

PERPETUATING “ONE PERSON, ONE VOTE” ERRORS

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“One person, one vote” has no plausible basis in the text or original meaning of the Fourteenth Amendment of the United States Constitution.¹ More than fifty years after *Baker v. Carr*, however, this mantra remains essentially inviolable.² It remains widely hailed as one of the Supreme Court’s greatest achievements.³ “One person, one vote” is so esteemed that even a stray remark critiquing it is enough to cause a judicial nominee to receive the wrath of members of Congress.⁴

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1. RAOUL BERGER, *GOVERNMENT BY JUDICIARY* 104 (1997) (“Chief Justice Warren . . . struck off a new version of constitutional principle and history.”); ROBERT H. BORK, *THE TEMPTING OF AMERICA* 84 (1990) (“There is no better example of the Court’s egalitarianism and its disregard for the Constitution in whose name it spoke than the legislative reapportionment cases, which created the principle of one person, one vote.”); Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 *HARV. J.L. & PUB. POL’Y* 103, 103 (2000) (“Yet as a matter of text and history, that proposition [“one person, one vote”] is almost certainly incorrect”); Robert J. Pushaw, Jr., *Judicial Review and the Political Question Doctrine: Reviving the Federalist “Rebuttable Presumption” Analysis*, 80 *N.C. L. REV.* 1165, 1175 (2002) (“In short, the Court pretended to honor, but effectively reversed, the long-established law governing political questions and equal protection in order to implement the Justices’ personal vision of appropriate representation in a democracy.”); ALEXANDER M. BICKEL, *POLITICS AND THE WARREN COURT* 197 (1973) (“The judges are plunged into second-guessing the expedient, empirical, political judgments of fifty state legislatures decade after decade. This they are unfitted to do”).

2. While *Baker* opened the door to articulating vote dilution claims under the Equal Protection Clause, the standard was first pronounced in a series of cases beginning with *Gray v. Sanders*, 372 U.S. 368 (1963).

3. See, e.g., Abner J. Mikva, *Justice Brennan and the Political Process: Assessing the Legacy of Baker v. Carr*, 1995 *U. ILL. L. REV.* 683, 685.

4. See, e.g., Samuel Alito, Personal Qualifications Statement (Nov. 15, 1985), available at <http://news.findlaw.com/hdocs/docs/alito/111585stmnt2.html> [<http://perma.cc/K7RV-F9WF>] (“In college, I developed a deep interest in constitutional law, motivated in large part by disagreement with Warren Court decisions, particularly in the areas of criminal procedure, the Establishment Clause, and reapportionment.”); *Biden: Alito’s views may bring filibuster*, *USA TODAY* (Nov. 20, 2005), http://usatoday30.usatoday.com/news/washington/2005-11-20-biden-alito_x.htm [<http://perma.cc/6QEN-SWVK>] (quoting then-Senator Biden as saying “If [Alito] really believes that reapportionment is a questionable decision—that is, the idea of *Baker v. Carr*, one man, one vote—then clearly, clearly, you’ll find a lot

The Supreme Court entered the “political thicket”⁵ with fanfare, invoking no specific constitutional text at the time but relying upon penumbras⁶ from the Declaration of Independence and the amendments to the Constitution,⁷ dismantling the structure of the state legislatures with the stroke of a pen. Among other consequences of its political interventionism, the Court compelled “that the seats in both houses of a bicameral state legislature must be apportioned on a population basis.”⁸

The judiciary had effectively nationalized the composition of all fifty state legislatures. But, its mantra was mercifully limited. Shortly after the Court’s entry into that thicket, it recognized that myriad unanswered questions remained, and it refused to refine its mantra any further. “Population basis” was deemed expansive enough to permit a representative body to draw districts on bases other than total population, including citizens and voters.⁹ The judiciary had ended its articulation of political theories that would forever bind the States. Instead, the States could continue to act within our federalist system and draw districts on the basis of some legitimate population total, acting in the absence of specific judicial directive.

This Article examines an under-discussed element of the reapportionment cases—the extent to which the parties themselves and the clerks to the Supreme Court Justices resisted advancing the kind of sweeping claims that the Supreme Court ultimately embraced. The Court’s errors in the redistricting cases

of people, including me, willing to do whatever they can to keep him off the court That would include a filibuster, if need be.”).

5. See *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

6. Cf. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (“The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”); *id.* at 501 (Harlan, J., concurring in the judgment) (“Need one go further than to recall last Term’s reapportionment cases, *Wesberry v. Sanders* and *Reynolds v. Sims*, where a majority of the Court ‘interpreted’ ‘by the People’ and ‘equal protection’ to command ‘one person, one vote,’ an interpretation that was made in the face of irrefutable and still unanswered history to the contrary?”) (citations omitted).

7. *Gray*, 372 U.S. at 381 (“The conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.”).

8. *Reynolds v. Sims*, 377 U.S. 533, 568 (1964).

9. See, e.g., *Burns v. Richardson*, 384 U.S. 73, 92 (1966).

arose in spite of repeated guidance from the litigants before the Court and the Justices' own clerks to decide the cases in a narrower fashion or pursuant to existing constitutional standards. Through archival research, this Article demonstrates that all parties were reluctant to redefine all state legislatures under a single (and under-theorized) political definition. The Court took little heed of such modest proposals and instituted sweeping claims about how state legislatures ought to look. The Article then identifies the circumstances in which the Court finally embraced restraint—it permitted States to choose an appropriate population basis for drawing legislative districts, leaving the matter to the sound discretion of the States. The Article identifies a lost footnote in an early draft of *Burns v. Richardson* that would have articulated the most lucid basis for deferring to the States as they selected the appropriate redistricting population. The Article then reflects on the proposed expansion of these sweeping claims in *Evenwel v. Abbott*, an attempt to return to the judicial nationalization of state legislatures articulated in *Baker* and its progeny. The Article calls for an end to these redistricting errors and for greater deference to the States.

I. MODEST STRATEGIES

The Founders' design included multiple theories of representation at the federal level. It permitted election by the people for the House of Representatives;¹⁰ it permitted election by the state legislatures for the Senate;¹¹ and it permitted election by electors for the President and Vice President.¹² The House would be accountable directly to the people and be apportioned on the basis of total population;¹³ Senators would represent the several States, as each state received two Senators;¹⁴ and the President was the product of a complicated series of mechanisms that largely deferred to the state legislatures.¹⁵

10. U.S. CONST. art. I, § 2, cl. 1.

11. U.S. CONST. art. I, § 3, cl. 1, *amended by* U.S. CONST. amend. XVII.

12. U.S. CONST. art. II, § 1, cl. 2.

13. U.S. CONST. art. I, § 2, cl. 3, *amended by* U.S. CONST. amend. XIV.

14. U.S. CONST. art. I, § 3, cl. 1, *amended by* U.S. CONST. amend. XVII.

15. *See* U.S. CONST. art. II, § 1, cl. 2.

