

AMERICAN CONSTITUTIONALISM

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Supplementary Material

The Contemporary Era—Democratic Rights/Voting

Evenwel v. Abbott, 578 U.S. __ (2016)

Sue Evenwel lived in a state legislative district that had a high ratio of eligible voters to total population. Texas, like every other state in the Union, relied heavily on total population when drawing state legislative districts. The result was that in 2013, while the maximum total population deviation of Texas legislative districts was 8%, which was permitted by Supreme Court precedents, the maximum voter population deviation was 40%. Evenwel claimed that this deviation was unconstitutional, that the Texas failure to district by votes violated their right to equal protection under the Fourteenth Amendment. A local district court rejected their claim. Evenwel appealed to the Supreme Court of the United States.

The Supreme Court unanimously held that states could allocate legislative districts by total population. Justice Ruth Bader Ginsburg's majority opinion declared that total population was consistent with history, precedent, practice, and the "theory of the Constitution." On what basis does Ginsburg claim that total population is the "theory of the Constitution?" Why does Justice Samuel Alito disagree? Who has the better of that argument? Justice Thomas claims that one person, one vote provides no principled basis for allocating legislative districts because the principle of one person, one vote has no basis in the Constitution. Why does he make that claim? How might Ginsburg respond?

Justice Alito claims that, "power politics, not democratic theory . . . carried the day" when the framers determine how the federal government was staffed. Is this claim correct? If so, is there any good reason to defer to the power politics of a bygone era?

Justice GINSBURG delivered the opinion of the Court.

. . . We hold, based on constitutional history, this Court's decisions, and longstanding practice, that a State may draw its legislative districts based on total population.

This Court long resisted any role in overseeing the process by which States draw legislative districts. . . . Judicial abstention left pervasive malapportionment unchecked. The Court confronted this ingrained structural inequality in *Baker v. Carr* (1962). . . . Rather than steering clear of the political thicket yet again, the Court held for the first time that malapportionment claims are justiciable. Although the Court in *Baker* did not reach the merits of the equal protection claim, *Baker*'s justiciability ruling set the stage for what came to be known as the one-person, one-vote principle. Just two years after *Baker*, in *Wesberry v. Sanders* (1964), the Court invalidated Georgia's malapportioned congressional map, under which the population of one congressional district was "two to three times" larger than the population of the others. Relying on Article I, § 2, of the Constitution, the Court required that congressional districts be drawn with equal populations. Later that same Term, in *Reynolds v. Sims* (1964), the Court upheld an equal protection challenge to Alabama's malapportioned state-legislative maps. "[T]he Equal Protection Clause," the Court concluded, "requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis." *Westberry* and *Reynolds* together

instructed that jurisdictions must design both congressional and state-legislative districts with equal populations, and must regularly reapportion districts to prevent malapportionment.

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.... In contrast to repeated disputes over the permissibility of deviating from perfect population equality, little controversy has centered on the population base jurisdictions must equalize. . . . Today, all States use total-population numbers from the census when designing congressional and state-legislative districts, and only seven States adjust those census numbers in any meaningful way.

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.... At the time of the founding, the Framers confronted a question analogous to the one at issue here: On what basis should congressional districts be allocated to States? The Framers' solution, now known as the Great Compromise, was to provide each State the same number of seats in the Senate, and to allocate House seats based on States' total populations. "Representatives and direct Taxes," they wrote, "shall be apportioned among the several States which may be included within this Union, according to their respective Numbers." U.S. Const., Art. I, § 2, cl. 3. "It is a fundamental principle of the proposed constitution," James Madison explained in the *Federalist Papers*, "that as the aggregate number of representatives allotted to the several states, is to be ... founded on the aggregate number of inhabitants; so, the right of choosing this allotted number in each state, is to be exercised by such part of the inhabitants, as the state itself may designate." In other words, the basis of representation in the House was to include all inhabitants—although slaves were counted as only three-fifths of a person—even though States remained free to deny many of those inhabitants the right to participate in the selection of their representatives. . . .

.... In December 1865, Thaddeus Stevens, a leader of the Radical Republicans, introduced a constitutional amendment that would have allocated House seats to States "according to their respective legal voters"; in addition, the proposed amendment mandated that "[a] true census of the legal voters shall be taken at the same time with the regular census." Supporters of apportionment based on voter population employed the same voter-equality reasoning that appellants now echo. . . . Voter-based apportionment proponents encountered fierce resistance from proponents of total-population apportionment. Much of the opposition was grounded in the principle of representational equality. "As an abstract proposition," argued Representative James G. Blaine, a leading critic of allocating House seats based on voter population, "no one will deny that population is the true basis of representation; for women, children, and other non-voting classes may have as vital an interest in the legislation of the country as those who actually deposit the ballot." The product of these debates was § 2 of the Fourteenth Amendment, which retained total population as the congressional apportionment base.

