiate the legitimate authority of white rule.

The similarities of this case with the trial of Socrates are striking. Just as Socrates was charged with “impiety,” and accused of “corrupt[ing] the young,” so was Angelo Herndon charged with insurrection, for recruiting members of the Young Communist League, “the champion not only of the young white workers but especially of the doubly oppressed negro young workers.” Just as Socrates was charged with “failing to believe in the gods in whom the city believes,” (which in Athenian democracy was indistinguishable from renouncing the authority of the state), so too was Herndon indicted for opposing “the established order or advocating a change in that order. . . .” In the Georgia of the 1930s, there was no principle more crucial to the entire social order than maintaining the subordinate status of blacks. Indeed, the insurrection statute under which Angelo Herndon was prosecuted descended directly from the Draconian laws enacted by most Southern legislatures in the 1830s to guard against slave insurrections like Nat Turner’s Rebellion. Teaching blacks, slave or free, to read or write, permitting blacks to congregate

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48 Id.

49 The jury recommended mercy, so he was not sentenced to death. See Kendall Thomas, Rouge et Noir Reread: A Popular Constitutional History of the Angelo Herndon Case, 65 S. Cal. L. Rev. 2599, 2632, 2645 (1992).


51 Id. at 276 (Van Devanter, J., dissenting).

52 Morris, supra note 1, at 26.


54 See Morris, supra note 1, at n.138–40.


56 See Thomas, supra note 49, at 2641 (“At base, the legal question of Herndon’s guilt or innocence could not be separated from either the cultural meanings attached to the idea of race or from the political relations of white supremacy and black subordination of which those cultural meanings were both a cause and consequence.”)

57 See id. at 2631–32; Knight v. Alabama, 787 F.Supp. 1030, 1067 (N.D. Ala. 1991), aff’d in relevant part, 14 F.3d 1534 (11th Cir. 1994).
in more than small numbers, or saying anything opposing the slave ideology were subject to criminal penalties. The original 1833 Georgia insurrection statute states: “Exciting an insurrection or revolt of slaves, or any attempt by writing, speaking, or otherwise, to excite an insurrection or revolt of slaves, shall be punished with death.” A century later, fear of violence at the hands of vengeful blacks could still evoke terrifying images in the minds of whites.

But violent revolt was not as real and immediate a danger in the rhetoric of Herndon’s prosecutors as was the call for black rule. Advocacy of self-determination for African Americans through the creation of a majority-black state, by whatever means, was the most subversive speech in the eyes of all the participants in the Herndon trial and appeal, including the courts. I have argued at length elsewhere that the prospect of the descendants of slaves entering into the constitutional compact as co-rulers of the American republic with whites challenges our foundational understanding of freedom, and that this unresolved problem is both the most demeaning and least discussed vestige of slavery. The Shaw majority thinks the intentional creation of majority-black election districts are subversive of national unity and the alleged colorblind political identity of the American voter. It has formed this opinion without any analysis of its correctness as a matter of fact or of its desirability as a normative aspiration.

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58 Kendall Thomas, supra note 49, at 2631–32 (footnote omitted).

59 See, e.g., id. at 2644 (“The prosecutor predictably played on the jurors’ racial solidarity, arguing that they were duty bound as white men to crush Herndon’s plan to ‘attack homes, take our property, rape our women, and murder our children.’

60 See Herndon v. Lowry, 301 U.S. 242, 250–51; Thomas, supra note 49, at 2638, 2601 (quoting Zechariah Chafee, Jr., Free Speech in the United States 392 (1941): “Herndon’s real crime, argued Chafee, was that he sought ‘to put the Fifteenth Amendment into wider effect.’ Those in power in Georgia, Chafee ironically observed, were ‘afraid, not that the United States Constitution would be overthrown, but that it might be enforced.’

61 See Blacksher, Dred Scott, supra note 30, at 676.

62 See Shaw v. Reno, 509 U.S. 630, at 646 (1993). The Court noted:

A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. The message that such districting sends to elected representatives is equally pernicious. When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole. This is altogether antithetical to our system of representative democracy.