Additionally, representation of the “people” might include all people, voters and non-voters alike. Even though states largely had limited the franchise to adult white male citizens who owned property, apportionment for the House of Representatives would occur after the census enumerated the number of “persons” in each state—voters and non-voters alike.¹⁶ Many states embraced similar principles in their own constitutions and laws.

Over time, the form of government altered as the right to vote expanded. By the middle of the twentieth century, constitutional amendments and state laws broadly expanded the franchise, leaving very few populations disenfranchised—in most places, non-residents, children, felons, some ex-felons, the mentally ill, resident aliens, and illegal immigrants.¹⁷

Additional constitutional amendments and state practices have turned all of our federal elections into essentially direct elections by the people. The Seventeenth Amendment converted elections for Senators into direct elections, and the practice of the Electoral College means that the people directly elect presidential electors who pledge to support a particular presidential candidate.¹⁸

In the early 1960s, finding even these changes to our political system insufficient, voting rights groups sought creative ways to enforce new theories of voting rights in the federal courts. One strategy principally cited state laws and merely asked federal courts to enforce those state guarantees through the Equal Protection Clause. It was a kind of federalism, one in which federal courts would enforce state legal guarantees that the states themselves had abandoned. It did require novel judicial intervention into areas of traditional state authority, but it turned upon state abdication of laws in ways that unequally impacted some voters.

Additionally, seizing upon the Court’s Fourteenth Amendment jurisprudence that required state laws to pass “rational

16. U.S. CONST. art. I, § 2, cl. 3, *amended by* U.S. CONST. amend. XIV.

17. *See, e.g.*, ALASKA CONST. art. V, §§ 1–2.

18. U.S. CONST. amend. XVII. Despite such elections being essentially direct elections, they are admittedly not wholly national popular elections, as the presidential election in 2000 demonstrates. *See generally* Derek T. Muller, *The Compact Clause and the National Popular Vote Interstate Compact*, 6 ELECTION L.J. 372 (2007) (identifying proposals to convert the presidential election into a truly national direct election).

basis" review, plaintiffs filed lawsuits arguing that some of the state redistricting practices were so arbitrary and capricious that they could not pass the Court's rational basis test. While the precise contours of the right to vote and composition of their legislatures would be left to the States, the States would need to articulate some modest basis to justify their systems of government. These two relatively modest strategies drove the litigation in *Baker v. Carr*.

A. Early History and Briefs

The buildup to *Baker v. Carr*¹⁹ began in Tennessee. The Tennessee Constitution of 1870 dictated that apportionment of representatives in the General Assembly should occur according to the "enumeration of the qualified voters" in the state.²⁰ No such redistricting had occurred since 1901.²¹ Legislative districts yielded significant disparities in the total number of voters in each district as populations grew and shifted—urban districts had high numbers of voters, and rural districts had relatively few voters.²² But questions about redistricting had long been deemed political questions, matters of the Guarantee Clause and long foreclosed from any remedy in the federal courts—that is, the federal courts would not enforce Article IV's requirement that each State have a "Republican Form of Government."²³

Plaintiffs, then, crafted a new theory under the Fourteenth Amendment instead of the Guarantee Clause. Appellants' jurisdictional brief in *Baker v. Carr* identified a violation of the Equal Protection Clause because "an enumeration of qualified voters was not made and the actual number of qualified vot-

19. 369 U.S. 186 (1962).

20. TENN. CONST. OF 1870 art. II, §§ 4–6.

21. *Baker*, 369 U.S. at 191.

22. Read through this factual lens, *Baker* might be best understood as a pre-Voting Rights Act set of racial gerrymandering cases in which the Court rooted out political decisions of the States that disproportionately disempowered racial minorities. See Sanford Levinson, *One Person, One Vote: A Mantra in Need of Meaning*, 80 N.C. L. REV. 1269, 1280 n.40 (2002) (evaluating Samuel Issacharoff's interpretation of *Baker* and *Reynolds* as "prophylactic"); cf. Melissa Saunders, *Reconsidering Shaw: The Miranda of Race-Conscious Districting*, 109 YALE L.J. 1603, 1606 (2000) (calling the rules for evaluating racial gerrymandering "prophylactic").

23. See, e.g., *Luther v. Borden*, 48 U.S. 1 (1849); *Colegrove v. Green*, 328 U.S. 549 (1946); Pushaw, *supra* note 1, at 1170.

ers in the state was ignored."²⁴ Tennessee required reapportionment to occur on the basis of "voting population."²⁵ The constitution, Appellants argued, "clearly contemplated that overall representation should, as nearly as possible, approximate relative voting population."²⁶

These arguments focus almost completely on what the Tennessee Constitution required. They did not include an independent understanding of what voting weight ought to look like under the Equal Protection Clause of the U.S. Constitution. That is because the original litigation strategy in *Baker v. Carr* focused on a state-based theory that the Equal Protection Clause could be invoked to enforce existing state law—law that the state legislature (and state courts) had refused to enforce and one that resulted in unequal treatment of voters.

Indeed, Appellants' briefs went so far as to concede that their legal claims turned on enforcement of existing state law:

[Appellants] claim equality in voting rights as provided by the Constitution of Tennessee, and charge that the legislative attempt (successful so far) to deny that equality results in a violation of the equal protection of the laws. This is an important distinction, which reflects the manner in which the Fourteenth Amendment operates. It does not in itself decree equality in voting rights. It says that if a state policy is to afford equal voting rights . . . the attempt by state officers, under color of law, to deny such equality to some of the citizens is a denial of equal protection.²⁷

Baker v. Carr was hardly the first case to rely on this argument. Lower federal courts adopted similar tactics shortly before 1962. Consider the essentially advisory opinion in 1958 in *Magraw v. Donovan*.²⁸ Plaintiffs invoked the Equal Protection Clause and Minnesota state law in their quest to secure reap-

24. Jurisdictional Statement for Appellants at 5, *Baker v. Carr*, 369 U.S. 186 (1962) (No. 103), available in 56 LANDMARK CASES OF THE SUPREME COURT 11 (Philip B. Kurland & Gerhard Casper eds. 1975); Brief for Appellants at 6, *Baker v. Carr*, 369 U.S. 186 (1962) (No. 103).