Appellants ask us to find in the Fourteenth Amendment's Equal Protection Clause a rule inconsistent with this "theory of the Constitution." But, as the Court recognized in *Wesberry*, this theory underlies not just the method of allocating House seats to States; it applies as well to the method of apportioning legislative seats within States. "The debates at the [Constitutional] Convention," the Court explained, "make at least one fact abundantly clear: that when the delegates agreed that the House should represent 'people,' they intended that in allocating Congressmen the number assigned to each state should be determined solely by the number of inhabitants." . . . It cannot be that the Fourteenth Amendment calls for the apportionment of congressional districts based on total population, but simultaneously prohibits States from apportioning their own legislative districts on the same basis.

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Reynolds and Gray [v. Sanders] (1963) . . . involved features of the federal electoral system that contravene the principles of both voter and representational equality to favor interests that have no relevance outside the federal context. Senate seats were allocated to States on an equal basis to respect state sovereignty and increase the odds that the smaller States would ratify the Constitution "The [Electoral] College was created to permit the most knowledgeable members of the community to choose

the executive of a nation whose continental dimensions were thought to preclude an informed choice by the citizenry at large.” By contrast, as earlier developed, the constitutional scheme for congressional apportionment rests in part on the same representational concerns that exist regarding state and local legislative districting. The Framers’ answer to the apportionment question in the congressional context therefore undermines appellants’ contention that districts must be based on voter population.

Consistent with constitutional history, this Court’s past decisions reinforce the conclusion that States and localities may comply with the one-person, one-vote principle by designing districts with equal total populations. . . . In *Reynolds*, for instance, the Court described “the fundamental principle of representative government in this country” as “one of equal representation for equal numbers of people.” Moreover, from *Reynolds* on, the Court has consistently looked to total-population figures when evaluating whether districting maps violate the Equal Protection Clause by deviating impermissibly from perfect population equality.

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What constitutional history and our prior decisions strongly suggest, settled practice confirms. Adopting voter-eligible apportionment as constitutional command would upset a well-functioning approach to districting that all 50 States and countless local jurisdictions have followed for decades, even centuries. . . . As the Framers of the Constitution and the Fourteenth Amendment comprehended, representatives serve all residents, not just those eligible or registered to vote. Nonvoters have an important stake in many policy debates—children, their parents, even their grandparents, for example, have a stake in a strong public-education system—and in receiving constituent services, such as help navigating public-benefits bureaucracies. By ensuring that each representative is subject to requests and suggestions from the same number of constituents, total-population apportionment promotes equitable and effective representation.

Justice THOMAS, concurring in the judgment.

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In my view, the majority has failed to provide a sound basis for the one-person, one-vote principle because no such basis exists. The Constitution does not prescribe any one basis for apportionment within States. It instead leaves States significant leeway in apportioning their own districts to equalize total population, to equalize eligible voters, or to promote any other principle consistent with a republican form of government. The majority should recognize the futility of choosing only one of these options. The Constitution leaves the choice to the people alone—not to this Court.

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Since *Baker* empowered the federal courts to resolve redistricting disputes, this Court has struggled to explain whether the one-person, one-vote principle ensures equality among eligible voters or instead protects some broader right of every citizen to equal representation. The Court’s lack of clarity on this point, in turn, has left unclear whether States must equalize the number of eligible voters across districts or only total population.

In a number of cases, this Court has said that States must protect the right of eligible voters to have their votes receive equal weight. The Court’s seminal decision in *Baker* exemplifies this view. Since Tennessee’s last apportionment, the State’s population had grown by about 1.5 million residents, from about 2 to more than 3.5 million. And the number of voters in each district had changed significantly over time, producing widely varying voting populations in each district. Under these facts, the Court held that reapportionment claims were justiciable because the plaintiffs—who all claimed to be eligible voters—had alleged a “debasement of their votes.”

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In applying the one-person, one-vote principle to state legislative districts, the Court has also emphasized vote dilution, which also supports the notion that the one-person, one-vote principle ensures equality among eligible voters. It did so most notably in *Reynolds*. In that case, Alabama had failed to reapportion its state legislature for decades, resulting in population-variance ratios of up to about 41 to 1 in the State Senate and up to about 16 to 1 in the House. In explaining why Alabama's failure to reapportion violated the Equal Protection Clause, this Court stated that "an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State."

In contrast to this oft-stated aspiration of giving equal treatment to eligible voters, the Court has also expressed a different understanding of the one-person, one-vote principle. In several cases, the Court has suggested that one-person, one-vote protects the interests of all individuals in a district, whether they are eligible voters or not. In *Reynolds*, for example, the Court said that "the fundamental principle of representative government in this country is one of equal representation for equal numbers of people." . . . In line with this view, the Court has generally focused on total population, not the total number of voters, when determining a State's compliance with the one-person, one-vote requirement.