Id. at 646.

63 In immigration cases, the Court has emphatically rejected any judicial role in defining the political identities of American communities:

The exclusion of aliens from basic governmental processes is not a deficiency in the democratic system but a necessary consequence of the community’s process of political self-definition. Self-government, whether direct or through representatives, begins by defining the scope of the community of the governed and thus of the governors as well: Aliens are by definition those outside of this community. Judicial incursions in this area may interfere with those aspects of democratic self-government that are most essential to it.

SUBVERSIVE SPEECH

It has not attempted to reconcile its demand for colorblindness as the price for political inclusion with the trans-generational quest of African Americans for self-determination on the same basis as other Americans, whose ancestors either ratified the constitutional compact or consented to it through voluntary immigration. It has not explained how judicial imposition of an historical, individualistic political identity can satisfy the longing of African Americans to become the authors, not simply the bearers, of equal constitutional rights. Nor has it shown, strictly as a matter of realpolitik, that its creation of a new, “analytically distinct” constitutional constraint on the political process actually will work to strengthen rather than to weaken national unity. As for subjugated indigenous peoples, the recent case of Rice v. Cayetano, raises the question whether Native Hawaiian ancestral claims to self-determination may also be submerged by a new, expansive and historical interpretation of the term race in the Fifteenth Amendment, the one place where it appears in the text of the Constitution. In the absence of reflective discussion, debate and consensus, the Shaw rule risks acquiring the appearance, if not the actual purpose, of an imperial decree.

This is not to deny that all Americans have a protectible stake in preventing the process of legislative redistricting from degenerating into a clear and present danger to the bonds of political unity and the authority of the government. Libertarians who criticize the Supreme Court for enforcing the First Amendment’s guarantee of free speech only “as long as it ultimately contributed to social unity” must respond to the counter-charge that there is “an inescapable tradeoff between individual autonomy and social solidarity.” In the subversive speech cases the Court has evaluated the First Amendment costs not of lonely individuals railing against the established order but of groups who were organizing to undermine it. Criminal convictions have been reversed mostly in those instances where a majority of the Court, taking into account the collective character of the objectionable speech, was unimpressed with prosecutors’ charges that the political stability required to sustain democratic discourse truly was in danger. There was no chance, for example, that a Black Belt State was about to become a reality because of Angelo Herndon’s efforts, and such an idea was not the realistic goal of Southern black leaders, but rather a Marxist illusion embraced by a few. The all-white government of Georgia, and the dissenting justices, were really concerned with damping criticism that the structures of government are unjust. Popular dissension, not revolution, was what they wanted to suppress. Just like the Hamiltonian Federalists who enacted the Sedition Act, the State of Georgia feared that Herndon and his comrades might be “undermining the very foundation of legitimate authority.”

The same can be said with respect to the Shaw majority’s project of suppressing the ability of American voters to identify themselves politically primarily in racial or ethnic terms. The Court’s references to balkanization and segregation have no credible relation to the actual creation of separate states or governments or even subdivisions of governments. The African-American and Latino politicians who

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65 120 S.Ct. 1044 (2000).
66 Haskell, supra note 18, at 811 (quoting David Rabban, Free Speech In Its Forgotten Years 238 (1997)).
67 Id.
68 Burt, supra note 32, at 109.
negotiated irregularly shaped Congressional districts in North Carolina, Texas, Georgia and Louisiana for the purpose of aggregating their ethnic constituencies were pursuing a strategy aimed at inclusion in the sovereign communities of the states and nation, not secession. The five Shaw justices were worried about political clamor within the single sovereign, and of the passions they feared would be stirred when citizens confront each other openly in their ethnic personalities. In this sense, they thought that too much democracy is threatening to the established order.