25. Brief for Appellants, *supra* note 24, at 8–12.

26. *Id.* at 24.

27. Reply to Appellees' Statement in Opposition and Motion to Dismiss at 2, *Baker v. Carr*, 369 U.S. 186 (1962) (No. 103).

28. 163 F. Supp. 184, 187–88 (D. Minn. 1958).

portionment of the Minnesota state legislature.²⁹ And while the federal court recognized it had jurisdiction over the matter because of the invocation of the federal constitution, the remainder of the opinion—brief as it is—was wholly devoted to an interpretation of the Minnesota Constitution.³⁰ While federal abstention doctrines³¹ or discretionary jurisdiction³² might counsel against the exercise of federal power in such situations, the federal court quickly dispatched concerns regarding jurisdiction in this case.³³ And, the federal remedy was rather opaque—it consisted of a declaration that the state legislature had failed to do what state law required and a promise that, if the legislature “advisedly and deliberately and refused” to take its redistricting responsibilities seriously, then the court might intervene later.³⁴ Under this threat, the Minnesota legislature swiftly redrew its state legislative districts in compliance with existing state law.³⁵

A federal district court in Hawaii performed a similar feat. The Organic Act of Hawaii required reapportionment of the districts of the chambers of the legislature “from time to time . . . on the basis of the population in each of said districts who are citizens of the Territory.”³⁶ The Act did not provide for “unequal geographic representation” but required equal citizen population in the districts.³⁷ That claim, a federal district court concluded, was a justiciable issue under, among other provisions, the Equal Protection Clause.³⁸

Essentially, federal courts had opened themselves to becoming potential new outlets for the enforcement of state (or territorial) laws through the Equal Protection Clause on the theory

29. *Id.* at 185.

30. *Id.* at 187–88.

31. *Cf.* *South v. Peters*, 339 U.S. 276, 277 (1950).

32. *See, e.g.*, 28 U.S.C. § 1367(c) (2012) (permitting federal courts to decline to exercise pendent jurisdiction when faced with a “novel or complex issue of State law”); *cf.* *United Mine Workers v. Gibbs*, 383 U.S. 715, 725–26 (1966).

33. *Magraw*, 163 F. Supp. at 187.

34. *Id.* at 188.

35. Jurisdictional Statement for Appellants, *supra* note 24, at 23, 29.

36. 48 U.S.C. § 562 (1952).

37. *Dyer v. Kazuhisa Abe*, 138 F. Supp. 220, 226 (D. Haw. 1956), *rev'd on other grounds*, 256 F.2d 728 (9th Cir. 1958).

38. *Dyer*, 138 F. Supp. at 225.

that the failure to enforce those laws was a constitutional violation. On the other hand, one might make the more generic claim that the failure to enforce occurred equally across all jurisdictions—after all, Tennessee’s failure to redistrict was occurring equally everywhere and not simply being enforced selectively. This, then, required a more nuanced claim of vote dilution—the ballots were being counted, but voters overcrowded in certain districts had less “valuable” votes than voters in underpopulated districts. Such an interpretation would be rather novel under the Equal Protection Clause but could be reserved for a later day—*Baker*, after all, simply asked whether the Court could even hear such an Equal Protection Claim.³⁹

B. Clerks’ Memoranda

The archived internal memoranda from Supreme Court clerks in *Baker* reflect great hesitation about a broad standard for an Equal Protection violation. Murray H. Bring drafted a bench memorandum to Chief Justice Warren expressing skepticism that “one man, one vote” would need to control the outcome of the case: “With regard to reapportionment, I do not think that the 14th Amendment requires a system based upon a formula of one man, one vote. There are obviously unequal formulas which could pass muster under the Constitution.”⁴⁰ Bring, who grew up in Los Angeles and attended the University of Southern California,⁴¹ invoked the Golden State as an example for his Californian Justice:

For example, I have little doubt that the Calif. system, under which one house of the legislature is based upon geographical considerations while the other is based upon population, is constitutional. This is a reasonable classification because it attempts to strike a balance between the legitimate interests of

39. The Court would later articulate the standard of “one person, one vote” for the first time in *Gray v. Sanders*, 372 U.S. 368, 381 (1963).

40. Bench Memorandum on *Baker v. Carr* from Murray H. Bring to Chief Justice Earl Warren 18 (1961) (available in the Earl Warren Papers, Box 218, file 9, at the Library of Congress) [hereinafter Bring Bench Memo].

41. Interview by Laura McCreery, Reg’l Oral History Office, The Bancroft Library, University of California, Berkeley, with Murray H. Bring, in N.Y.C., N.Y. (Nov. 23, 2004).

urban and rural communities, and is therefore much like the formula upon which the national Congress was established.⁴²

California's Senate, much like the federal Senate, drew its district lines primarily on the basis of geography rather than total population.⁴³ Warren, when he was governor of California, had even publicly defended California's legislative system from challenges that it was unfair or should solely be based on population.⁴⁴ Naturally, Warren's clerk assumed that the existing legislatures of several states may continue to exist nearly a century after the enactment of the Fourteenth Amendment.

Bring's initial reaction to Baker's claim, then, was to examine whether the redistricting was "arbitrary and unreasonable on its face."⁴⁵ Tennessee's malapportionment was in contravention to its existing constitutional law, Bring argued, which suggested there was no rational principle and "no legitimate state interest" being served.⁴⁶ This argument united a "rational basis" test with the more novel state-based theory that might establish a constitutional violation.

Subsequent memoranda concurred. In a supplemental memo to Chief Justice Warren, Peter D. Ehrenhaft emphasized that the claim turned upon the existing state legislative scheme:

Applied to this case, I interpret this rationale to mean that once the state provides for direct representation of the people in a legislature, it must provide for equal representation and equal opportunities for representation. It cannot make

42. Bring Bench Memo, *supra* note 40, at 18–19.

43. ROBERT G. DIXON, JR., DEMOCRATIC REPRESENTATION 86 (1968).

44. *Id.* at 264 ("Many California counties are far more important in the life of the State than their population of the State. It is for this reason that I have never been in favor of restricting the representation in the senate to a strictly population basis.") (quoting Governor Earl Warren, Speech at Merced, Cal. (Oct. 29, 1948)).