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This inconsistency (if not opacity) is not merely a consequence of the Court's equivocal statements on one person, one vote. The problem is more fundamental. There is simply no way to make a principled choice between interpreting one person, one vote as protecting eligible voters or as protecting total inhabitants within a State. That is because, though those theories are noble, the Constitution does not make either of them the exclusive means of apportionment for state and local representatives. In guaranteeing to the States a "Republican Form of Government," Art. IV, § 4, the Constitution did not resolve whether the ultimate basis of representation is the right of citizens to cast an equal ballot or the right of all inhabitants to have equal representation. The Constitution instead reserves these matters to the people.

The Constitution lacks a single, comprehensive theory of representation. The Framers understood the tension between majority rule and protecting fundamental rights from majorities. This understanding led to a "mixed" constitutional structure that did not embrace any single theory of representation but instead struck a compromise between those who sought an equitable system of representation and those who were concerned that the majority would abuse plenary control over public policy. . . .

Because, in the view of the Framers, ultimate political power derives from citizens who were "created equal," The Declaration of Independence ¶ 2, beliefs in equality of representation—and by extension, majority rule—influenced the constitutional structure. . . . The Framers' preference for apportionment by representation (and majority rule) was driven partially by the belief that all citizens were inherently equal. In a system where citizens were equal, a legislature should have "equal representation" so that "equal interests among the people should have equal interests in [the assembly]." . . .

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In many ways, the Constitution reflects this preference for majority rule. To pass Congress, ordinary legislation requires a simple majority of present members to vote in favor. And some features of the apportionment for the House of Representatives reflected the idea that States should wield political power in approximate proportion to their number of inhabitants. Thus, "equal representation for equal numbers of people," features prominently in how representatives are apportioned among the States. These features of the Constitution reflect the preference of some members of the founding generation for equality of representation. But, as explained below, this is not the single "theory of the Constitution."

The Framers also understood that unchecked majorities could lead to tyranny of the majority. As a result, many viewed antidemocratic checks as indispensable to republican government. And included among the antidemocratic checks were legislatures that deviated from perfect equality of representation.

The Framers believed that a proper government promoted the common good. They conceived this good as objective and not inherently coextensive with majoritarian preferences. . . . Of particular concern for the Framers was the majority of people violating the property rights of the minority. . . . Because of the Framers' concerns about placing unchecked power in political majorities, the Constitution's majoritarian provisions were only part of a complex republican structure. The Framers also placed several antidemocratic provisions in the Constitution. The original Constitution permitted only the direct election of representatives. Senators and the President were selected indirectly. And the "Great Compromise" guaranteed large and small States voting equality in the Senate. By malapportioning the Senate, the Framers prevented large States from outvoting small States to adopt policies that would advance the large States' interests at the expense of the small States.

These countermajoritarian measures reflect the Framers' aspirations of promoting competing goals. Rejecting a hereditary class system, they thought political power resided with the people. At the same time, they sought to check majority rule to promote the common good and mitigate threats to fundamental rights.

As the Framers understood, designing a government to fulfill the conflicting tasks of respecting the fundamental equality of persons while promoting the common good requires making incommensurable tradeoffs. For this reason, they did not attempt to restrict the States to one form of government.

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Republican governments promote the common good by placing power in the hands of the people, while curtailing the majority's ability to invade the minority's fundamental rights. The Framers recognized that there is no universal formula for accomplishing these goals. At the framing, many state legislatures were bicameral, often reflecting multiple theories of representation. Only "[s]ix of the original thirteen states based representation in both houses of their state legislatures on population." In most States, it was common to base representation, at least in part, on the State's political subdivisions, even if those subdivisions varied heavily in their populations.

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None of the Reconstruction Amendments changed the original understanding of republican government. Those Amendments brought blacks within the existing American political community. The Fourteenth Amendment pressured States to adopt universal male suffrage by reducing a noncomplying State's representation in Congress. And the Fifteenth Amendment prohibited restricting the right of suffrage based on race. As Justice Harlan explained in *Reynolds*, neither Amendment provides a theory of how much "weight" a vote must receive, nor do they require a State to apportion both Houses of their legislature solely on a population basis. . . .

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. . . [I]n embracing one person, one vote, the Court has arrogated to the Judiciary important value judgments that the Constitution reserves to the people. . . . *Reynolds*' assertions are driven by the belief that there is a single, correct answer to the question of how much voting strength an individual citizen should have. These assertions overlook that, to control factions that would legislate against the common good, individual voting strength must sometimes yield to countermajoritarian checks. And this principle has no less force within States than it has for the federal system. Instead of large States versus small States, those interests may pit urban areas versus rural, manufacturing versus agriculture, or those with property versus those without. There is no single method of reconciling these competing interests. And it is not the role of this Court to calibrate democracy in the vain search for an optimum solution.