I would also argue that the Shaw Court’s effort to brand racial districting as subversive reflects the fear of having its own institutional authority undermined, a fear that also animated the Federalists who passed the Sedition Act. Specifically, the Shaw majority could well have been afraid, subconsciously or not, that consenting to the free-wheeling racial bargaining over electoral districts that followed the 1990 census and four years earlier in the case of Thornburg v. Gingles,69 could be used by the proponents of affirmative action in employment, school admissions and other scarce resources cases not just to counteract, but perhaps to delegitimize the colorblind agenda of the Rehnquist Court. After all, legislators openly engaged in democratic bargaining between ethnically identified constituencies—and, more importantly, the citizens who elected them—might be expected at some point to question the legitimacy of Supreme Court rulings that bar the negotiation of compromises with respect to controversies over racial preferences in hiring, scholarships and the like.

This fear for its own authority may explain why the Court took the extraordinary step of injecting subversive speech justifications into redistricting decisions where concrete individual harms could not be identified. It had no choice but to consider subversiveness in the First Amendment cases, because that was the sole justification for stripping particular persons of their life and liberty. But the Shaw Court acted gratuitously when it decided to require legislatures purposefully constructing majority-black and majority-Latino electoral districts to demonstrate that they were not engaging in politically subversive speech. This is another reason, not expressly formulated as such by the dissenters, why the Shaw plaintiffs should have been dismissed for lack of standing, or on the ground of political question nonjusticiability. In short, the Supreme Court exceeded its constitutional authority to regulate the political process, as it is not the appropriate institution in the American constitutional republic to provide answers to legitimate questions about the wisdom and justice of creating electoral districts designed to aggregate voters based on their ethnicity.

I realize that this assertion propels me into the debate over judicial supremacy in our constitutional scheme. Nor do I hesitate to take sides. I endorse Robert Burt’s contention that when the Court attempts to close off or dampen political conflict by attempting to provide a final, authoritative resolution of controversies between the advocates of incommensurable values, it may violate an anti-subordination principle that is basic to our democratic tradition and to our constitutional regime of law.70 Professor Burt promotes Lincoln’s theory of democratic equality, which would require competing factions, both majorities and minorities, to exercise political advantages they lawfully obtain in ways which do not effectively subjugate their opponents. Lincoln thought that “the principle of democracy contains an inherent contradiction between the concepts of equal self-determination and majority rule and can therefore provide

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70 See BURT, supra note 32, at 81.
no univocal guidance for the resolution of social conflict or even for determining which institutions should address it.”

Kathleen Sullivan has criticized Burt’s “Protestant” position on constitutional authority, from the standpoint of her “Catholic” view. Liberal and progressive theorists who hold the Protestant view argue that authority to interpret the Constitution should be diffused among the several branches of government, other institutions of civil society and even citizens themselves. Equally liberal and progressive theorists who take the Catholic stance contend that when warring factions are backed by intractable convictions, one institution, namely, the Supreme Court, must be able to give authoritative answers to preserve civil peace.

Burt characterizes as judicial subjugation decisions in which the Court creates normative rules as “‘a preemptive weapon’ meant to silence dialogue between the opposing sides.” Sullivan responds with “Hobbesian pessimism” that failing to accord interpretive supremacy to the Supreme Court may “foreclose [ ] the possibility of normative judgment about which claims to subjugation are better.”

It should be clear from my criticism of the Shaw cases why I favor Burt’s theory. The Court’s treatment of issues regarding the freedom and equality of the descendants of slaves is the centerpiece of Burt’s analysis. Like Burt, I have argued that, at some times more obviously than at others, Supreme Court decisions affecting the claims of African Americans for full national membership, such as Dred Scott v. Sandford, and Brown v. Board of Education, in particular, have failed to address or have actively impeded resolution of African Americans’ grievances which by their nature can only be resolved through political processes. I too have quoted Lincoln for the proposition that the legacy of slavery presents problems of self-determination for African Americans that go beyond being provided equal rights.