45. Bring Bench Memo, *supra* note 40, at 19.

46. *Id.* at 19–20 ("While it is true that the violation of the state constitution would not itself amount to a violation of the 14th Amendment, *Owensboro Waterworks Co. v. Owensboro*, 200 U.S. 38; it is equally true that the violation of state law does tend to indicate that the present apportionment is based upon something other than a rational principle, and that no legitimate state interest is being served by this malapportionment.") (citing Anthony Lewis, *Legislative Apportionment and the Federal Courts*, 71 HARV. L. REV. 1057, 1078 (1958)).

an arbitrary selection of a class of persons favored for representation. The key word is arbitrary⁴⁷

Ehrenhaft assured, “I think it can safely be stipulated that one man-one vote is not the only system for distributing legislative representation that would pass constitutional muster.”⁴⁸ He cited other “rational foundation[s]” for legislative apportionment, such as representation of counties or towns.⁴⁹ He urged Warren, “I do not think such a scheme could be struck down on equal protection arguments, without the support of the ‘republican form of govt’ clause.”⁵⁰

The problem, as Ehrenhaft saw it, turned in part on Tennessee’s own definition of its legislature:

So long as a given representative body claims to be based upon direct election by the people (as distinguished from election by counties, cities or other inanimate entities) it is precisely what Holmes called a ‘play on words’ to find all voters equally protected merely because they can each cast one vote for their representative.⁵¹

The Tennessee legislature did purport to draw districts based on voting population and not based upon geography. Therefore, in Ehrenhaft’s eyes, like Bring’s before him, and the original briefing in *Baker*, the nature of the remedy arose from the form of government that Tennessee purported to have.

C. Oral Argument

These two themes—emphasis on the terms of the state constitution and reliance on a rational basis that might permit non-population-based theories of representation—dominated oral argument and reargument. Charles S. Rhyne led the charge on behalf of Baker, and he was a major proponent of the theory

47. Supplemental Bench Memorandum on *Baker v. Carr* from Peter D. Ehrenhaft to Chief Justice Earl Warren 9 (1961) (available in the Earl Warren Papers, Box 218, file 9, at the Library of Congress).

48. *Id.* at 10.

49. Supplemental Memorandum on *Baker v. Carr* from Peter D. Ehrenhaft to Chief Justice Earl Warren 2 (Feb. 14, 1962) (available in the Earl Warren Papers, Box 480, file 6, at the Library of Congress).

50. *Id.*

51. Supplemental Bench Memorandum on *Baker v. Carr* from Peter D. Ehrenhaft to Chief Justice Earl Warren, *supra* note 47, at 5.

that the Tennessee Constitution should be the emphasis of the claims before the Court. He had consistently emphasized the state law point and regularly returned to the issue during oral argument. He emphasized that "the Tennessee constitution is one of the important, the very important legal facts that this Court must consider It shows what Tennessee intended with respect to voting rights and the extent of the violation of that intention, and then also indicates a measurable remedy."⁵² He insisted that state law served as "tremendous significance" as the "fundamental law" of Tennessee, and it was "one of the things that the Court should consider in deciding whether or not there's a violation of the Fourteenth Amendment."⁵³

Solicitor General Archibald Cox pushed back against this strategy. For instance, a question from Chief Justice Warren during oral argument challenged the relevance of state law, and a rejoinder, at the urging of Cox, claimed that it was "just part of the background."⁵⁴ Instead, Cox's argument turned on a rational basis theory of Equal Protection. He expressly disclaimed that "one person, one vote" would necessarily control all cases regardless of state law: "Our history makes it plain that other considerations—geographical distribution, historic association, political subdivision, and things of that kind—may be taken into consideration, certainly in one house, and I would assume, for present purposes, may be taken into account in both houses."⁵⁵

Despite these two major discussions on the possible merits of a redistricting claim, the outcome in *Baker v. Carr* demurred on the appropriate standard. The bulk of the opinion emphasized the justiciability of the claim and the distinction between the non-justiciable Guarantee Clause and the justiciable Equal Protection Clause.⁵⁶ It spoke generically about the potential Equal Protection Clause violation that might be found on remand, noting that citizens have the right to vote "free of arbitrary im-

52. Transcript of Reargument at 9, *Baker v. Carr*, 369 U.S. 186 (1962) (No. 103), available in 56 LANDMARK CASES OF THE SUPREME COURT, *supra* note 24, at 624.

53. *Id.* at 12.

54. GENE GRAHAM, ONE MAN, ONE VOTE: *BAKER V. CARR* AND THE AMERICAN LEVELLERS 226–27 (1972).

55. Transcript of Oral Argument at 20, *Baker v. Carr*, 369 U.S. 186 (No. 103), available in 56 LANDMARK CASES OF THE SUPREME COURT, *supra* note 24, at 569.

56. *Baker*, 369 U.S. at 208–37.

pairment by state action"⁵⁷ but reflected that the merits would be left to the district court.⁵⁸ It would reserve further interpretation for another day.

II. NATIONALIZING REDISTRICTING ERRORS

After its landmark decision in *Baker v. Carr*, the Supreme Court needed to identify what standards, if any, the Equal Protection Clause demanded in elections. In *Gray v. Sanders*,⁵⁹ the Court examined Georgia's "county unit" system for political primaries.⁶⁰ Each county received at least one representative but could receive as many as three in more populous counties, and Georgia's primary elections for the United States Senate and for governor were based on the same system.⁶¹ It was there that the court demanded that Georgia comply with the standard of "one person, one vote": in the statewide gubernatorial election, all ballots should be weighed equally across the State, pursuant to the penumbras of the Declaration of Independence and the Bill of Rights.⁶²

In *Wesberry v. Sanders*,⁶³ the Court next examined the standard for redistricting congressional districts. The Court found it "abundantly clear" that the Constitution demanded that representation be based upon the "people," "determined solely by the number of the State's inhabitants."⁶⁴

These cases set the stage for a bundle of potentially highly disruptive redistricting cases among state legislatures, led by a challenge to the Alabama legislature in *Reynolds v. Sims*.⁶⁵ Alabama had anticipated that its state legislature, like Tennessee's, might be called into question. It rapidly proposed constitutional amendments to alter the composition of the leg-

57. *Id.* at 208.

58. *Id.*

59. 372 U.S. 368 (1963).

60. *Id.* at 370-71.

61. *Id.*

62. *Id.* at 381.

63. 376 U.S. 1 (1964).

64. *Id.* at 13.