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So far as the Constitution is concerned, there is no single "correct" way to design a republican government. Any republic will have to reconcile giving power to the people with diminishing the influence of special interests. The wisdom of the Framers was that they recognized this dilemma and left

it to the people to resolve. In trying to impose its own theory of democracy, the Court is hopelessly adrift amid political theory and interest-group politics with no guiding legal principles.

. . . . I agree with the majority's ultimate disposition of this case. As far as the original understanding of the Constitution is concerned, a State has wide latitude in selecting its population base for apportionment. It can use total population, eligible voters, or any other nondiscriminatory voter base. And States with a bicameral legislature can have some mixture of these theories, such as one population base for its lower house and another for its upper chamber.

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Justice ALITO, with whom Justice THOMAS [in part], concurring in the judgment.

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Both practical considerations and precedent support the conclusion that the use of total population is consistent with the one-person, one-vote rule. The decennial census required by the Constitution tallies total population. Art. I, § 2, cl. 3; Amdt. 14, § 2. These statistics are more reliable and less subject to manipulation and dispute than statistics concerning eligible voters. Since *Reynolds*, States have almost uniformly used total population in attempting to create legislative districts that are equal in size. And with one notable exception, *Burns v. Richardson* (1966), this Court's post-*Reynolds* cases have likewise looked to total population. Moreover, much of the time, creating districts that are equal in total population also results in the creation of districts that are at least roughly equal in eligible voters. I therefore agree that States are permitted to use total population in redistricting plans.

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The Court does not purport to decide whether a State may base a districting plan on something other than total population, but the Court, picking up a key component of the Solicitor General's argument, suggests that the use of total population is supported by the Constitution's formula for allocating seats in the House of Representatives among the States. Because House seats are allocated based on total population, the Solicitor General argues, the one-person, one-vote principle requires districts that are equal in total population. I write separately primarily because I cannot endorse this meretricious argument.

First, the allocation of congressional representation sheds little light on the question presented by the Solicitor General's argument because that allocation plainly violates one person, one vote. This is obviously true with respect to the Senate. . . . And even the allocation of House seats does not comport with one person, one vote. Every State is entitled to at least one seat in the House, even if the State's population is lower than the average population of House districts nationwide. . . .

Second, *Reynolds v. Sims* squarely rejected the argument that the Constitution's allocation of congressional representation establishes the test for the constitutionality of a state legislative districting plan. . . . Rejecting Alabama's argument that this system supported the constitutionality of the State's apportionment of senate seats, the Court concluded that "the Founding Fathers clearly had no intention of establishing a pattern or model for the apportionment of seats in state legislatures when the system of representation in the Federal Congress was adopted."

Third, as the *Reynolds* Court recognized, reliance on the Constitution's allocation of congressional representation is profoundly ahistorical. When the formula for allocating House seats was first devised in 1787 and reconsidered at the time of the adoption of the Fourteenth Amendment in 1868, the overwhelming concern was far removed from any abstract theory about the nature of representation. Instead, the dominant consideration was the distribution of political power among the States.

The original Constitution's allocation of House seats involved what the *Reynolds* Court rather delicately termed "compromise and concession." Seats were apportioned among the States "according to their respective Numbers," and these "Numbers" were "determined by adding to the whole Number of

free Persons ... three fifths of all other Persons.” Art. I, § 2, cl. 3. The phrase “all other Persons” was a euphemism for slaves. Delegates to the Constitutional Convention from the slave States insisted on this infamous clause as a condition of their support for the Constitution, and the clause gave the slave States more power in the House and in the electoral college than they would have enjoyed if only free persons had been counted. . . .

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After the Civil War, when the Fourteenth Amendment was being drafted, the question of the apportionment formula arose again. . . . As was the case in 1787, however, it was power politics, not democratic theory, that carried the day. . . . [I]n the leadup to the Fourteenth Amendment, claims about representational equality were invoked, if at all, only in service of the real goal: preventing southern States from acquiring too much power in the National Government.

. . . . In light of the history of Article I, § 2, of the original Constitution and § 2 of the Fourteenth Amendment, it is clear that the apportionment of seats in the House of Representatives was based in substantial part on the distribution of political power among the States and not merely on some theory regarding the proper nature of representation. It is impossible to draw any clear constitutional command from this complex history.

For these reasons, I would hold only that Texas permissibly used total population in drawing the challenged legislative districts. I therefore concur in the judgment of the Court.