Burt’s view that “the Court should not seek ‘techniques for conclusively ending conflict’ but instead should

71 Id.


Dean Sullivan attributes the Protestant and Catholic interpretations of constitutional authority to Sanford Levinson and Thomas Grey, respectively. See id. and notes 2–3 accompanying text (citing Sanford Levinson, Constitutional Faith (1988); Thomas C. Grey, The Constitution as Scripture, 37 Stan. L. Rev. 1 (1984)).

73 See Sullivan, supra note 70, at 1122–24, 1128.

74 Id. at 1124 (quoting Burt, supra note 32, at 349)

75 Id. at 1128–29.

76 60 U.S. 393 (1857).


78 Compare Burt, supra note 32, with Blacksher, Dred Scott, supra note 30.

79 See Blacksher, Dred Scott, supra note 30, at 690 and n.256. Professor Burt found a passage from one of Lincoln’s speeches I had overlooked:

But if the negro is a man, is it not to that extent a total destruction of self-government, to say that he too shall not govern himself? When the white man governs himself that is self-government; but when he governs himself and also governs another man, that is more than self-government—that is despotism.

facilitate ‘political conversation’ or ‘precipitate a process of collaboration and accommodation’ that advances ‘the mutual empowerment of both disputants.’

80 echoes the sentiments of this article and those of African-American scholars like Lani Guinier.

Dean Sullivan asks where Burt’s equality principle comes from, suggesting that all citizens who have agreed to be governed by the Constitution have thereby made an ex ante precommitment to submit to judicial outcomes. However, this begs the question of where judicial supremacy comes from and disregards Burt’s efforts to analyze the intentions of Madison and his co-founders, the work of “civic republican revivalists,” who, Sullivan acknowledges, tend to agree with Burt, and the scholars who have mapped the deep roots of republican traditions in the American constitutional regime. It is Burt’s reliance on American constitutional history that refutes Sullivan’s contention that his democratic equality theory universalizes all winners into subjugators and all losers into subordinated victims. It is reference to that same history that informs Sullivan’s example of normative judgments that Allan Bakke was not justified in feeling subjugated the way that Homer Plessy was. Thus, it seems that even progressive liberals of the Catholic persuasion agree that anti-subordination is a foundational constitutional value that the Shaw Court should have taken into account before labeling race-conscious districting subversive speech.

Perhaps it is unacceptably subversive in some contexts. But, in both American democratic tradition and constitutional jurisprudence prior to Shaw, that conclusion should be reached first through the political forums, where African Americans, Latinos and other communities can be heard. Nowhere in the Shaw opinions does the Court invite the political leadership of these groups to present their positions on such crucial questions of democratic legitimacy, nor does it express any willingness to consider them. Their objectives in the redistricting process should be discussed openly, along with the political and national unity concerns of the white majority and other subnational and interest groups. Perhaps agreement or compromise can be hammered out in particular situations, or perhaps not. Either way, through change or maintenance of the status quo, there would be a provisional resolution of questions about political stability, which courts could weigh, where necessary, in cases or controversies brought by litigants seeking judicial redress of demonstrable violations of their individual rights. Yet that is precisely the process of dialogue and negotiation the Shaw majority has moved to cut off by threatening to strike down any electoral districts that are the product of race-conscious bargaining. The Supreme Court has taken a wrong turn which is both unjust and dangerous. Athens was not saved when Socrates drank the hemlock. The Shaw cases, and their

80 Sullivan, supra note 72, at 1125.

81 See Lani Guinier, Lift Every Voice (1998) (examining the author’s experience as a presidential nominee as evidence of the importance of political debate).

82 See Sullivan, supra note 72, at 1129.

83 Id. at 1123.


85 See Sullivan, supra note 72, at 1129–30.

86 See id. at 1130 (citing University of Cal. Regents v. Bakke, 438 U.S. 265 (1978); Plessy v. Ferguson, 163 U.S. 537(1896)).
agenda of forcing racial and ethnic minorities to drink the kind of political hemlock Ralph Ellison wrote about, should be overruled.