65. 377 U.S. 533 (1964).

islature—but even then representatives would not be elected purely on the basis of population.⁶⁶

Anticipating legal challenges to its preexisting system, a pair of proposed reapportionment plans in Alabama were thought to comply with post-*Baker* directives. One, the "67-Senator Amendment," apportioned the Senate with one senator for each of the 67 counties and the House by giving each county one representative and apportioning the rest of the thirty-nine representatives on the basis, roughly, of population.⁶⁷ Another, the "Crawford-Webb Act," would control in the event the 67-Senator Amendment failed Alabama's constitutional amendment process. It created a 35-member Senate with districts along county lines, and a House similar to the 67-Senator Amendment.⁶⁸

As the mantra of "one person, one vote" percolated in the lower courts, questions arose as to the true extent of its scope. Specifically, what could a state legislature look like? Could both houses of a bicameral state legislature be based on some basis other than districts drawn by population? Could one house be based on population and the other house be based on some other basis, like the United States House of Representatives and Senate?

The Supreme Court was confronted with a number of alternatives, particularly given the suite of cases before it—Alabama was hardly alone as a state with at least one legislative chamber not drawn solely on the basis of population.⁶⁹ It was within the realm of possibility to offer a rather minimal standard—find that Alabama's system was too bizarre and irrational to pass muster under the Equal Protection Clause and defer specific findings on whether a more sensible legislative arrangement was permissible. Or, the Court could conclude that at least one house of the state legislature be based on districts drawn on a population basis. Or, the Court might go toward the broadest possible claim and compel *both* legislative chambers include districts drawn on a population basis.⁷⁰

66. *See id.* at 543–44.

67. *Id.*

68. *Id.* at 544–45.

69. *See generally* Beytagh Memoranda, *infra* notes 77–78.

70. Nebraska is the only state that has a unicameral legislature; all others have two chambers.

A. Briefs

Much as the parties had done in *Baker v. Carr*, the briefs in *Reynolds v. Sims* denied that any sweeping changes in the state legislatures would need to occur. Ample room existed within the Fourteenth Amendment for at least one chamber of the state legislature to be apportioned on some basis other than total population. The United States as amicus curiae, in a brief by Solicitor General Cox, emphasized, "The gross discrimination that exists today in *per capita* representation is not simply the result of the limitation of one senator to any one county or the minimum of one representative for each county. Those inequalities have at least an intelligible basis."⁷¹ Here, Cox argued, the redistricting in Alabama had occurred, much like Tennessee in *Baker v. Carr*, because of "shifts in population," which had "no justification."⁷²

The "federal analogy" fared no better in Cox's view. Alabama insisted that it could take geographic considerations into account, much like the United States Senate; and, Alabama argued, it could ensure that each county received at least one representative, just as the United States House of Representatives guaranteed each state at least one representative regardless of population.⁷³ According to Cox, "The very most the federal analogy could be supposed to show is that the upper house may deviate substantially from equality on the basis of population if the lower house is apportioned fairly."⁷⁴ He noted that the population disparities in Alabama's lower chamber caused by guaranteeing each county at least one representative dwarfed the disparities in the federal system—Wyoming and Alaska were not such stark population outliers as some rural Alabama counties.⁷⁵ Regardless, Cox proposed "reserving further judgment" as to the circumstances where "permissible objectives of legislative apportionment . . . would justify some departure from equality *per capita*."⁷⁶

71. Brief of the United States as Amicus Curiae at 23, *Reynolds v. Sims*, 377 U.S. 533 (1964) (Nos. 23, 27, 41).

72. *Id.*

73. *Id.* at 35.

74. *Id.*

75. *Id.* at 35–36.

76. *Id.* at 31 n.19.

B. Clerk's Memoranda

Francis X. Beytagh took responsibility for the bench memorandum in *Reynolds v. Sims* for Chief Justice Warren, who ultimately drafted the opinion in the case. Beytagh preferred a more modest outcome than the Court's ultimate resolution—he would have required at least one house to be drawn on the basis of population. He repeatedly cited the absence of one population-based house as the primary basis for rejecting the form of the Alabama legislature in that particular case.⁷⁷

Alabama had argued that it could use a non-population-based system of representation in its legislature. Alabama argued, as many states had argued, that they could invoke a "federal analogy" as an appropriate basis for at least one chamber of the state legislature. But Beytagh saw the Alabama proposal as one that only "superficially" resembled the United States Senate.⁷⁸ He would reserve judgment as to whether a state could even do so until one house had been redistricted on the basis of total population.⁷⁹

Warren was also concerned about the impact of the timing of pronouncements from the Court and the level of specificity the Court ought to offer. The federal judiciary was working rapidly in dozens of cases around the country trying to respond to the many new questions left unanswered in the wake of *Baker, Gray,*

77. Bench Memorandum on *Reynolds v. Sims* from Francis X. Beytagh to Chief Justice Earl Warren 34–35 (Oct. 8, 1963) (available in the Earl Warren Papers, Box 246, file 5, at the Library of Congress) ("And I feel that, without question, both of the proposed measures were not constitutionally valid, since the apportionment of neither house in either plan is based substantially on population, and the disparities from a population-based standard in at least one house under each of the plans is too gross to comport with minimum fed constitutional requirements."); Memorandum on the Alabama "67-Senator Amendment" and the Federal Analogy from Francis X. Beytagh to Chief Justice Earl Warren 5 (Dec. 19, 1963) (available in the Earl Warren Papers, Box 607 or 608, file unknown, at the Library of Congress) ("I feel that it is rather hazardous to allow the employment of a scheme for the apportionment of seats in a state legislature which superficially resembles the fed situation, unless the apportionment of at least one house is based strictly on population."); *id.* at 6 ("I suggest that a fed analogy situation should not be regarded as presented unless the apportionment of one house of a state legislature is based almost strictly on a population basis.").

78. See Memorandum on the Alabama "67-Senator Amendment" and the Federal Analogy from Francis X. Beytagh to Chief Justice Earl Warren, *supra* note 77, at 5–6.

79. *Id.*

and *Wesberry*. Challenges to state legislatures had to move quickly in anticipation of upcoming elections in those states.

Beytagh, then, was also tasked with examining the logistics of the state legislatures (and lower courts) implementing any diktat from the Court. On that matter, Beytagh acknowledged a cost to minimalism. An opinion of the Court addressing solely the matters squarely before it might leave the state legislatures unsure as to how to act:

If the [Court] states that, at a minimum, at least one house must be apportioned strictly on a population basis, without reaching the question of whether deviations from a population standard in the other house are permissible, legislatures and courts in States having an election of legislators and courts in States having an election of legislators in November 1964, in attempting to comply with the [Court's] decisions, will not have any adequate guidance with respect to apportioning the second house. About all they will know is that one house must be apportioned on a population basis. . . . [T]hey may then be required to again alter the apportionment in the second house in compliance with the standards stated in [a subsequent] decision, depending on the result reached in that case by the [Court].⁸⁰

According to Beytagh, the Court would have to speak broadly in order to give clear guidance to the state legislatures so they could speedily comply with the Court's pronouncements ahead of the next election.

Reynolds would go on to make such a broad pronouncement, expounding upon the errors in *Baker*, *Gray*, and *Wesberry*. The Court abolished the diversity of state legislatures that included some non-population-based forms of representative government. Gone were geopolitical bases for representation. Gone, too, were guarantees that each county would receive at least one representative.⁸¹ Furthermore, the Court saw its role as protecting the people of the several States from themselves—it would invalidate a Colorado ballot proposition passed by a

80. Memorandum on the Urgency of the Reapportionment Cases from Francis X. Beytagh to Chief Justice Earl Warren 10 (Jan. 15, 1964) (available in the Earl Warren Papers, box 607 or 608, file unknown, at the Library of Congress).

81. Cf. James A. Gardner, *One Person, One Vote and the Possibility of Political Community*, 80 N.C. L. REV. 1237 (2002).

nearly 2-to-1 margin that proposed one house of the state legislature be based on several factors, including population and geography.⁸² Such a system was inappropriate under the Court's political theory. Raw population totals would be the sole permissible basis for redistricting.

The breadth of the claim was a sweeping assertion of judicial power.⁸³ There were, of course, myriad alternative bases for the Court's decisions. The claims of *Baker* and its progeny are assuredly more cogent, even defensible, when viewed as Guarantee Clause cases instead of Equal Protection Clause cases.⁸⁴ Or, if the Court wanted to lodge the cases in the Fourteenth Amendment, the best way to explain the actual holdings of *Baker* and its progeny may be to identify them as articulating a version of "rational basis" review.⁸⁵ Indeed, such a framework for these cases would have given the States some opportunity to justify their legislatures, even if Tennessee's and Alabama's "redistricting" by abdication of standards as populations shifted might be deemed sufficiently irrational, as Cox and others repeatedly argued before the Court.

But, no matter. The Court's pronouncements, lacking any textual or historical basis in the Constitution, and even lacking meaningful support from the Justices' clerks or the litigants themselves, remain the law of the land. Those pronouncements, however, leave still more questions unanswered.

82. See *Lucas v. Forty-Fourth General Assembly of Colo.*, 377 U.S. 713 (1964).

83. See generally Robert J. Pushaw, Jr., *Bush v. Gore: Looking at Baker v. Carr in a Conservative Mirror*, 18 CONST. COMMENT. 359, 372-78 (2001). Admittedly, even opponents to the redistricting cases agree that the Constitution demands some political equality—but that such guarantees are limited to the Constitution's text and original meaning. Cf. Guy-Uriel E. Charles, *Constitutional Pluralism and Democratic Politics: Reflections on the Interpretive Approach of Baker v. Carr*, 80 N.C. L. REV. 1103, 1152-57 (2002).

84. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST* 120-23 (1980); McConnell, *supra* note 1, at 105-07; BORK, *supra* note 1, at 86 (footnote explaining how Guarantee Clause would have solved *Baker*).

85. Luis Fuentes-Rohwer, *Baker's Promise, Equal Protection, and the Modern Redistricting Revolution: A Plea for Rationality*, 80 N.C. L. REV. 1353, 1367 (2002) ("This is traditional rational basis review, a very flexible standard that allows redistricters much leeway when crafting their redistricting plans.").

III. RETREATING FROM ERROR

Shortly after this sweeping judicial definition of the composition of state legislatures, states responded. But a little judicial intervention demanded still greater judicial intervention. States had been instructed to draw legislative districts on the basis of people, but the Court's opinions lacked precision. Sometimes it spoke of people; in other places, citizens; and in other places, voters. Tennessee's 1901 provision, for instance, demanded districts drawn on the basis of "qualified voters." New York used citizen population, while Hawaii and Vermont used registered voters—and all had some measure of judicial approval.⁸⁶

Burns v. Richardson arose before the Court to challenge Hawaii's legislative scheme.⁸⁷ Hawaii drew districts on the basis of registered voters instead of total population. That, Hawaii claimed, was necessary because of the substantial number of unregistered voters, specifically military personnel, stationed on the island of Oahu. The basis of representation would be distorted if it were required to include the total population. But challenges to Hawaii's system saw that the language of the redistricting cases most frequently referred to people generally, not voters—indeed, the "person" in "one person, one vote" may have suggested that total population, regardless of voter registration or even voter eligibility status, was the sole appropriate benchmark. The Court used the case to back away from any further refinement of its political principles that would bind state legislatures.

A. *Deliberations*

Michael E. Smith, clerking for Chief Justice Warren, adopted a very similar tactic to the one raised by Warren's previous clerks: defer to the State as long as it could articulate some rational basis for the form of its legislature. He acknowledged a number of competing interests that complicated any broad pronouncement about the appropriate basis for redistricting:

86. ROBERT G. DIXON, JR., *DEMOCRATIC REPRESENTATION* 501 (1968); accord *Burns v. Richardson*, 384 U.S. 73, 91–92 (1966).

87. 384 U.S. 73 (1966).

There is some truth to Burns' argument that the registered voter base may work against the interest of certain folks who are unable to vote for one reason or another. But use of the total population base works against the interests of voters in areas where a very high percentage of other residents register and vote. Since there is a balance of disadvantage involved here, I would opt for allowing states the freedom to choose their own apportionment base so long as it is rational.⁸⁸

By the time the case reached oral argument, the Justices had agreed that States had the flexibility, within some yet-unarticulated minimum parameters, to include or exclude categories of people in redistricting. Justice Brennan would ultimately write the opinion, and his notes from the oral argument conference reflect the varying attitudes of the Justices.

According to Brennan's notes, Chief Justice Warren saw Hawaii as a "special case" because of the transient community (specifically the military) but emphasized that "[we d]on't have to say in all circumstances that it would be a proper basis. If it resulted in gerrymander to discriminate that would be something else."⁸⁹ Justice Black was a "little bothered" about the case because the standard "might be abused," but that would be "another case" if a state abused it.⁹⁰ Justice Harlan had "trouble with reconciling totality" of the population and believed that any "[d]eparture from pure population basis [was] not as permissive."⁹¹ And Justice White did "have trouble" with registered voters as the basis for redistricting, but the "only excuse" was "convenience" in this case, which was "the same result substantially as broad population basis."⁹² All expressed some concern of manipulation by the state legislature, but all also agreed that Hawaii had sufficiently justified the composition of its legislature.

88. Bench Memorandum on *Burns v. Richardson* from Michael E. Smith to Chief Justice Earl Warren 10–15 (Feb. 18, 1966) (available in the Earl Warren Papers, Box 280, file 4, at the Library of Congress).

89. William Brennan, *Burns v. Richardson* Conference Notes (available in the William Brennan Papers, Box 129, file 6, at the Library of Congress) (summarizing the thoughts of the Justices at their conference on *Burns*).

90. *Id.*

91. *Id.*

92. *Id.*

B. *Early Drafts*

The core of the Court's conclusion in *Burns* ultimately rested upon finding no basis to intervene in that particular dispute, permitting a sort of play in the joints for States to administer standards under an incomplete federal standard.⁹³ The Court returned to something closer to rational basis and deferred to the "choices" of the States on the "nature of representation": "The decision to include or exclude any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere."⁹⁴

But just two weeks before the opinion was published, a draft circulated that included a footnote after this sentence, then numbered footnote 21. The footnote would be eliminated in subsequent drafts, but that footnote emphasized the deference to be given to States in determining the theory of representation:

Thus, one State may stress that the role of a representative is to serve the entire community from which he comes, whether or not all its members are or ever will be eligible to participate in the electoral process. It may assume that those who are ineligible to vote will find "representation" in the voting booth through those who are eligible, as children do through their parents, and will find other ways to participate in the political process or share the burdens of government. Another may consider that a representative is more likely to respond to the needs of those who are or may be eligible to vote for him than to the needs of ineligibles. Voters residing in areas of the State where there are unusual percentages of ineligibles might appear from this perspective to have enhanced voting power if a total population distribution were used.⁹⁵

This footnote would have greatly clarified the deference given to States in deciding the appropriate basis for redistricting. Perhaps it was simply *because* it articulated a notion of deference to the States that it was abolished—after all, the Court had been anything but deferential in the prior few years in redistricting

93. See Derek T. Muller, *The Play in the Joints of the Election Clauses*, 13 ELECTION L.J. 310, 310 (2014).

94. *Burns v. Richardson*, 384 U.S. 73, 92 (1966).

95. Draft Opinion of *Burns v. Richardson* (April 11, 1966) (on file with the Library of Congress).

cases, and it likely sought to reserve judgment as to whether such determinations ought to be left in the hands of the States.

While "one person, one vote" was a popular mantra, its utility does not arise out of its exhaustive articulation of a dominant political theory. Scrutiny of the redistricting cases has suggested that much of its value—or, perhaps, its least satisfying result⁹⁶—arises out of its simplicity.⁹⁷ Some have even argued that the cases *compel* the conclusion that "one person, one vote" extends redistricting to voters and non-voters.⁹⁸ Others have looked at the redistricting cases as much more open-ended in their theory of representation.⁹⁹

But, if one begins with the premise—as this Article does—that *Baker v. Carr* and its progeny lack any basis in the text or original meaning of the Fourteenth Amendment, then *Burns* is a welcome retreat from further judicial intervention into the composition of the state legislatures. And this draft footnote, while non-precedential and not even dicta, provides a more complete justification for the ways in which a State could justify the composition of its own legislature, free from further federal judicial micromanagement.

96. See Joseph Fishkin, *Weightless Votes*, 121 YALE L.J. 1888, 1898 (2012) ("Thus we reach a strange and unsatisfying conclusion: one person, one vote protects the weight of an individual vote if and only if 'weight' is defined in an entirely circular, tautological way.").

97. Cf. Heather K. Gerken, *The Costs and Causes of Minimalism in Voting Cases: Baker v. Carr and its Progeny*, 80 N.C. L. REV. 1411 (2002).

98. Sanford Levinson, *One Person, One Vote: A Mantra in Need of Meaning*, 80 N.C. L. REV. 1279, 1281 (2002) (identifying *Wesberry* and *Reynolds* as adopting a "one voting representative/one constituent" model); Marsha D. Bilzin, Note, *Reapportionment on the Sub-State Level of Government: Equal Representation or Equal Vote?*, 50 B.U. L. REV. 231, 241 (1970) ("[T]he Court must have necessarily decided that state representatives represent non-voters as well as voters.").

99. DIXON, *supra* note 86, at 502 ("If a legislator is a delegate—and if he is not, why then do we worry about apportionment?—is he the delegate of the majority who voted for him, or of all those who took part in the election, or of all those who were entitled to take part in the election, or of all those entitled to participate in the election, including their dependents? Or should he be viewed as the delegate of the total population in his district, including that of the state prison, the state mental hospital, the federal military installation, and the colleges?").

IV. PERPETUATING NEW ERRORS

After *Burns*, States went about drawing legislative districts with this flexibility, always operating within the Court's "one person, one vote" mantra.¹⁰⁰ Most states, understandably, use total population as the basis for drawing legislative districts.¹⁰¹ States can easily borrow data from the United States Census Bureau, which primarily discloses raw population totals. States need not rely on Census survey data, which offers information like the person's age, citizenship status, or more granular data that states might otherwise consider standards for drawing legislative districts.

But this judgment by the States is not necessarily solely one of easy administration. It may also reflect the decision to embody a fairly common view of representative government—representatives represent people, not simply voters or eligible voters.¹⁰² Indeed, federal courts have responded to *Burns* generally with the level of deference to be expected.¹⁰³ Decisions as to whether redistricting should occur on the basis of total population or citizen voting-age population is a political question left to the legislature.¹⁰⁴

Such deference is threatened after the Court's decision in *Evenwel v. Abbott*,¹⁰⁵ a challenge to the half-century peace between the federal judiciary and state legislatures. The *Evenwel* plaintiffs argued that Texas was constitutionally *forbidden* from drawing districts based on total population. Instead, they claimed, Texas must draw districts with equal numbers of voters.¹⁰⁶

The precise standard that Texas must employ remained undetermined in the eyes of the plaintiffs. They offered multiple possi-

100. Derek Muller, *One Man, One Vote in Texas*, LIBRARY OF LAW AND LIBERTY (May 29, 2015), <http://www.libertylawsite.org/2015/05/29/one-man-one-vote-in-texas/> [<http://perma.cc/HJ26-EPNS>].

101. *Id.*

102. See Draft Opinion, *supra* note 95.

103. See Derek T. Muller, *Invisible Federalism and the Electoral College*, 44 ARIZ. ST. L.J. 1237, 1258–59 (2012).

104. See, e.g., *Chen v. City of Houston*, 206 F.3d 502, 528 (5th Cir. 2000); *Daly v. Hunt*, 93 F.3d 1212, 1227 (4th Cir. 1996).

105. No. 14-940 (U.S. Apr. 4, 2016).

106. See Brief for Appellant at 2, *Evenwel v. Abbott*, No. 14-940 (U.S. July 31, 2015).

ble bases for drawing districts to approximate "voters"—citizen voting-age population, registered voters, and non-suspended voter registrations remain possibilities for exploration either by the Supreme Court or the lower courts on remand.¹⁰⁷ The lawsuit was driven by Texas's sizeable non-citizen population, whether resident alien or illegal immigrant—Texas's state legislative districts have equal populations, but some contain far more eligible voters than others when one accounts for citizenship status.

It might be that Texas's (and most states') practices of population-based redistricting are unwise for this reason, much as it would have been unwise for Hawaii to use total population instead of registered voters. That was a political judgment that the Court, for once, largely left to the political process. Yet this case sought to take the theories of the redistricting stage beyond what even the Warren Court felt comfortable doing—creating an ever more uniform political theory derived under a construction of the words "the equal protection of the laws." There remains a meaningful threat that the federal judiciary will further perpetuate the errors that *Baker* and its progeny wrought.

The Court rejected the plaintiffs' claims unanimously.¹⁰⁸ But in doing so, only one justice rejected "one person, one vote" as a standard compelled by the Constitution.¹⁰⁹ And the majority opinion suggested that total population is the *only* acceptable basis for redistricting, formally reserving that question for another day.¹¹⁰

Indeed, *Evenwel* threatened, and still threatens, to reopen the many questions that the Warren Court recognized it was incapable of answering. For instance, must states that exclude felons from voting now exclude prisons from districts?¹¹¹ Can they?

107. See *id.* at 46.

108. *Evenwel v. Abbott*, No. 14-940 (U.S. Apr. 4, 2016).

109. *Id.* (Thomas, J., concurring in the judgment).

110. *Id.* slip op. at 19 (majority opinion) ("[W]e need not and do not resolve whether, as Texas now argues, States may draw districts to equalize voter-eligible population rather than total population."); *id.* slip op. at 4 (Alito, J., concurring in the judgment) ("The Court does not purport to decide whether a State may base a districting plan on something other than total population . . . but . . . 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.").

111. See Adam Liptak, *A.C.L.U.'s Own Argument May Work Against It in Voting Rights Case*, N.Y. TIMES (Oct. 12, 2015), <http://www.nytimes.com/2015/10/13/>

May states that prohibit ex-felons from voting exclude that population from districts? What about excluding the mentally ill from the political population?¹¹² And does this mean that the Census Bureau must take new powers to obtain the granular data needed to comply with a federal standard, or must the States supplement the Census with their own headcounts?¹¹³

The prospect of states seeking to move toward drawing districts on some basis other than total population may well be too risky for widespread acceptance—indeed, it was the primary source of hesitation in approving Hawaii’s system,¹¹⁴ and it is undoubtedly another ease-of-administration principle guiding Texas and other states. But the suggestion from the Court in *Evenwel* that such a plan may be constitutionally forbidden perpetuates “one person, one vote” errors—albeit in a different direction than the one suggested by the *Evenwel* plaintiffs.

To return to the text and original understanding of the Constitution, rather than political preferences and political theories operating under the penumbras of the Constitution, one should seek to limit, if not expressly seek to overturn, *Reynolds v. Sims*.¹¹⁵ The several States should remain free to select the appropriate population base, assuming they can articulate some rational basis for doing so, and further redistricting errors need not be perpetuated.¹¹⁶

It is not very difficult to articulate a rational basis for using total population. Setting aside the ease of administration principle, which alone should be sufficient, Texas may well choose to believe that elected officials represent all of us. “The President of the United States represents all of us—even if we didn’t vote for him; even if we didn’t vote at all, and even if we were not yet born when he was elected, even if we just moved here a few months

us/politics/aclus-own-arguments-may-work-against-it-in-voting-rights-case.html [http://perma.cc/N5XU-LUB5].

112. See Muller, *supra* note 103, at 1278.

113. See Derek T. Muller, *Could Evenwel v. Abbott End Prison Gerrymandering? And Other Political Implications*, EXCESS OF DEMOCRACY (June 2, 2015), <http://excessofdemocracy.com/blog/2015/6/could-evenwel-v-abbott-end-prison-gerrymandering-and-other-potential-implications> [http://perma.cc/UFY8-32GS].

114. See *supra* Part III.A.

115. See *Evenwel*, slip op. at 2 (Alito, J., concurring in the judgment) (explaining that further refining of the “one person, one vote” “implicates very difficult theoretical and empirical questions about the nature of representation.”).

116. See *supra* Part III.B.

ago."¹¹⁷ Our representatives in Congress, in the state legislature, and in local government do the same. It would be a rather cramped view of representative government to think that representatives only represent voters and no one else—at the very least, one good finding from the Court in *Evenwel*.¹¹⁸

Federalism, of course, is not a license for Texas to act however it so desires in state elections. States are limited by express constitutional provisions¹¹⁹ and federal statutes¹²⁰ that control their elections. And they remain limited by the Court's dubious interpretations of the Fourteenth Amendment in *Reynolds v. Sims* and related cases. But these, and no more. The States remain in their sound discretion to apportion representatives among the people of their States as they see fit. The Constitution demands nothing else.

117. Muller, *supra* note 103, at 1258, 1260.

118. *Evenwel*, slip op. at 18–19 (majority opinion).

119. See, e.g., U.S. CONST. amends. XV, XIX, XXVI.

120. See, e.g., Voting Rights Act of 1965, 52 U.S.C. §§ 10301 *et seq.* (2012); National Voter Registration Act of 1993, 52 U.S.C. §§ 20501 *et seq.* (2012); Help America Vote Act of 2002, 42 U.S.C. §§ 15301 *et seq.* (2012).